

New Hampshire Supreme Court
Professional Conduct Committee

a committee of the attorney discipline system

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ORDER

On July 21, 2020, the Professional Conduct Committee (the Committee) deliberated a stipulation entered after a hearing on allegations that the Respondent, Aaron A. Greenlee, violated Rules of Professional Conduct 1.3, 5.3, and 8.1. The Hearing Panel (the Panel) found a violation of Rule 1.3, but found that Rule 8.1 was not applicable to the alleged misconduct, and that the Attorney Discipline Office (the ADO) failed to prove a violation of Rule 8.1 by clear and convincing evidence.

Because the Committee had questions about the applicability of Rule 8.1 and the materiality of Mr. Greenlee's statements, it tabled the matter and requested oral argument. That argument occurred on September 15, 2020. The Committee approves the Panel's report.

Background

Rule 8.1 states, in pertinent part, "An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not . . . (a) knowingly make a false statement of material fact." The basis for the Rule 8.1 violation was alleged false and

material statements made by Mr. Greenlee in a voluntary written response to a grievance filed with the Attorney Discipline Office. The Panel explained its decision to dismiss the Rule 8.1 charge as follows:

The Panel . . . concluded that the ADO had not met its burden of proving by clear and convincing evidence a violation of Rule 8.1. The Panel was not convinced that the statements made by Mr. Greenlee in his letter to the ADO, before the Notice of Charges had issued, were statements made “in connection with a disciplinary matter” for purposes of Rule 8.1. Regardless of whether Rule 8.1 applied, however, the Panel found that the ADO had not proven a violation, as it was not convinced that Mr. Greenlee had “knowingly (made) a false statement of material fact,” because the statement in issue did not appear to be material.

The Committee did not agree with the Panel’s conclusion that Rule 8.1 did not apply to false statements made in a voluntary response to a grievance filed with the ADO “before the Notice of Charges had issued,” because such statements were not made “in connection with a disciplinary matter.” Rather than rejecting the Panel’s Report, the Committee issued an order “allow(ing) the parties an opportunity to address the applicability of Rule 8.1 to Mr. Greenlee’s alleged conduct via oral argument.”

The question of whether a lawyer’s voluntary written response to a grievance is a statement made “in connection with a disciplinary matter,” as that phrase is used in Rule 8.1, is a question of law for the Committee to review *de novo*. See *Appeal of Collins*, 171 N.H. 61, 62 (2018) (Court reviews legal

conclusions of administrative board *de novo*). After considering the record and the parties' arguments, the Committee determined that Mr. Greenlee's voluntary response was made "in connection with a disciplinary matter," and that the Panel erred as a matter of law in ruling that the statements did not fall within the scope of Rule 8.1.

The Panel's finding that the ADO had failed to prove a violation of Rule 8.1 - that "the statement in issue did not appear to be material" - raises a question of fact that can only be overturned on review if it is clearly erroneous. *See Appeal of Farmington School Board*, 168 N.H. 726, 730 (2016) (factual findings reviewed for clear error). The Committee did not find clear error, and on this basis alone it upholds the Panel's finding that the ADO failed to prove a Rule 8.1 violation.

The Reach of Rule 8.1

The phrase "in connection with a disciplinary matter" is not defined in Rule 8.1 or Rule 1.0 (the "Definitions" section of the Rules). In construing the language of a rule, the Committee will examine the language of the rule and afford its words of the rule their ordinary meaning. *Vector Marketing Corp. v. N.H. Dep't of Revenue Admin.*, 156 N.H. 781, 783 (2008). The Committee will consider the language of the rule in conjunction with the other Rules of Professional Conduct. *Appeal of Morton*, 156 N.H. 76, 78 (2008).

There is no support in the Rule's language for the Panel's conclusion that the phrase applies only to statements made after a formal Notice of Charges is issued by disciplinary counsel. Moreover, such an interpretation would remove

most matters investigated by the ADO from the scope of Rule 8.1, since, as Disciplinary Counsel stated at argument, a significant majority of grievances filed against attorneys are dismissed or resolved before formal charges are issued. In light of the importance placed on honesty and integrity throughout the Rules of Professional Conduct, the Committee does not believe that the Court intended the prohibition of false statements in Rule 8.1(a) to have such a limited application.

