THE STATE OF NEW HAMPSHIRE
SUPREME COURT

LD-2009-0010

IN THE MATTER OF
Nancy S. Tierney, Esquire

BRIEF FOR
THE NEW HAMPSHIRE SUPREME COURT
PROFESSIONAL CONDUCT COMMITTEE

New Hampshire Supreme Court
Professional Conduct Committee
By its counsel:

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(Oral Argument by James L. Kruse)

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QUESTION PRESENTED

Is the Professional Conduct Committee's recommendation of a one year suspension from the practice of law, stayed for two years on conditions, an appropriate sanction in light of the Respondent's misconduct and the circumstances of this case?

STATEMENT OF THE CASE

On February 15, 2008, the Attorney Discipline Office ("ADO") issued a Notice of Charges in this case. PCC Vol. 1 at 2[1]. Respondent, Nancy S. Tierney, Esq., filed a timely answer to the Notice of Charges. PCC Vol. 1 at 3. On June 25, 2008, Ms. Tierney and the ADO entered into a Stipulation of Facts. PCC Vol. 3 at 12. A hearing on the merits before a Hearing Panel occurred on June 24, 2008. PCC Vol. 4 at 16.

The Hearing Panel issued its Hearing Panel Report on July 30, 2008, addressing the facts and rules violations. The Hearing Panel found that Ms. Tierney had violated N.H. R. Prof. Conduct 1.1(a-c); 1.3(a-b); 1.4(a-c); and 8.4(a). PCC Vol. 4 at 17. The Hearing Panel conducted further hearing on the question of sanction on October 24, 2008. PCC Vol. 4 at 27. The Hearing Panel issued a Hearing Panel Recommendation on Sanction on November 3, 2008, recommending that Ms. Tierney be suspended for six months, with conditions for reinstatement. PCC Vol. 4 at 26.

On February 17, 2009, the Professional Conduct Committee ("Committee") considered the matter, including oral argument of counsel. See PCC Vol. 4 at 33. The Committee issued its Recommendation of a One Year Suspension Suspended for Two Years, dated March 12, 2009. As a condition of the stay, the Committee recommended that Ms. Tierney arrange for a mentor to

[1] Citations to the record are as follows: "PCC Vol. 1" through "PCC Vol. 4" denotes the entire record (consisting of 42 tabbed entries in 4 volumes) before the Committee in this matter. By way of example, "PCC Vol. 1 at 2" denotes tab 2 within volume 1 of the record.

assist her in regard to office practices. PCC Vol. 4 at 34. The Committee issued an Order on Motion for Clarification and Reconsideration and Response, dated September 9, 2009, recommending specific provisions regarding mentoring for Ms. Tierney. PCC Vol. 4 at 42.

The Committee's Assented-to Petition for One Year Suspension from the Practice of Law, Suspended for Two Years ("Petition") was filed with this Court on October 29, 2009. In her Answer of November 30, 2009, Ms. Tierney confirmed her acceptance of the Committee's findings, rulings, and recommendations.

STATEMENT OF THE FACTS

The facts in this matter are as set forth in the Stipulation of Facts (PCC Vol. 3 at 12), the ADO Exhibits (PCC Vol. 3 at 7-10), the findings of the Hearing Panel (PCC Vol. 4 at 17) and the findings of the Committee. PCC Vol. 4 at 34.

Ms. Tierney was admitted to the practice of law in the State of New Hampshire on June 3, 1986. At all times relevant to this proceeding, Ms. Tierney has operated as a sole practitioner with an office in Lebanon, New Hampshire. PCC Vol. 3 at 12.

In or about July 1998, Alfred Carbone of Allenstown, New Hampshire, retained Ms. Tierney to pursue a claim against his son and daughter-in-law, Daniel and Lisa Carbone of Danvers, Massachusetts. On November 11, 1998, Ms. Tierney and Mr. Carbone executed a contingency fee agreement relating to the pursuit of Mr. Carbone's claim. PCC Vol. 4 at 34, p. 2.

Mr. Carbone sought to recover approximately $69,000, representing a portion of the proceeds of the sale of his house in Londonderry, New Hampshire, which he had given to Daniel and Lisa. The parties apparently had agreed to sell their respective homes and purchase a new one. The new house was to include an apartment for Mr. Carbone. Mr. Carbone claimed that Daniel and Lisa had breached the agreement and defrauded him, by taking the proceeds of the sale of Mr. Carbone's house and using the money for purposes other than buying a new house or making improvements to accommodate Mr. Carbone. Id.

On July 14, 1998, Ms. Tierney wrote to Mr. Carbone to address the question whether his suit should be brought in state or federal court. Anticipating jurisdictional issues in the New Hampshire and Massachusetts state courts, Ms. Tierney recommended filing in the United States District Court for the District of New Hampshire. Ms. Tierney referred in her letter to diversity jurisdiction required for suit in federal court. She did not discuss with Mr. Carbone the requirement that a certain level of damages must be claimed in order to satisfy subject-matter jurisdiction requirements in a federal diversity action. PCC Vol. 4 at 34, p. 2-3.

Mr. Carbone was severely hearing impaired during the course of his attorney-client relationship with Ms. Tierney, and Ms. Tierney was aware of such impairment from the outset. Mr. Carbone had considerable difficulty hearing and understanding Ms. Tierney's explanations about the case and he asked Ms. Tierney to communicate with him in writing. Ms. Tierney did not consistently communicate with Mr. Carbone in writing and many of her written communications were incomplete or inaccurate. PCC Vol. 4 at 34, p. 20. As the matter progressed, Ms. Tierney recognized that, on a number of occasions, Mr. Carbone was not hearing what she was telling him about questions arising in his case. PCC Vol. 4 at 34, p. 4.

Ms. Tierney had not previously represented a client in a federal diversity case; she was unaware of the minimum level of damages required to satisfy subject-matter jurisdiction requirements in a federal diversity action; she did not consult current law applicable to diversity jurisdiction; she did not consult

current rules of federal procedure; and she did not consult other counsel with current knowledge and experience in federal litigation. As a result, Ms. Tierney misapprehended the law pertaining to minimum damages required for subject-matter jurisdiction in a federal diversity case. PCC Vol. 4 at 34, p. 3. Mr. Carbone's claim appeared initially to involve approximately $20,000 in damages. Id.

