

Supreme Court Imposes the Harshest Sanction in Coffey's Case

AUGUST 30, 2005

On August 12, 2005, the New Hampshire Supreme Court issued its decision in Coffey's Case, a professional discipline case that found rule violations for charging "clearly excessive" fees (Rule 1.5[a]); knowingly entering into a transaction with an elderly and deteriorating client on terms that were unreasonable to her (Rule 1.8[a][1]); allowing the client's representation to be materially limited by respondent's conflicting personal interests (Rule 1.7[b]); acquiring a proprietary interest in the subject matter of litigation (Rule 1.8[j]) - - and others. See Coffey's Case, No. LD-2003-011 (N.H. Aug. 12, 2005).

The Court accepted all findings made by the Judicial Referee (Manias, J.) after an extended evidentiary hearing. Id., Slip Op. at 1. Exercising its "ultimate authority" to determine the appropriate sanction in attorney discipline matters, Kersey's Case, 150 N.H. 585, 586 (2004); Shillen's Case, 149 N.H. 132, 139 (2003), the Court then declined to follow the Referee's recommended sanction of a two-year suspension and disbarred the respondent. Id. at 11.

A copy of Coffey's Case can be found on the Court's website at www.courts.state.nh.us/supreme/opinions/2005/coffe094.htm. During a time of increased scrutiny of lawyer conduct, the decision provides insights into the Court's approach to lawyer discipline matters as well as broader risk management lessons for practicing lawyers.

Coffey's Case **Factual Background**

The transaction at the core of this case was a transfer of property from Natalie Hopkins, the client, to the respondent, summarized by the Court (Duggan, J.) as follows:

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The Referee found . . . [that] [o]n July 9, 1998, the respondent's client, Natalie Hopkins, signed a deed conveying to the respondent property located on Ocean Boulevard in Rye. The conveyance was for a stated consideration of \$50,000, which was based in part upon the respondent's estimated fee of \$30,000 for handling an appeal to this court. The property has been assessed at over \$200,000.

Id. at 1.

The Referee found, and the Supreme Court agreed, that the following additional circumstances were proved by "clear and convincing" evidence:

- Natalie Hopkins assumed sole ownership of the Rye property by right of survivorship in 1991 and respondent subsequently defended Hopkins against multiple claims to the property brought by one John Canty, Jr. Id. at 1-2.
- In April 1998, Canty appealed to the Supreme Court from his last defeat (a dismissal on *res judicata* grounds) and respondent advised his client that the defense of the appeal could cost \$30,000.00 or more. Id. at 2.
- When Hopkins indicated that she was not prepared to use liquid assets or provide a mortgage on the Rye house, respondent proposed that he purchase the house. Id.
- Respondent recommended three law firms with real estate practices to draft a deed. After his client selected one, respondent asked the firm "to prepare a warranty deed conveying the property to him largely [as] a gift, and partly for fees," subject to a life estate for the client. Respondent paid the law firm for preparing the deed. Id.
- Respondent failed to ensure that Hopkins received detached, independent advice from a fully-informed attorney before she executed the conveyance. Id. at 9.
- At the time of the conveyance on July 9, 1998, Hopkins was in deteriorating condition; was "at best, mentally impaired, and at worst, suffering from dementia because

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of Alzheimer's [disease]"; and "lacked the mental capacity to make an informed decision about conveying the Rye property to the respondent." *Id.* at 2 (quotations omitted).

- Respondent, who was present when Hopkins executed the deed, testified that his client was competent at the time of the conveyance. The Referee did not find this testimony credible "[i]n light of the overwhelming evidence to the contrary." *Id.* at 3 (quotations omitted).
- Respondent's violation of various professional rules was knowing, rather than negligent, and caused injury to his client. Respondent turned a "blind eye" towards his client's mental condition despite many opportunities to ascertain whether she had the mental capacity to make informed decisions. *Id.* at 3, 6 (quotation omitted).
- Respondent's bills for the Canty appeal reflected 225 hours to write the brief, including "day after day after day of anywhere from ten to eighteen hours"; and an additional 85 hours to prepare for oral argument. Respondent admitted that his invoices billed secretarial and paralegal time at his own rate. The actual amount billed for the appeal was \$64,242.89. *Id.* at 7 (quotations omitted).