In addition, the ABA Comments to Model Rule of Professional Conduct 8.1, which is a verbatim predecessor to New Hampshire's Rule 8.1, indicate that the rule was intended to have a broader reach. ABA Comment (1) states, in relevant part, that "it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a *disciplinary investigation* of the lawyer's own conduct." (Emphasis added.) The Committee believes that all investigations carried out by the ADO – whether related to grievances or complaints or carried out in conjunction with formal charges against a Respondent – are "disciplinary investigations" within the meaning of the ABA Comment, and fall within the scope of Rule 8.1.

The Annotated Model Rules of Professional Conduct, published by the ABA's Center for Professional Responsibility, also describe the reach of Rule 8.1(a) in broad language: "Rule 8.1(a) prohibits a lawyer from making a false statement of material fact to admission or *disciplinary authorities*." (Emphasis added.) In New Hampshire, "disciplinary authorities" include members of the Office of General Counsel who review incoming grievances, and who in this

case invited Mr. Greenlee to submit a voluntary response to his client's grievance.

In sum, if an attorney undertakes to file a "voluntary" response to a grievance with the ADO, that lawyer assumes the responsibility to communicate honestly and truthfully with General Counsel. That responsibility is neither greater, nor less, than the responsibility of a lawyer filing an answer to a docketed complaint or an answer to a formal notice of charges. The stage of the investigative or prosecutorial process does not impact either the lawyer's duty of honesty or the applicability of Rule 8.1.

For these reasons, the Committee finds the Panel's conclusion that Rule 8.1 did not apply to Mr. Greenlee's voluntary response is erroneous as a matter of law.

Materiality of the False Statements

The ruling on the scope of Rule 8.1 does not end the inquiry. The Panel also decided that, even if the rule applied, the ADO failed to prove, by clear and convincing evidence, that the false statements were "material."

In his voluntary response, Mr. Greenlee blamed the poor outcome of a Temporary Hearing (the focus of the grievance) on the failure of his paralegal to properly prepare a financial affidavit and a proposed order that were necessary filings at the hearing. Mr. Greenlee also stated that from that time forward he did not allow the paralegal to work on his files. The Rule 8.1 violation set forth in the Notice of Charges alleged that these statements were knowing, false and material misrepresentations.

The Panel found that “the statement in issue did not appear to be material.” While the Panel did not elaborate on its reasoning, at the arguments before the Committee on September 15, 2020, both parties were heard on this issue. The Committee’s standard of review for factual determinations made below is a deferential one. *See State v. Giles*, 140 N.H. 714, 718-19 (1996) (Court defers to lower tribunal, which had the chance to see and hear witnesses). The Panel, unlike the Committee, heard substantial testimony that bore on the potential materiality of the misstatements, assessed the weight to be given to the testimony, and concluded that the ADO had not proven this element of a Rule 8.1 violation by clear and convincing evidence. There is no basis in the record for finding that this determination was clearly erroneous.

Accordingly, while false statements made by a lawyer in a voluntary response to a grievance are statements “made in connection with a disciplinary matter” and fall squarely within the scope of Rule 8.1(a), the Committee affirms the Panel’s decision that the ADO failed to prove the element of materiality by clear and convincing evidence.

Conclusion

The Committee approves the Panel’s Report within the limits set forth in this Order. It also approves the Parties’ Stipulated Sanction of Reprimand and the Order relating to Costs assessed against Mr. Greenlee.

September 23, 2020

David M. Rothstein
David M. Rothstein
Chair

cc. Sara S. Greene, Disciplinary Counsel
William C. Saturley, Esquire

NEW HAMPSHIRE SUPREME COURT

HEARINGS COMMITTEE

Aaron A. Greenlee advs. Attorney Discipline Office

#18-028

HEARING PANEL REPORT

A Notice of Charges was referred to the Hearings Committee pursuant to New Hampshire Supreme Court Rule 37A(III)(b)(4) on June 30, 2019. A panel of five members was appointed, with one panel member being recused. The following panel of four presided¹:

Richard C. Gagliuso, Chair

Judith Fairclough, Reporter

Barbara Keshen

Patricia Sherman

Summary of Charges

Mr. Greenlee is alleged to have violated New Hampshire Rules of Professional Conduct ("Rule" or "Rules") 1.3 and 8.1 with 5.3 as an alternative rule violation. These Rules are set forth in their entirety or in pertinent part below:

Rule 1.3: A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 5.3: With respect to a nonlawyer employed or retained by or associated with a lawyer: ...