On August 8, 1998, Ms. Tierney filed a complaint against Daniel and Lisa Carbone in the United States District Court for the District of New Hampshire ("USNH"), invoking the Court's diversity jurisdiction. The complaint alleged an amount in controversy exceeding $10,000, exclusive of interest and costs. It contained a specific allegation that Mr. Carbone had suffered $69,000 in damages. Id.

The USNH Clerk's office rejected the filing because the signature page on the complaint was not signed and Court rules precluded acceptance of a personal check from Mr. Carbone tendered by Ms. Tierney for the filing fee. Ms. Tierney was also advised by the U.S. Marshall that she had used an outdated form for service of process, and that she should consult a current version of the federal rules. Filing errors were corrected and Ms. Tierney filed returns of service on September 16, 1998. PCC Vol. 4 at 34, p. 4.

The defendants filed three motions to dismiss on September 24, 1998, contesting federal court jurisdiction. The defendants disputed personal jurisdiction on grounds that plaintiff could not establish "minimum contacts" necessary to permit out-of-state service of process under New Hampshire's

Long-Arm Statute and that the summons served on defendants was not accompanied by a copy of the underlying complaint. Defendants also moved to dismiss on grounds that Mr. Carbone had failed to establish subject-matter jurisdiction because he did not claim a minimum amount in controversy of $75,000, as required under current federal law. PCC Vol. 4 at 34, pp. 4-5.

Ms. Tierney wrote to Mr. Carbone on September 25, 1998, advising him that the defendants had filed a "Motion to Dismiss" on grounds that no copy of the complaint was attached to the summons, and that she was taking care of that issue. In her letter of September 25, 1998, Ms. Tierney did not advise Mr. Carbone that the defendants had also moved to dismiss the complaint for lack of subject-matter jurisdiction. PCC Vol. 4 at 34, p. 5. Ms. Tierney did not otherwise timely or effectively inform Mr. Carbone that the defendants had challenged the complaint on grounds that there was no subject-matter jurisdiction. Id.

On October 1, 1998, Ms. Tierney sent a message to Mr. Carbone asking for information relating to the amount of damages he claimed in connection with replacing the laboratory facility he had used at his home. By message of October 5, 1998, Ms. Tierney acknowledged receipt of such information. Id.

On or about October 2, 1998, Ms. Tierney drafted objections to the defendants' motions to dismiss. In a combined pleading, Ms. Tierney undertook to challenge both the claim of no subject-matter jurisdiction and the claim of no personal jurisdiction. Id.

Ms. Tierney sent her combined responsive pleading to the USNH. However, the Clerk's office promptly returned the pleading to Ms. Tierney and advised her that her combined filing in response to defendants' motions to dismiss was defective as to form and would not be docketed. PCC Vol. 4 at 34, p. 5-6. Ms. Tierney's combined responsive pleading was not accepted for filing. Rule 7.1 of the local United States District Court Rules provides that "objections to pending motions . . . shall not be combined in one filing." PCC Vol. 4 at 34, p. 6.

Notwithstanding the Clerk's notice that her response to defendants' motions to dismiss was rejected because it was defective, Ms. Tierney did not thereafter file timely, corrective pleadings objecting to such motions, in compliance with applicable United States District Court Rules. Nor did Ms. Tierney, at any time prior to expiration of the deadline for objecting to defendants' motions to dismiss, undertake to file a voluntary non-suit without prejudice or to request leave of the Court to amend the complaint. PCC Vol. 4 at 34, p. 6.

On October 22, 1998, the Court disposed of defendants' motions to dismiss. It found that no objection had been filed to the motion to dismiss for lack of subject-matter jurisdiction and, on that basis, it granted that motion. In light of the dismissal for lack of subject-matter jurisdiction, the Court ruled that the remaining motions to dismiss were moot. Judgment was entered in favor of the defendants on October 23, 1998. Id. Copies of the orders of

October 22 and 23, 1998, were forwarded by the USNH Clerk to Ms. Tierney. Id.

On October 27, 1998, Ms. Tierney filed a Motion for Late Entry, with Objections to each of defendants' motions to dismiss; a Motion to Vacate the Judgment; and a Motion to Amend Complaint, to increase the amount of damages claimed. Ms. Tierney did not send copies to Mr. Carbone, or otherwise apprise him of these October 27, 1998, filings. PCC Vol. 4 at 34, pp. 6-7.

On October 29, 1998, each of Ms. Tierney's motions (filed October 27) was denied upon the Court's finding that the "case has been dismissed." Copies of the Court orders were forwarded to Ms. Tierney. Ms. Tierney did not appeal the Court's rulings and orders of October 22, 23, and 29, 1998. PCC Vol. 4 at 34, p. 7.

The Court's order of October 29, 1998, effectively eliminated Mr. Carbone's case from the USNH docket. Ms. Tierney received the Court's order and she understood that Mr. Carbone's case no longer existed. Id. Ms. Tierney did not send a copy of the October 29 order to Mr. Carbone. Nor did she or her paralegal assistant, Kristin LaBarre, otherwise timely or effectively apprise Mr. Carbone of the dismissal of his case. Id.

On October 30, 1998, Ms. Tierney wrote to Mr. Carbone stating, "I am writing to advise you of the status of your case." Ms. Tierney advised that she was in the process of "re-serving" the complaint for the purpose of increasing the amount of damages claimed. She also advised that "the other side has filed

Motions to Dismiss and we have countered with Objections to said Motions." In her October 30, 1998, correspondence, Ms. Tierney made no reference to the Court's rulings and orders of October 22 and 23, 1998, granting defendants' motions to dismiss and entering judgment for the defendants.

At the time of her October 30, 1998, correspondence, Ms. Tierney knew that the case had been dismissed. Ms. Tierney made no reference in her correspondence to the Court's orders of October 22 and 23 because she assumed that her motions of October 27 would be granted and that the case would be placed back on track. Ms. Tierney failed to apprise Mr. Carbone of her most recent filings or of the preliminary pretrial conference scheduled at the beginning of November. PCC Vol. 4 at 34, pp. 7-8. Further, Ms. Tierney's correspondence of October 30, 1998, made no reference to the Court's order of October 29, 1998, denying her motions filed on October 27, 1998, or (if unaware of said order) to the prospects of success of such motions. PCC Vol. 4 at 34, p. 8.

