

**ATTORNEY CENSURED FOR NUMEROUS  
ETHICAL VIOLATIONS ARISING FROM ROMANTIC  
RELATIONSHIP WITH CLIENT**

DECEMBER 8, 2011

This is the fifth of our regular *Advisories on the Law of Lawyering in New Hampshire* series devoted to significant disciplinary decisions issued by the Professional Conduct Committee. The purpose of these Advisories is to identify areas where New Hampshire practitioners are encountering problems, and to assist the bar and law firm risk managers in avoiding similar problems in the future. This case involves the significant problems that can arise when an attorney seeks to represent a client with whom he is emotionally and romantically involved. Though the decisions are public and available on the Attorney Discipline Office's website, the Advisories do not use the names of the attorney(s) involved.

**PCC # 10-003 (2011)****A. Factual Background to Disciplinary Proceeding**

This case arose from a hotly contested marital matter. It arrived at the Attorney Discipline Office through independent referrals from the husband and the New Hampshire Supreme Court.

The Moynihans divorced in 2003. In 2007, the parties locked in a bitter dispute over child custody and relocation of the residence of the wife, who had primary physical custody. Numerous substantive motions on these issues and motions for contempt were filed over the subsequent two years.

In June 2009, the wife's counsel was unable to attend a hearing on a Motion to Suspend [the wife's] Parenting Time with Her Son. The Respondent agreed to represent her on this matter and filed an appearance.

Though it appears Respondent may have filed the appearance in order to cover this particular motion, Respondent remained in the case for another eight months, until March 2010. Wife's prior counsel withdrew a few days after his appearance. At the time he entered his appearance, Respondent had been romantically involved with the wife for a substantial period and had frequent contact with her children.

Over the subsequent year, the battle over the custody of the couple's son became extremely heated. There were allegations that Respondent

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counseled wife to share pleadings with her son despite a court order to the contrary. The court ultimately suspended wife's custody over the son in a ruling that manifested the court's serious concern over the impact of the ongoing, live-in relationship between the Respondent and the mother:

There is clear and convincing evidence of mental and emotional harm to the parties' son by remaining in the environment afforded him by Ms. Moynihan. The Court found that Ms. Moynihan continues to battle the relocation decision; that her "current attorney is also her live in boyfriend which means that the (son's) mother's boyfriend represents (the son's) mother against his father; that the son feels that he will be used in the litigation against his father with whom he has a very good relationship; and that the son was drawn deeper into the conflict when, notwithstanding the Court's prior orders and "on advice of counsel", Ms. Moynihan gave him a copy of the GAL's pleading requesting a suspension of Ms. Moynihan's parenting time.

Respondent then pursued numerous motions for reconsideration, all denied by the court; was sanctioned for one of the earlier motions with a finding of bad faith and an award of attorneys' fees; and then filed several appeals to the New Hampshire Supreme Court which were also denied. Several of the pleadings filed by Respondent were actually written by the wife with aggressive, belligerent language that Respondent did nothing to modify.

#### B. Stipulated Rulings of Law

The disciplinary counsel's office and Respondent arrived at a stipulated disposition of this case that was presented to the Professional Conduct Committee for approval. The parties stipulated that Respondent chose to represent the wife in a "highly contentious domestic relations matter involving disputes over parenting and visitation of the parties' children while, at the same time, [Respondent] had a personal interest in and was romantically involved with [wife]"; and that his romantic relationship with the wife "materially limited" his representation. This violated NH Rule of Professional Conduct, 1.7(b), the rule governing general conflicts of interest.

The PCC further found that "Respondent could not have reasonably believed under the circumstances that he could provide competent and diligent representation to Ms. Moynihan in dealing with parenting, custody and child relocation issues in the underlying domestic relations matter"; that the wife did not consent in writing to the conflict; and most importantly that no disinterested lawyer would have requested such a waiver, and thus the conflict was nonwaivable as a matter of law. See NHRPC 1.7(b) (1); *Fiandaca v. Cunningham*, 827 F.2d 825 (1st Cir. 1987). This analysis - - stipulated to by the parties and ultimately approved by the PCC - - reflects an application of New Hampshire's "harsh reality test", under which conflicts are analyzed retrospectively and through a subjective, "disinterested lawyer" standard.