(b) Each lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;...

Rule 8.1: An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(b) knowingly make a false statement of material fact;...

Background

This matter arose out of a complaint against Mr. Greenlee (the "Complaint") filed by Joseph A. Mori ("Mr. Mori") with the Attorney Discipline Office ("ADO") on June 30, 2018. The Complaint contained allegations related to Mr. Greenlee's representation of Mr. Mori in his

¹ Counsel for the ADO and Mr. Greenlee agreed to proceed with four rather than five panel members

divorce proceedings, and more specifically to a hearing on temporary orders held on November 27, 2017 (the "Temporary Hearing").

Mr. Greenlee was admitted to practice law in New Hampshire on May 25, 2017 after having been admitted to the Bars of Rhode Island and Massachusetts, where he had been practicing since 2011. At the time of the alleged violation, Mr. Greenlee was practicing law at Eckberg & Associates in Laconia, New Hampshire. At the time of Mr. Mori's engagement of Eckberg & Associates in April 2017, Mr. Greenlee had not yet been admitted to the New Hampshire Bar and was supervised by Attorney Donald Eckberg. After his admission to the New Hampshire Bar, Mr. Greenlee was at all times the responsible attorney on Mr. Mori's case.

Mr. Mori's wife, Ms. Mori, had filed a motion to force the sale of the marital home to which Mr. Greenlee filed an objection. Mr. Mori's primary goal was to be able to continue to live in the marital home and avoid a forced sale. Mr. Greenlee had also filed a motion seeking to award sole use and possession of the marital home to Mr. Mori. The Court ruled by Order dated July 13, 2017 that it would hear all issues related to the marital home at a hearing on temporary orders (scheduled initially on September 28, 2017 and later rescheduled by the Court to November 27, 2017). On October 1, 2017, prior to the Temporary Hearing, Mr. Greenlee became a partner of the firm. Under the partnership agreement, Mr. Greenlee and another partner of the firm, Ms. Santuccio-Richey, as well as Mr. Eckhart, were to share the paraprofessional services of Mr. Eckhart's long time paralegal, Ms. Lisa Vertigen ("Ms. Vertigen").

Ms. Mori's motion to force the sale of the marital home was based upon Mr. Mori's alleged financial inability to continue to support the house, particularly the mortgage payments. Under New Hampshire law, the Court could order a sale only if Ms. Mori was able to demonstrate that Mr. Mori did not have sufficient resources to maintain the house. See N.H. R.S.A. 458-16(l)(h). Therefore, Mr. Greenlee's primary objective at the hearing was to demonstrate that Mr. Mori had the financial ability to maintain the house.

Because the November 27, 2017 hearing was also a hearing on temporary orders, Mr. Greenlee was required to produce a financial affidavit signed by Mr. Mori.² The financial affidavit would have provided the Court with the information necessary to determine Mr. Mori's financial ability to maintain the house. Mr. Greenlee was also required to produce a proposed order on the issues to be heard. See *Fam. Div. Rules 2.19*.

At the hearing, Mr. Greenlee failed to produce either a proposed order or a completed financial affidavit for Mr. Mori. The incomplete and unsigned affidavit that he had in his file in court was missing, among other things, the monthly expense sheet. Counsel for Ms. Mori submitted her required documentation at the hearing. As a result of Mr. Greenlee not having submitted the required filings, the Court defaulted Mr. Mori and adopted Ms. Mori's proposed

² While the Rules require an exchange of financial affidavits and proposed orders 7 days prior to the hearing, counsel for Ms. Mori submitted her filings at the time of hearing.

order in its entirety, which included the granting of Ms. Mori's motion to sell the marital home. Due to the failure to submit the required filings, the Court refused to allow Mr. Greenlee to even argue his client's position.