On November 25, 1998, Ms. LaBarre wrote to Mr. Carbone to "update" him on his case. She indicated that once a process server was appointed, Mr. Carbone's amended complaint with revised damages claim would be served. Ms. LaBarre's letter makes no reference to the Court's prior orders dismissing Mr. Carbone's case. Id.

On December 9, 1998, Ms. Tierney undertook to refile Mr. Carbone's complaint in the USNH. She invoked diversity jurisdiction once again, this time alleging that the amount in controversy exceeded $75,000, exclusive of

interest and costs, with a revised total claim of $77,000. Ms. Tierney also moved successfully for the appointment of a special process server. PCC Vol. 4 at 34, pp. 8-9.

On January 12, 1999, Ms. LaBarre wrote again to Mr. Carbone to "update" him on the case. She advised him that the complaint had been successfully served on the defendants, that the Court would be issuing a notice of hearing, and that Ms. Tierney would schedule a meeting to prepare for the hearing. PCC Vol. 4 at 34, p. 9.

On January 20, 1999, defendants filed a Motion to Dismiss the new, revised complaint in the USNH on grounds that there was no personal jurisdiction over the two Massachusetts defendants. Id. Ms. Tierney filed a timely objection to defendants' Motion to Dismiss, along with a supporting memorandum of law. In her memorandum of law, Ms. Tierney addressed the issue of "minimum contacts" under New Hampshire's Long Arm Statute. Ms. Tierney acknowledged that the case had previously been dismissed, but argued that the dismissal was without prejudice and that the new action was brought within the applicable statute of limitations. Id.

Ms. Tierney's objection to defendants' Motion to Dismiss contained a request that the case be transferred to the United States District Court in Massachusetts ("USMA") if the USNH ruled against her and found no personal jurisdiction in New Hampshire. PCC Vol. 4 at 34, p. 9.

Ms. Tierney forwarded copies of the new, revised complaint and the recent pleadings addressing the question of dismissal to Mr. Carbone on March 31, 1999, along with her bill for out-of-pocket expenses. Id.

On April 5, 1999, the Court ruled that defendants' Motion to Dismiss was "moot in light of my determination that the court lacks subject-matter jurisdiction over plaintiff's claim." PCC Vol. 4 at 34, p. 10. The Court also issued an order on April 7, 1999, as follows: "plaintiff had a full and fair opportunity to litigate the jurisdictional issue in the former action. He chose not to appeal the District Court's adverse ruling in that action. He cannot avoid the effect of that ruling simply by filing a new action." The Court made clear that "although a dismissal for lack of subject-matter jurisdiction does not operate as an adjudication of the merits [citation omitted], it conclusively resolves the jurisdictional issue decided by this court [citations omitted]." The Court dismissed the case "without prejudice to plaintiff's right to reinstate his claim in a state court of competent jurisdiction." Id. Judgment for the defendants in USNH was entered on April 8, 1999. Id.

Copies of the Court's ruling and orders of April 5, 7, and 8, 1999, were sent to Ms. Tierney. Copies of the April 5 and 7 orders were received by Ms. Tierney's office on April 8, 1999. The April 8, 1999, order of judgment was received by Ms. Tierney's office on or before April 13, 1999. Id.

On April 9, 1999, Ms. Tierney wrote to Mr. Carbone. She told him that she had received "notice" from the USNH "indicating they believe the lawsuit should be brought in the United States District Court for the District of

Massachusetts. . . ." She also stated her presumption that "the Court believes if we are successful in the litigation, you would have an easier time collecting from your son if the Order issued from a Massachusetts based court." Ms. Tierney sought Mr. Carbone's authority to file the complaint in Massachusetts. She described the process as "in essence a transfer from one United States District Court to another. . . ." In her letter of April 9, 1999, Ms. Tierney made no reference to any of the recent Court orders or to the enclosure of any copies of such orders. PCC Vol. 4 at 34, pp. 10-11.

While Ms. Tierney's file copy of the order of April 5, 1999, contains the notation, "cc client," there is no other record of supplying Mr. Carbone with copies of the Court's orders of April 5, 7, and 8, 1999, and Mr. Carbone denies receiving them. PCC Vol. 4 at 34, p. 11.

On April 30, 1999, Ms. Tierney filed Mr. Carbone's complaint (dated April 28, 1999) in the USMA, followed by a return of service dated May 10, 1999. Ms. Tierney contemplated moving the Court to waive the filing fee and to treat the matter as a transfer case from the USNH. She did not file such a motion. At the time of filing the USMA complaint, Ms. Tierney identified the case as an "original proceeding." PCC Vol. 4 at 34, p. 11.

On May 25, 1999, the defendants filed a Motion to Dismiss in the USMA, raising again the issue of subject-matter jurisdiction and asserting that the order of the USNH was dispositive. Counsel attached to his motion copies of the complaints filed in New Hampshire, the defendants' motions to dismiss,

and the Court's ruling and orders of April 5, 7, and 8, 1999. PCC Vol. 4 at 34, pp. 11-12

Ms. Tierney filed an Objection to defendants' Motion to Dismiss and a supporting memorandum of law on June 7, 1999. In her Objection, Ms. Tierney represented that "this matter has not been adjudicated but, rather, the Honorable United States Court for the District of New Hampshire has declined jurisdiction believing that the matter should, instead, be adjudicated by the Honorable United States District Court for the District of Massachusetts." PCC Vol. 4 at 34, p. 12.

In her Objection, Ms. Tierney mischaracterized the import or intention of the USNH orders on the jurisdictional issue. There was no suggestion by the Court in its orders of April 5 and 7, 1999, that it intended, in effect, for jurisdictional reasons, to defer to the USMA. Rather, the Court made clear that, while its dismissal for lack of subject-matter jurisdiction "does not operate as an adjudication of the merits, [citations omitted], it conclusively resolves the jurisdictional issue decided by the court [citations omitted]." In other words, Mr. Carbone's case does not fall within the diversity jurisdiction of any federal court. Id.

In her supporting memorandum of law, Ms. Tierney acknowledged that the initial complaint filed in New Hampshire had not alleged damages sufficient to satisfy jurisdictional limits, but argued that the complaint and Mr. Carbone's motion to vacate the Court's order of dismissal had been "withdrawn without prejudice," and that a second "action" had been filed in New

Hampshire correctly delineating the damages assessed. PCC Vol. 4 at 34, pp. 12-13.

