

NEW HAMPSHIRE LAWYER VIOLATES CANDOR RULES; RECEIVES STAYED SUSPENSION

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This *Advisory* is the fourth in a series devoted to recent disciplinary decisions issued by the Professional Conduct Committee. The purpose of these Advisories is to identify areas where New Hampshire practitioners are encountering problems, to assist practitioners and their lawyers with the defense of similar charges, and to promote the best possible compliance and risk management programs in firms across the state. These decisions are public and available on the Attorney Discipline Office's website, which can be found at www.nhattyreg.org.

Docket No. PCC # 08-058 (2011)(Candor and Honesty in Pleadings Filed with the Court)

A. Factual Background:

The Respondent in this case, an experienced practitioner, was also the managing member of an LLC formed for the purpose of land development. In January 2005, the LLC entered an oral contract to have surveying work done on property it planned to develop. The agreement anticipated payment to be made with a lot or lots in the subdivision.

The development did not come to fruition, and in May 2007, the LLC abandoned the project and instructed the surveyor to stop all work. The surveyor then forwarded a \$7,000.00 bill for his services.

After the LLC had failed to pay this bill for approximately a year, the surveyor hired a lawyer to bring suit against the LLC for the unpaid fee, and to attach the property. Two months later, in July 2008, the Respondent notified the surveyor and his lawyer that he had a potential buyer; requested perc test results, wetland delineation studies and other materials relating to the surveyor's work; and discussed the potential for payment of the surveyor's bill from closing proceeds. The surveyor did not produce his work product due to the outstanding accounts receivables.

Ultimately, the closing occurred and the Respondent sent the surveyor's counsel a HUD settlement statement and a check for \$ 1,800.00 in an

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effort to settle the claim. The lawyer for the surveyor rejected this amount, but retained the check pending resolution of the collection action.

Shortly thereafter, the Respondent's LLC and the surveyor settled the case. The terms required the LLC to pay \$4,460.00 in accordance with a payment schedule. The Respondent personally guaranteed the payments; but thereafter failed to make the first two required payments individually or through the LLC. The surveyor moved to enforce, and when the Respondent failed to timely appear for a show cause hearing due to adverse weather, the district court entered a default and issued an arrest warrant.

Respondent filed a Motion to Lift Default and Void Arrest Warrant, and also made a partial payment just prior to the hearing on this motion. The pleading filed by the Respondent, which he filed in the capacity of Managing Member of the development LLC, contained the misstatements that became the subject of the disciplinary proceeding. More specifically, Respondent asserted that "Respondent has been making payments regularly"; and that "(t)he remaining debt is to be paid in increments of \$1,000 per month over the next three months, as previously agreed". (Emphasis added.)

B. The Decision of the Professional Conduct Committee ("Committee"):

The Professional Conduct Committee had little difficulty finding these statements to be false and in violation of Rule 3.3(a)(1), which bars a lawyer from "knowingly mak[ing] a false statement of fact or law to a tribunal . . ." The stipulated facts underlying the Committee's decision stated:

As of December 18, 2008, the date of his Motion to Void Warrant, (Respondent) had not been "making payments regularly" under the terms of the Stipulation. Although (Respondent) had paid \$1800 at the time of closing, he had paid (on December 4, 2008) only the \$1400 that was due on September 30, 2008, under the terms of the Stipulation. (Respondent) knew or should have known that the Stipulation contemplated complete payment by December 20, 2008, and that, notwithstanding his stated intention to pay the remaining debt in \$1000 monthly increments over the next three months, the timing of (Respondent's) proposed schedule of payment was not "as previously agreed" under the Stipulation.

The Committee then proceeded to apply the sanctions analysis found in the *ABA's Standards for Imposing Lawyer Sanctions* (2005)(Standards). See *Conner's Case*, 158 N.H. 299, 303 (2009)(looking to the Standards for guidance though not adopting them). The Standards set out a four part analysis: (a) the duty violated; (b) the lawyer's mental state; (c) the

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injury caused; and (d) mitigating or aggravating factors. The sanctions analysis was certainly the most intriguing part of the Committee's ruling.

The Committee noted that the duty violated - - the duty of honesty and candor to the tribunal - - was one of the most significant professional obligations of a lawyer. In one portion of its opinion, for example, the Committee stated that "the truthfulness of an attorney's words form the very bedrock of the judicial system and confidence in that truthfulness must be justified whether an attorney is appearing on behalf of a client or pro se". In another passage, the Committee cited previous decisions for the proposition that candor "is a fundamental principle (that) is not subject to discretion. See *In Re Morse*, LD-2009-006 (N.H. ____ July 20, 2010; *Conner's Case*, 158 N.H. 299, 303 (2009)".

The Committee further found that the lawyer's conduct had been "knowing". Finally, there was actual harm to the justice system due to the "misinformation" submitted in a court pleading; and to the surveyor, who had to endure additional court proceedings. Based on these factors, the Committee determined the baseline sanction as a suspension.

In addition to the gravity of the offense itself, the Committee found several aggravating factors. The Respondent had received warnings from the professional conduct committee on three previous occasions in 1997, 2007 and 2008. (A warning, or dismissal with a warning, is a *non-disciplinary* mechanism for resolving a complaint that remains on the attorney's record; and that can be considered by the Committee if the Respondent faces additional charges in the future.)

The Committee found the Respondent's "substantial experience in the practice of law" to be an additional aggravating factor. (He had practiced for 23 years when sanctioned.)

Finally, the Committee rejected Respondent's argument that his appearance on his own behalf, rather than for another client, should mitigate the sanction imposed in his case: "The Rules of Professional Conduct apply to (a lawyer's) behavior whether he or she is acting as a private citizen or serving in a professional capacity." (Citing *Bruzga's Case*, 145 N.H. 62, 72 (2000); and *Astles' Case*, 134 N.H. 602, 605 [1991]). With lawyers branching out into ancillary businesses in which traditional attorney-client relationships do not exist, the Committee's holding is an important reminder that certain rules of professional conduct (including core obligations of honesty and integrity) apply to lawyers regardless of the context of their behavior.

Against the aggravating circumstances surrounding Respondent's misconduct, the Committee found that Respondent's "expressions of genuine remorse and acceptance of responsibility [were] . . . mitigating factors." The Committee does not elaborate on this finding, or describe

the conduct of the Respondent that led it to place countervailing weight on this mitigator.

Based on the above, the PCC suspended the lawyer from practice for six months. However, it then stayed the sanction for one year; required that any new grievance during the period of the stay be expedited; and allows for an extension of the stay until any new grievance is resolved. Presumably, if there are further violations of the Respondent's professional obligations during the one year stay, the six month suspension would be triggered. In short, it appears that the Committee felt a substantial sanction should be imposed in light of the professional obligation violated, but also felt that the threat of imposition of the suspended sanction would protect the public while allowing the attorney to continue to practice.

The Advisories on the Law of Lawyering in New Hampshire issued by the Attorney Conduct, Liability and Professionalism Group are intended to provide general overviews of professional responsibility law in a variety of areas encountered by lawyers. Because the law in this field is constantly changing, and because the Advisories are generic, they should not be relied upon as guidance or advice on how to handle specific situations. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at AC&LPG@devinemillimet.com.