Mr. Greenlee filed a motion for reconsideration of the November 27, 2017 order, which was denied. He did not charge Mr. Mori for his time on November 27, 2019.

When Mr. Mori's Complaint was submitted, the ADO gave Mr. Greenlee the opportunity to respond to the Complaint, although a response was not required as no formal charges had been initiated. In response to the Complaint, Mr. Greenlee blamed the outcome of the Temporary Hearing, at least in part, on the failure of Ms. Vertigen to properly prepare the file for the hearing. Mr. Greenlee also stated that from that time forward he did not allow Ms. Vertigen to work on his files.

Evidentiary Hearing and Preliminary Report

An evidentiary hearing on the Notice of Charges against Mr. Greenlee was convened on November 13 and 14, 2019 at the Office of the ADO in Concord, NH. In addition to Mr. Greenlee, testimony was offered by Donald Eckberg and Ms. Vertigen. Attorney Kathleen A. Hickey offered expert testimony to support Mr. Greenlee's reliance upon Ms. Vertigen, however, Attorney Hickey's testimony concluded that the ultimate responsibility for trial preparation rests with the attorney, not the paralegal. The Panel also heard the arguments of Disciplinary Counsel and counsel for Mr. Greenlee. A verbatim transcript was prepared and is part of the record in this matter.

Following the hearing, the Panel issued a Preliminary Report concluding that Mr. Greenlee had failed to act with reasonable diligence in representing Mr. Mori at the Temporary Hearing, and therefore, that the ADO had met its burden of proving a violation of Rule 1.3. This finding made the ADO's alternative charge of a violation of Rule 5.3 moot.

The Panel also concluded that the ADO had not met its burden of proving by clear and convincing evidence a violation of Rule 8.1. The Panel was not convinced that the statements made by Mr. Greenlee in his letter to the ADO, before the Notice of Charges had issued, were statements made "in connection with a disciplinary matter" for purposes of Rule 8.1.³ Regardless of whether Rule 8.1 applied, however, the Panel found that the ADO had not proven a violation, as it was not convinced that Mr. Greenlee had "knowingly [made] a false statement of material fact," because the statement in issue did not appear to be material.

After the Panel issued its Preliminary Report, a hearing on sanctions was scheduled for December 12, 2019, and the parties submitted memoranda on this issue. Just before the hearing, the parties reached and presented to the Panel a Stipulation for Sanctions ("Stipulation"), as yet unsigned, stipulating to a sanction of reprimand. Not having had

³ The Chair of the Panel gave the parties an opportunity to submit written arguments on this issue, and the Panel considered their memoranda in reaching its conclusion.

sufficient time prior to the hearing to digest the Stipulation, the Panel requested that counsel appear again to answer its questions regarding the Stipulation. See Supreme Court Rule 37(A)(III)(aa)(3)(a). Counsel appeared before the Panel again on January 29, 2020. Mr. Greenlee, by agreement, was not present.

Analysis

Although the Supreme Court has not adopted the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("Standards"), the Panel looked to them for guidance. *Conner's Case*, 158 NH 299, 303 (2009). In accordance with the *Standards*, there is a four step analysis to determine the appropriate sanction: (1.) the ethical duty violated; (2.) the lawyer's mental state; (3.) the extent of actual or potential injury caused by the lawyer's misconduct; and (4.) the existence of aggravating or mitigating circumstances. The Panel addresses each step of the analysis as follows:

(1) What duty did Mr. Greenlee violate?

Mr. Greenlee owed Mr. Mori a duty to represent him with "reasonable diligence and promptness" and to provide such representation without avoidable harm to Mr. Mori's interests. Rule 1.3. The Panel finds that Mr. Greenlee breached this ethical duty by failing to exercise reasonable diligence in his representation of Mr. Mori in connection with the Temporary Hearing, in that he failed to properly prepare for the hearing by ensuring that he had a financial affidavit and a proposed order ready to file. Mr. Greenlee assumed that Ms. Vertigen had prepared the file for the hearing and he did not review the file prior to the hearing to assure that it contained the necessary pleadings. As a result of Mr. Greenlee's failure, the Court defaulted Mr. Mori and adopted Ms. Mori's proposed orders that the marital home be sold. The Panel found that Mr. Greenlee's conduct was a clear violation of Rule 3.1.