Contrary to Ms. Tierney's assertion, the initial complaint and motion to vacate filed in the USNH had not been "withdrawn without prejudice." In fact, the Court had "rejected Plaintiff's attempt to vacate the judgment and amend the complaint to cure the jurisdictional defect." It issued an adverse ruling (albeit without prejudice to a filing in state court), to which Ms. Tierney had not taken an appeal. PCC Vol. 4 at 34, p. 13. Ms. Tierney's various arguments and representations to the USMA in her aforesaid Objection and memorandum were not soundly based on the record or the law of the case. Id.

Following a temporary stay of proceedings due to Lisa Carbone's filing in bankruptcy and related proceedings described below, the USMA issued a scheduling order on January 27, 2000, setting the matter for hearing on February 2, 2000. Id.

Following notice from the USMA that Mr. Carbone had appeared personally to inquire as to the status of his case, Ms. Tierney wrote to Mr. Carbone on January 31, 2000. Ms. Tierney assured Mr. Carbone that the matter was being handled as expeditiously as possible, that the hearing was being rescheduled due to scheduling conflicts, and that the Court might soon issue a ruling based on the documents already on file. Ms. Tierney also offered to withdraw as counsel if Mr. Carbone so directed. PCC Vol. 4 at 34, pp. 13-14.

On February 9, 2000, the USMA issued an order granting the defendants' Motion to Dismiss on jurisdictional grounds, citing the earlier adverse ruling in the USNH. Further, the Court ruled that Plaintiff's claim was "dismissed without prejudice to its prosecution in state court." PCC Vol. 4 at 34, p. 14.

While the proceedings in the USMA were still pending, on July 1, 1999, Ms. Tierney filed a complaint on behalf of Mr. Carbone against Daniel and Lisa Carbone in the Essex County, Massachusetts Superior Court. Id. Defendants promptly filed a Motion to Dismiss the Essex County Superior Court case and sought sanctions, citing the pendency of the same matter in the USMA that had earlier been dismissed in New Hampshire. Id.

On July 12, 1999, Ms. Tierney filed an objection to the Motion to Dismiss, arguing, in part, that her client was proceeding in state court in response to an order of the USNH dismissing the case "without prejudice to plaintiff's right to reinstate his claim in a state court of competent jurisdiction." PCC Vol. 4 at 34, p. 14. On July 14, 1999, Ms. LaBarre wrote to Mr. Carbone on Ms. Tierney's behalf, advising that his complaint had been "forwarded" to the Essex County Superior Court. She made no reference to the aforementioned Motion to Dismiss in Essex County Superior Court or to Ms. Tierney's objection thereto. PCC Vol. 4 at 34, pp. 14-15.

On August 4, 1999, the Essex County Superior Court denied the defendants' Motion to Dismiss, but stayed the proceeding until resolution of the jurisdictional issue pending in the USMA. In response to a call from Mr.

Carbone to Ms. Tierney's office, Ms. LaBarre faxed Mr. Carbone a letter dated August 12, 1999, attaching a copy of the aforesaid Essex County Superior Court's ruling on the Motion to Dismiss. Ms. LaBarre encouraged Mr. Carbone to call with questions. PCC Vol. 4 at 34, p. 15.

In May 1999, while Mr. Carbone's case was still pending in USMA, Lisa Carbone filed a Motion to Dismiss and Suggestion of Bankruptcy, a copy of which was sent to Ms. Tierney. Id. On June 3, 1999, Ms. LaBarre wrote to Mr. Carbone about the bankruptcy proceeding. She commented on Lisa Carbone's legal position in that process. Ms. LaBarre also reassured Mr. Carbone that Ms. Tierney was in touch with the Trustee in Bankruptcy; that she would be contacting Lisa's attorney; that Ms. Tierney would request a deposition of Lisa; that there would be a chance to appeal a court finding favorable to Lisa; and that Mr. Carbone's case in federal court could proceed solely against Defendant Daniel Carbone. Id.

Ms. Tierney agreed to represent Mr. Carbone in pursuit of his claim against Lisa Carbone in the bankruptcy proceeding. Id. In connection with that proceeding, Ms. Tierney planned to contest Lisa Carbone's use of the homestead exemption and to oppose discharge of Lisa's debt to Mr. Carbone. Ms. Tierney communicated with the Trustee in Bankruptcy regarding the first meeting of creditors and later filed an appearance on behalf of Mr. Carbone. PCC Vol. 4 at 34, p. 16.

The bankruptcy filing and related proceedings temporarily stayed the proceedings in USMA, as a matter of law, until January 2000. It also barred

initiation of new claims against Lisa Carbone in any other courts. Knowing that Lisa Carbone had filed for bankruptcy, and in spite of the automatic statutory stay, Ms. Tierney delayed dropping Lisa Carbone as a defendant in the USMA case and went forward with the new case in Essex County Superior Court. Id.

Pursuant to the Notice of Chapter 7 Bankruptcy, Meeting of Creditors & Deadlines issued May 14, 1999, Ms. Tierney was required to file Mr. Carbone's Complaint Objecting to Discharge of the Debtor (Lisa Carbone) on or before August 9, 1999. An Objection to any exemptions claimed by Lisa Carbone was due 30 days after the conclusion of the meeting of creditors scheduled for June 8, 1999. Id. Ms. Tierney did not file these pleadings in the bankruptcy proceeding, nor did she communicate with Mr. Carbone concerning her determination, if any, not to file such pleadings. Lisa Carbone was discharged in bankruptcy on August 18, 1999. Id.

Ms. Tierney had not pursued prejudgment attachment of Lisa Carbone's real property in connection with any of the aforementioned civil proceedings, so as to secure judgment and possibly to avoid a discharge in bankruptcy. PCC Vol. 4 at 34, p. 17.

Following a formal notice by letter of August 9, 1999, Lisa Carbone's bankruptcy counsel filed a Motion for Sanctions in United States Bankruptcy Court on August 23, 1999. The Motion was filed against Mr. Carbone and Ms. Tierney for having maintained an action in the USMA and for having proceeded

with a new action in Essex County Superior Court in violation of the automatic stay. Id.