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It is interesting to note that this was not a case brought under the more stringent “sex with client” rule. NHRPC 1.8(j). That rule was adopted during the 2007 revisions to make the prohibition on most sexual relationships with clients mandatory: “A lawyer shall not have sexual relations with a client . . . .” However, the rule goes on to qualify this restriction to permit a “consensual sexual relationship [that] existed . . . when the client-lawyer relationship commenced.” This case makes clear that this last clause is not a safe harbor; and that cases of pre-existing relationships still need to satisfy the broader and more general conflict of interest test.

The PCC also found a violation of the little considered Rule 2.1. This rule mandates that a lawyer must exercise independent professional judgment and render candid advice. It seems unlikely, although perhaps not impossible, that a lawyer emotionally involved with his or her client will ever be able to render truly independent judgment in contested family law matters.

Finally, the Committee found Respondent’s work fell below the competence standard of Rule 1.1. This finding was based on the filing of untimely motions, improperly seeking to supplement the record and filing a motion with “no intelligible text to support the relief sought.”

### C. The Sanctions Analysis and a Split in the Committee

The Committee looked to the ABA Standards for Imposing Lawyer Sanctions for guidance in assessing the sanction. *See Conner’s Case*, 158 N.H. 299, 303 (2009). The Standards look to: 1. the duty violated; 2. the lawyer’s mental state; 3. potential or actual injury caused by the misconduct; and 4. mitigating or aggravating factors. Standards § 3.0; *Douglas’ Case*, 155 N.H. 613, 621 (2007).

The Committee’s decision made it clear that the sanction decision was a difficult one, noting that “the Committee engaged in considerable discussion about the (parties’) stipulation especially in light of (Respondent’s) conduct in engaging in such an egregious conflict of interest.” Ultimately, the majority accepted the stipulated penalty of public censure while a minority issued a strongly worded dissent.

Applying the structured analysis required under the Standards, the majority concluded that the duties were those encompassed in the Rule violations described above; that the Respondent’s “mental state” involved “a pattern of negligence”. The majority further concluded that the Respondent entered the case in good faith but was nevertheless negligent in failing to recognize the conflict. Injuries were identified both to the legal system itself (“by confounding the record and the process with multiple, ineffective pleadings”) and to the client, Ms. Moynihan, due to Respondent’s failure to exercise independent judgment and the resulting increased risk of adverse rulings from the Court. The parties stipulated, and the majority of the Committee agreed, that the baseline sanction was public censure.

In the last step in the analysis, the Committee looked at the aggravating and mitigating factors. The Committee found a prior reprimand and

substantial experience in the practice of law to be aggravating factors. These were balanced by Respondent's lack of a selfish motive, his cooperation in the ADO process and his acceptance of responsibility - - all traditional mitigating factors. The majority also noted that Respondent had done substantial service to the Bar and the public through his pro bono work.

Somewhat unusually, the decision included a strong dissenting opinion. The majority had relied to a significant degree on the stipulations. The dissent seemed less than satisfied with the stipulations; and discussed other potential violations that were not part of the parties' stipulation, including Respondent's submission of pleadings that made "frivolous" arguments and his advice to his client to pursue conduct that violated court orders, i.e. Respondent's advice that the wife give the minor child a copy of the GAL Report despite a court order barring this.

The dissent concluded that Respondent's advocacy went beyond "vigorous" and was "vicious, vituperative advocacy replete with frivolous allegations." Noting the "extremely busy" state of Family Courts in New Hampshire, the dissent also stated that "the judicial system suffered serious injury as a direct result of (Respondent's) actions. The dissent felt that public censure was inadequate and sent the wrong message to the Bar. It would have imposed a one-year suspension to protect the public.

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