Coffey's Case **Considerations for the Practicing Bar**

Coffey's Case provides valuable risk management lessons for New Hampshire lawyers - - both in their day-to-day practice, and when confronted with a client's disciplinary complaint. These are only a few:

1. The Pursuit of Unsuccessful Factual Defenses Will Frequently Increase the Lawyer's Exposure in Disciplinary Proceedings

Lawyers facing disciplinary complaints are confronted with difficult strategic choices. One of the most immediate is whether the respondent should provide testimony challenging the central factual allegations of the complaint.

Respondent attempted to establish two important factual defenses or mitigators: (1) that the conveyance of the Rye property was a gift, not simply payment for fees; and (2) that he was “absolutely unaware” of his client’s deteriorating condition. Id. at 5-6. The Referee did not find his testimony “credible” on either issue. Id. These unfavorable findings on respondent’s credibility were approved and adopted by the Court on appeal, and became a persistent theme in its analysis of “aggravating” and “mitigating” factors set forth in the 1992 “ABA Standards for Imposing Lawyer Sanctions.” See id. at 9-11. More specifically, because respondent’s testimony was not considered worthy of belief, he lost whatever credit he might have received for cooperation with the Committee. This was also the basis for findings that he “ha[d] not shown the level of remorse that we have found to be mitigating in other cases,” had not “accepted responsibility for his ethical violations,” and had “failed to acknowledge the wrongfulness of his actions” Id. at 10.

The significance attached by the Court to the respondent’s lack of candor and credibility is reflected in the final paragraph of this unanimous opinion:

The conduct of a lawyer who selfishly takes advantage of an elderly, mentally ill client by charging an exorbitant fee and then relies upon less than forthright testimony to defend his conduct requires disbarment. Id. at 11. (Emphasis supplied.)

In short - - lawyers who testify on factual matters in disciplinary proceedings, and who fail to convince the fact finder of the veracity of their testimony, must expect to receive harsher sanctions at the end of the day.

2. Long-term Client Relationships Can Create their own Special Responsibilities

While arguing correctly that lawyers are trained to perform legal services rather than psychological assessments, see McLaughlin v. Sullivan, 123 N.H. 335, 340 (1983) (Court refuses to extend a lawyer’s duty of care to encompass the prevention of client suicide following incarceration), respondent’s claim that he was unaware of Hopkins’ mental deterioration was nevertheless rejected by the Referee and the Court due to his long-term personal (20 years) and attorney/client (8 years) relationship with Hopkins:

[I]t is not credible that someone who had known and represented Hopkins for this long did not notice that, by the spring of 1998, she had mentally deteriorated to a significant degree.

Id. at 5-6.

3. Certain Bills for Legal Services Will Defy an Effective Defense

Fee dispute litigation typically involves competing experts and a detailed analysis of the “reasonableness” factors set forth in Rule 1.5(a)(1-8). In Coffey’s Case, however, respondent faced more fundamental obstacles in defending his actual bill for legal services for the Hopkins appeal (\$64,242.89) against the Committee’s charge that it was “clearly excessive.” First, there appear to have been no contemporaneous discussions with the client about respondent’s ongoing and substantial exceedence of the original estimate. Second, respondent provided no convincing explanation for the overrun. Finally, any effort to defend the bill was dealt an almost certainly fatal blow by respondent’s admission that his client was billed at his rates for the work of his paralegal and his secretary; and by the Court’s clear skepticism about 49 hours billed for case law research during respondent’s two week vacation in July 1998. Slip Op. at p. 7. Under the circumstances of Coffey’s Case, his experts do not appear to have attempted to justify the \$64,000 bill.

It should be noted that the New Hampshire Bar Association’s Ethics Committee - - as part of a comprehensive review of the New Hampshire Rules of Professional Conduct - - is recommending that the “clearly excessive” standard of rule 1.5(a) applied in Coffey’s Case be changed to a “clearly unreasonable” standard. The Bar’s draft recommendations for all rules are available for public comment on the Bar’s website; and are expected to reach the Supreme Court this fall.

4. In Serious Cases, an Unblemished and Substantial Career will not Prevent Disbarment

The goal of sanctions in disciplinary matters is to achieve public protection, not punishment. Coffey’s Case once again confirms that “substantial experience in the practice of law” is an

aggravating factor even if it has never before given rise to disciplinary action. Id. at 10, citing Richmond's Case, 152 N.H. _____, _____, 872 A.2d 1023, 1030 (2005).

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Devine Millimet's Attorney Conduct & Liability Practice Group offers this free E-Mail Advisory to members of the New Hampshire Bar Association to provide information and discuss recent developments in the fields of professional liability, professional ethics and risk management. 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.