On September 22, 1999, Ms. Tierney filed a Motion to Amend Pleadings in the USMA to delete any reference to Lisa Carbone as a Defendant in the pending USMA matter. Id. As an objection to the Motion for Sanctions, Ms. Tierney filed a "Motion to Dismiss" on October 12, 1999, requesting that the United States Bankruptcy Court dismiss Lisa Carbone's petition in bankruptcy. In that same pleading, Ms. Tierney represented that she had filed the necessary documents to release Lisa Carbone as a defendant in the USMA matter. On November 9, 1999, the United States Bankruptcy Court denied Ms. Tierney's Motion to Dismiss and granted the Motion for Sanctions against Ms. Tierney. Id.

By letter of February 23, 2000, Ms. Tierney wrote to the Essex County Superior Court, advising it as to the status of the various proceedings and asking that the case be brought forward. The Essex County Superior Court issued a "Notice of Status Review of the Docket," dated March 14, 2000, requiring a response from the parties. According to the Notice, absent a response from the plaintiff within 20 days, "a dismissal will enter and the docket closed out." PCC Vol. 4 at 34, pp. 17-18.

Upon receipt of the March 14, 2000, Notice, Ms. Tierney contacted the Essex County Superior Court to inquire whether it had received her letter of February 23 providing information about the status of the matter. Ms. Tierney

was advised that the Court had not received her prior correspondence. PCC Vol. 4 at 34, p. 18.

Ms. Tierney followed-up with a letter dated March 16, 2000, sent to the Essex County Superior Court via Federal Express. Ms. Tierney included the completed Notice of Status Review form, another copy of her February 23 letter, and copies of the orders of dismissal issued by the USNH and USMA. Federal Express records confirm receipt of Ms. Tierney's letter by the Essex County Superior Court on March 17, 2000. Id.

The Essex County Superior Court issued an "Order of Dismissal" dated April 26, 2000, providing that, upon consideration of the action, "it is ORDERED AND ADJUDGED that the action be and hereby is dismissed." Ms. Tierney received a copy of the order. This Essex County Superior Court order contained no specific finding or explanation of the basis for dismissal; nor was Ms. Tierney aware of any basis for the Court's action. Id. Ms. Tierney determined that the Essex County Superior Court's order represented a final ruling on the merits. She did not file any additional pleadings to question or challenge the basis for this order. PCC Vol. 4 at 34, p. 19.

Essex County Superior Court records at the time contained a notation on the March 14, 2000, Notice of Status Review form issued in the Carbone case, as follows: "No response." The Essex County Superior Court records, including a docket sheet pertaining to Mr. Carbone's case, were open to the public and available for inspection by Ms. Tierney. Neither Ms. Tierney nor Ms. LaBarre undertook such an inspection. Id.

Upon receipt of the Order of Dismissal from the Essex County Superior Court, Ms. Tierney sent Mr. Carbone a letter dated May 4, 2000. Ms. Tierney summarized the procedural history of Mr. Carbone's case, noting that the USNH had "declined jurisdiction," that the USMA had dismissed the case, and that the Essex County Superior Court had followed suit. Id.

In her letter of May 4, 2000, Ms. Tierney advised Mr. Carbone that, while he could appeal the Essex County Superior Court order to the Massachusetts Supreme Judicial Court, such action would be costly and fruitless. She offered no analysis of the "jurisdictional issue" addressed by the federal courts, including the question whether the federal court orders of dismissal (issued "without prejudice" to pursuit of a claim in state court) could properly have served as the basis for dismissal of Mr. Carbone's claim in state court. Ms. Tierney concluded only that "every court which could have heard the matter has quashed all attempts for the case to be heard." Ms. Tierney offered to transfer the file to another attorney if Mr. Carbone so desired. PCC Vol. 4 at 34, pp. 19-20.

Ms. Tierney's attorney-client relationship with Mr. Carbone ended in May 2000. PCC Vol. 4 at 34, p. 20.

SUMMARY OF ARGUMENT

The Committee's recommended sanction in this matter is consistent with the New Hampshire case law and the ABA Standards, and properly accounts for the goals of attorney discipline.

Considering the record before it, the Committee reasonably found that Ms. Tierney conduct was, for the most part, the product of gross negligence. While Ms. Tierney's misconduct was "severe" and deprived her client of any reasonable opportunity to pursue his claim, the Committee found that Ms. Tierney was apparently unaware of the substantial harm that her misconduct could bring to her client.

The baseline sanction and aggravating factors support a suspension from the practice of law. However, the Committee reasonably found, based on the record before it, that mitigating factors were so compelling as to warrant a stay of the suspension on condition that Ms. Tierney consult with a mentor.

ARGUMENT

THE COMMITTEE'S SANCTION RECOMMENDATION IN THIS CASE IS CONSISTENT WITH NEW HAMPSHIRE CASE LAW, THE ABA STANDARDS, AND THE GOALS OF ATTORNEY DISCIPLINE.

New Hampshire case law and the American Bar Association's Standards for Imposing Lawyer Sanctions (1992) ("Standards") support the Committee's conclusion that Ms. Tierney should be suspended from the practice of law, with the suspension stayed for two years on condition that she consult with a mentor regarding office practices.

The Committee undertook a sanction analysis, employing the Standards as its guide. The Committee made clear its recognition that "the purpose of the Court's disciplinary power is to protect the public, maintain public confidence in the bar, preserve the integrity of the legal profession, and prevent similar conduct in the future." The Committee also endeavored to arrive at a sanction which would "take into account the severity of the misconduct." PCC Vol. 4 at 34, p. 22.

Although the Court has not adopted the Standards, it looks to them for guidance. Conner's Case, 158 N.H. at 303. The Standards set forth a four part analysis for courts to consider in imposing sanctions: "(a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors." Id. (quoting Douglas' Case, 155 N.H. 613, 621 (2007)); Standards § 3.0.

The first three steps in the analysis create the framework for characterizing the misconduct and determining a baseline sanction. See

Conner's Case, 158 N.H. at 303. Once the baseline sanction is determined, the Court then looks to the fourth and final step in the analysis: consideration of the existence of any aggravating or mitigating factors and whether they affect the baseline sanction. Id.

Under the first prong of the analysis, Ms. Tierney violated her obligations to her client and to the profession. Ms. Tierney exhibited incompetence in handling federal court matters, a serious lack of diligence in protecting her client's interests in the underlying litigation, and a failure to communicate effectively and accurately with her client. PCC Vol. 4 at 34, pp. 21-23.

As to Ms. Tierney's mental state, the Committee found that Ms. Tierney's misconduct was "severe" and that Ms. Tierney was "grossly negligent." In addition, Ms. Tierney did not demonstrate "an awareness of the substantial harm that her lack of experience in certain areas could bring to her client." PCC Vol. 4 at 34, p. 21.

With particular regard to her failure to communicate, the Committee concurred with the Hearing Panel that, while Ms. Tierney's client was "misled" by Ms. Tierney's various written communications, Ms. Tierney did not act with "a conscious objective or purpose" to misrepresent or mischaracterize the facts pertaining to the status of his case. PCC Vol. 4 at 26, pp. 2-3; 34, p. 21.

Under the third prong of the analysis, the Committee found that Ms. Tierney's misconduct caused actual injury to Mr. Carbone in that he was "deprived of any reasonable opportunity to pursue his claim and recover his financial losses." Vol. 4 at 34, pp. 21, 23. It is also clear that Ms. Tierney

effectively destroyed her attorney-client relationship with Mr. Carbone, and caused harm to the public's confidence in the legal profession.

In addition to the first three prongs of the sanction analysis, the Standards provide material guidance in reaching a baseline sanction.

Ms. Tierney's incompetent performance should be examined under the provisions of Standards § 4.5, entitled "Lack of Competence." See Appendix, p. 40. The Standards suggest a baseline sanction of suspension for a knowing violation that causes injury or potential injury to a client. Standards § 4.52. As an attorney with "considerable experience," the Committee found that Ms. Tierney knew that she did not have experience or knowledge in the area of federal diversity actions. Ms. Tierney failed to research current federal law and she exhibited a fundamental lack of understanding as to basic federal procedure. PCC Vol. 4 at 34, pp. 3, 21. Ms. Tierney knew or should have known that she lacked the requisite competence to pursue Mr. Carbone's claim. See PCC Vol. 4 at 26, p. 3; 34, pp. 2-3, 23.

With respect to Ms. Tierney's breach of her duty of diligence, the relevant provisions of the Standards are found at Standards § 4.4, entitled "Lack of Diligence." See Appendix, p. 39. The Standards call for a suspension where, as here, the attorney engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client. Standards § 4.42. The Committee found that over the two-year period of representation, Ms. Tierney was "seriously lacking in promptness and diligence by failing to file timely objections and pleadings in compliance with federal rules and by failing

to pursue other appropriate remedies in civil proceedings to the detriment of her client." PCC Vol. 4 at 34, pp. 4-20, 22.

Provisions of the Standards relevant to Ms. Tierney's failure to communicate with her client are set forth at Standards § 4.6, entitled "Lack of Candor." See Appendix, p. 40. The Committee did not find clear and convincing evidence that Ms. Tierney intended to deceive her client, but it did find that her "grossly negligent" conduct, which included misleading mischaracterizations of the facts regarding the status of Mr. Carbone's claims, caused significant injury to Mr. Carbone. PCC Vol. 4 at 34, p. 21; see also PCC Vol. 4 at 26, p. 20. As such, Ms. Tierney's misconduct is fairly characterized under the guidelines as something between a negligent and a knowing violation, warranting a public censure or suspension. See Standards, §§ 4.62, 4.63.

Weighing the facts against the relevant Standards, the Committee reasonably determined that a baseline sanction of suspension was warranted in this case. PCC Vol. 4 at 34, p. 23.

The Committee next analyzed whether there were aggravating and mitigating factors that might affect the baseline sanction of suspension. The Committee identified four aggravating factors: a) Ms. Tierney's extensive experience in the practice of law; b) a "disturbing pattern" of Ms. Tierney's failure to attend to the details of practice; c) Ms. Tierney's "troubling" unwillingness to accept responsibility for her actions, by insisting that her only mistake was not claiming the requisite level of damages in a federal diversity

action; and d) Ms. Tierney's prior disciplinary history. PCC Vol. 4 at 34, pp. 22-23; see also PCC Vol. 4 at 26, pp. 2-3.

With regard to Ms. Tierney's disciplinary history, the Committee had before it a warning issued in 1999, two additional warnings in 2004, and a Public Censure in 2006. The 1999 warning involved Ms. Tierney's failure to withdraw from a case after the client terminated her and her failure to appear at a hearing while her appearance was still on file with the court. The first 2004 warning cautioned Ms. Tierney about the need to be more precise and accurate in apprising the court of scheduling conflicts. The second 2004 warning addressed Ms. Tierney's inadequate communication with a client by declining to pick up certified mail at the post office. PCC Vol. 4 at 21, 23, 24.

The 2006 Public Censure was imposed in the matter of *Tierney, Nancy S. advs. Michael J. Mead #03-050.* PCC Vol. 4 at 23, pp. 13-14, Exh. 155; 33, pp. 9, 18-21. In that case, the Committee found that, during the period 2003 to 2005, Ms. Tierney violated Rules 1.5(b), 1.15(b) and (c), and 8.4(a) while representing Mr. and Mrs. Mead in a real estate transaction. Ms. Tierney demonstrated a lack of familiarity with the procedure and documents associated with the underlying transaction, while leading her clients to believe that she had sufficient knowledge and expertise to handle the matter. PCC Vol. 4 at 23.

Ms. Tierney disputed the relevance of the disposition in *Mead* on grounds that the conduct in the Carbone case pre-dated the conduct and disposition in *Mead* and that, the disposition did not qualify as a "prior disciplinary offense"

under the Standards. See Standards § 9.22(a). PCC Vol. 4 at 33, pp. 9. 18-21. While the Hearing Panel agreed with Ms. Tierney and declined to consider the disposition in *Mead* (PCC Vol. 4 at 26, p. 3), the Committee disagreed and found that Ms. Tierney's conduct in *Mead* qualified as an aggravating factor. See PCC Vol. 4 at 21, p. 13; 33, pp. 9, 21; 34, p. 22.

The Committee found significant mitigation in letters of support for Ms. Tierney, attesting to the nature and quality of legal services she provided, as well as concerns expressed about the impact of a suspension on Ms. Tierney's current client base. PCC Vol. 4 at 34, p. 22; 33 at pp. 17-18; 31. In this regard, the Committee considered evidence that a substantial portion of Ms. Tierney's practice has, for some time, involved *pro bono,* reduced fee, and court-appointed appearances, that few attorneys in the Upper Valley are willing to take. Such cases include juvenile proceedings, abuse and neglect and termination of parental rights cases, and guardianship matters. Id. Ms. Tierney testified that she has many of these cases currently pending, and that some of these cases "have spanned a number of years." PCC Vol. 4 at 27, pp. 7-9, 29-30.

The Committee assigned weight to evidence of Ms. Tierney's "personal and emotional challenges" faced while representing Mr. Carbone. PCC Vol. 4 at 34, p. 22. In Ms. Tierney's testimony before the Hearing Panel and in her supplemental statement to the Committee, Ms. Tierney indicated that her husband at the time was abusing her son of her first marriage, while her

husband was also suffering a nervous breakdown, and that her best friend of 43 years was dying of cancer. PCC Vol. 4 at 26, p. 3; 34, pp. 22-23

This Court has made clear its reluctance to accept personal difficulties experienced by an attorney as a basis for mitigation in a disciplinary proceeding. Attorneys are expected to "maintain a competent level of performance even while suffering trying times in their personal lives." Sheridan's Case, 148 N.H. 595, 600-02 (2002). In Sheridan's Case, the Respondent exhibited incompetence and a lack of diligence in handling an incorporation process. He also misrepresented the corporate status to his clients and exposed them to potential liability. Respondent's prayer for mitigation was based on an apparent mental disorder characterized by spells of fatigue, distractibility, and disorganization. The Court rejected Respondent's plea for mitigation and issued a one-year suspension. Sheridan's Case, 148 N.H. at 602-603.

Ms. Tierney's transgressions bear some resemblance to Mr. Sheridan's misconduct, and, indeed, the baseline sanction analysis and aggravators found in Ms. Tierney's case would support a comparable disposition. However, the Committee reasonably found that evidence of Ms. Tierney's personal challenges at the time of her representation, combined with the nature and value of the work she is able to perform within her area of expertise, served as a more compelling basis for mitigation than that offered by Mr. Sheridan. The issues Ms. Tierney faced in her personal life do not excuse her conduct. However, the Committee reasonably found them worthy of consideration as extenuating

circumstances contributing to her mishandling of a matter not within her area of expertise. See PCC Vol. 4 at 34, pp. 22-23.

This Court has found that a respondent's difficult personal circumstances can constitute a compelling mitigating factor. Grew's Case, 156 N.H. 361, 367 (2007). In Grew's Case, the Court reduced a baseline sanction of disbarment to a suspension on the basis of the mitigating factors. The respondent in that case had committed the crime of insurance fraud. In reducing the baseline sanction, the Court relied upon a finding by the Committee that, at the relevant time, "the respondent was going through a period of severe 'personal and financial stress.'" Id. The Court held: "While the issues [the respondent] faced in his private life are not unique, and certainly do not excuse his conduct, they are at least worthy of consideration as an extenuating circumstance." Id.

Unlike the respondent in Grew's Case, Ms. Tierney did not commit a serious crime, intentional deceit, or any purposeful act of misconduct. Rather, the Committee found that Ms. Tierney's failures to communicate were "grossly negligent" rather than purposeful. The Committee's sanction analysis in this case, therefore, began with a baseline suspension rather than disbarment. The Committee's further decision to stay the suspension was, like this Court's decision in Grew's Case, based on what the Committee found were personal circumstances and stressors that the Committee deemed "worthy of consideration," Grew's Case at p. 367, as a compelling mitigating factor. PCC Vol. 4 at 34, pp. 22-23.

Finally, the Committee focused on Ms. Tierney's "apparent need, as a sole practitioner, for assistance in certain aspects of practice." PCC Vol. 4 at 34, p. 23. The Committee's concerns in this regard are reflected in its recommendation for a lengthy period of mentoring, with very specific requirements tailored to the problems associated with Ms. Tierney's office practices and client communications. PCC Vol. 4 at 34, p. 23-24; 42.

This Court has repeatedly stated that punishment is not a goal of attorney discipline. Rather, the purposes of attorney discipline are primarily to restore public confidence and to protect the public. Grew's Case, 156 N.H. at 365. Considering the particular circumstances of this case and weighing the aggravating and mitigating factors against the baseline sanction, the Committee reasonably concluded that a one-year suspension, stayed for two years under conditions addressing flaws in Ms. Tierney's office practices and client communications, serves these purposes.

CONCLUSION

The Committee respectfully submits that it has undertaken the proper analysis contemplated by the Standards and that its recommended sanction is in accord with the purposes of attorney discipline as described by this Court. Accordingly, this Court should adopt the Committee's recommendation.

In the event the Court deems it necessary, Assistant Disciplinary Counsel requests oral argument.

Respectfully submitted,
New Hampshire Supreme Court
Attorney Discipline Office

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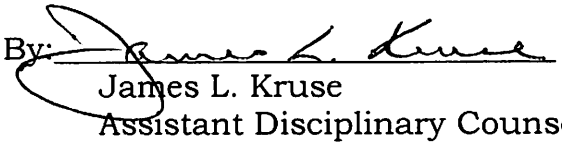
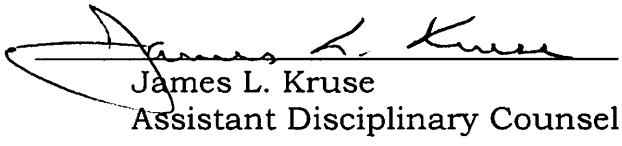
Dated: February 18, 2010 By: 
James L. Kruse
Assistant Disciplinary Counsel

CERTIFICATION

I, James L. Kruse, as counsel for the New Hampshire Supreme Court Professional Conduct Committee, certify that a copy of the aforesaid Petitioner's Brief is being mailed on this 18th day of February 2010, to counsel for Nancy S. Tierney, Russell F. Hilliard, Esquire, at Upton & Hatfield, LLP, 159 Middle Street, Portsmouth, New Hampshire 03801, by first class mail postage prepaid.


James L. Kruse
Assistant Disciplinary Counsel

APPENDIX TO
BRIEF FOR
THE NEW HAMPSHIRE SUPREME COURT
PROFESSIONAL CONDUCT COMMITTEE

New Hampshire Rules of Professional Conduct

Rule 1.1. Competence

(a) A lawyer shall provide competent representation to a client.

(b) Legal competence requires at a minimum:

(1) specific knowledge about the fields of law in which the lawyer practices;

(2) performance of the techniques of practice with skill;

(3) identification of areas beyond the lawyer's competence and bringing those areas to the client's attention;

(4) proper preparation; and

(5) attention to details and schedules necessary to assure that the matter undertaken is completed with no avoidable harm to the client's interest.

(c) In the performance of client service, a lawyer shall at a minimum:

(1) gather sufficient facts regarding the client's problem from the client, and from other relevant sources;

(2) formulate the material issues raised, determine applicable law and identify alternative legal responses;

(3) develop a strategy, in consultation with the client, for solving the legal problems of the client; and

(4) undertake actions on the client's behalf in a timely and effective manner including, where appropriate, associating with another lawyer who possesses the skill and knowledge required to assure competent representation.

Rule 1.3. Diligence

(a) A lawyer shall act with reasonable promptness and diligence in representing a client.

(b) Performance by a lawyer is prompt and diligent when:

(1) it is carried out in the manner and within the time parameters established by the agreement between the client and the lawyer; however, the lawyer may not rely upon the terms of an agreement to excuse performance which is not prompt and diligent in light of changes in circumstances, known to the lawyer, which require adjustments to the agreed upon schedule of performance.

(2) in all other matters of representation, it is carried out with no avoidable harm to the client's interest nor to the lawyer-client relationship.

Rule 1.4. Client Communications

(a) A lawyer shall keep a client reasonably informed regarding the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain the legal and practical aspects of a matter and alternative courses of action to the extent that such explanation is reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) A client is reasonably informed when information relevant to the protection of the client's interest is provided at an appropriate time and in an appropriate manner.

Rule 1.5. Fees

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

Rule 1.15. Safekeeping Property

(b) Upon receiving funds or other property in which a client has an interest, a lawyer shall promptly notify the client. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client any funds or other property that the client is entitled to receive.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) state or imply an ability to influence improperly a government agency or official; or

(e) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

United States District Court Rules

Rule 7.1 Motions.

a. Form.

1. **Title.** Motions, other than those submitted during trial, shall be considered only if submitted separately from other filings and only if the word "motion" appears in the title.
2. **Memorandum and Supporting Documents.** Every motion and objection shall be accompanied by a memorandum with citations to supporting authorities or a statement explaining why a memorandum is unnecessary. Every motion and objection which require consideration of facts not in the record shall be accompanied by affidavits or other documents showing those facts.
3. **Length of Memorandum.** Except by prior leave of the court, no memorandum in support of, or in opposition to, a nondispositive motion shall exceed fifteen (15) pages and no memorandum in support of, or in opposition to, a dispositive motion shall exceed twenty-five (25) pages.
4. **Reply Memorandum.** A reply memorandum shall not be permitted without prior leave of the court.

b. Time for Response. Except as otherwise required by law or order of the court, every objection, except objections to summary judgment motions, shall be filed within ten (10) days from the date the motion is filed. Objections to summary judgment motions shall be filed within thirty (30) days from the date the motion is filed. The time periods described in this rule shall be determined in accordance with Fed. R. Civ. P. 6(a) and (e). The court shall deem waived any objection not filed in accordance with this rule.

c. Concurrence. Any party filing a motion other than a dispositive motion shall certify to the court that a good faith attempt has been made to obtain concurrence in the relief sought. If the moving party has obtained concurrence, a statement of concurrence shall be included in the body of the motion so the court may consider it without delay. If concurrence has been obtained, the motion shall also contain the words "assented-to" in its title. The requirements of this subsection shall not apply to motions involving an incarcerated pro se litigant.

d. Oral Argument. Except as otherwise provided, the court shall decide motions without oral argument.

The court may allow oral argument after consideration of a written statement by a party outlining the reasons why oral argument may provide assistance to the court. Unless otherwise ordered, each side's argument shall be limited to fifteen (15) minutes.

American Bar Association's Standards for Imposing Lawyer Sanctions

Section 3.0: Generally

In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:

(a) the duty violated;
(b) the lawyer's mental state;
(c) the potential or actual injury caused by the lawyer's misconduct; and
(d) the existence of aggravating or mitigating factors.

Section 4.4: Lack of Diligence

4.41 Disbarment is generally appropriate when:

(a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or

(b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or

(c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.

4.42 Suspension is generally appropriate when:

(a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or

(b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

4.43 Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.

4.44 Admonition is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client.

Section 4.5: Lack of Competence

4.51 Disbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client.

4.52 Suspension is generally appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury or potential injury to a client.

4.53 Reprimand is generally appropriate when a lawyer:

(a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or

(b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client.

4.54 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether he or she is competent to handle a legal matter, and causes little or no actual or potential injury to a client.

Section 4.6: Lack of Candor

4.61 Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potential serious injury to a client.

4.62 Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.

4.63 Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client.

4.64 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in failing to provide a client with accurate or complete information, and causes little or no actual or potential injury to the client.

Section 9.0: Aggravation and Mitigation

9.1 Generally

After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose.

9.2 Aggravation

9.21 Definition. Aggravation or aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed.

9.22 Factors which may be considered in aggravation.

Aggravating factors include:

(a) prior disciplinary offenses;
(b) dishonest or selfish motive;
(c) a pattern of misconduct;
(d) multiple offenses;
(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
(g) refusal to acknowledge wrongful nature of conduct;
(h) vulnerability of victim;
(i) substantial experience in the practice of law;
(j) indifference to making restitution;
(k) illegal conduct, including that involving the use of controlled substances.

9.3 Mitigation

9.31 Definition. Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.

9.32 Factors which may be considered in mitigation.

Mitigating factors include:

(a) absence of a prior disciplinary record;
(b) absence of a dishonest or selfish motive;
(c) personal or emotional problems;

(d) timely good faith effort to make restitution or to rectify consequences of misconduct;
(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
(f) inexperience in the practice of law;
(g) character or reputation;
(h) physical disability;
(i) mental disability or chemical dependency including alcoholism or drug abuse when:
    (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;
    (2) the chemical dependency or mental disability caused the misconduct;
    (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
    (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely;
(j) delay in disciplinary proceedings;
(k) imposition of other penalties or sanctions;
(l) remorse;
(m) remoteness of prior offenses.