(2) What was Mr. Greenlee's mental state?

The parties and the Panel agree that Mr. Greenlee's mental state was negligent as to the Rule 1.3 violation.

(3) What was the extent of the actual or potential injury caused by Mr. Greenlee's misconduct?

The parties and the Panel agree that, as a direct result of Mr. Greenlee having failed to produce either a complete financial affidavit or a proposed order, the Court defaulted Mr. Mori and ordered the sale of the marital home. Maintaining the marital home and avoiding a forced sale was Mr. Mori's primary objective for the hearing. The Panel finds that Mr. Mori suffered an actual injury, notwithstanding Mr. Greenlee's claims that the Court might have issued such an order even if the required pleadings had been filed.⁴

⁴ Mr. Eckberg's testimony was consistent with Mr. Greenlee's belief regarding this potential outcome.

The Panel rejects this argument insofar as Mr. Greenlee's failings precluded him the opportunity to argue his client's position. Mr. Mori was effectively denied his day in court. The Panel also finds an actual injury in the attorney-client relationship between Mr. Greenlee and Mr. Mori as the relationship was damaged beyond repair: Mr. Mori was visibly upset when he and Mr. Greenlee returned to the office after the hearing and Mr. Mori soon terminated the representation.⁵

During its deliberations, the Panel considered all levels of possible sanctions as set forth in the *Standards*. The Panel finds that because Mr. Greenlee's violation of Rule 1.3 caused actual injury to Mr. Mori, the baseline sanction is public censure. *Standards*, sec. 4.4

(4) Are there any aggravating or mitigating circumstances?

The Panel assessed the presence of mitigating and aggravating factors in this case. Mr. Greenlee does not have a history of prior violations in any jurisdiction. Both parties agreed that Mr. Greenlee cooperated fully with the ADO investigation. Mr. Greenlee's lack of familiarity with the practice of law in New Hampshire was considered by Disciplinary Counsel to be a mitigating factor. In the Panel's view, however, this lack of familiarity may have required of Mr. Greenlee an even higher level of preparation and a greater need to familiarize himself with what the hearing required. Although the Panel is troubled that Mr. Greenlee's initial action in blaming his paralegal for his conduct is indicative of a lack of remorse, and suggests some arrogance on his part, Mr. Greenlee did ultimately admit that he would do things differently were the same situation to again present itself. Mr. Greenlee acknowledged his failings. Mr. Greenlee also wrote off certain of his billable time related to the hearing and the Panel agrees that this does represent a good faith effort to mitigate Mr. Mori's losses.

Recommended Sanction

Although the baseline sanction in this case is public censure, the Panel considered the sanction in light of aggravating and mitigating factors and agrees with the ADO that mitigating factors outweigh aggravating factors, thus supporting a downward departure from public censure to reprimand. In addition, the Panel considered that the Stipulation reached by the parties calls for reprimand. The Panel ultimately affords deference to the judgment of Disciplinary Counsel and approves the Stipulation, finding that the stipulated sanction is not outside the bounds of reasonableness.

The Panel's approval of the stipulated sanction, however, is not without reservation. The Panel views Mr. Greenlee's failure to represent his client competently at the Temporary Hearing as a serious ethical violation. The Panel also has concerns about the nature and extent of his client's injury in that Mr. Mori was denied his day in court and as a result, his goal of

⁵The Panel recognizes that the *Standards* do not distinguish between actual and potential injury.

retaining his home was not even considered by the Court. The Panel is also concerned about the aggravating circumstance found in Mr. Greenlee's failure to fully acknowledge the wrongful nature of his conduct by blaming his paralegal for his lack of preparedness. Mr. Greenlee ultimately did admit, however, that he did not review the file before going to court and acknowledged that he would prepare differently were the same circumstance to arise again. Therefore, to some extent he has acknowledged his failures.

The purpose of the disciplinary powers of the Court 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". *Conner's Case*, 158 N.H. 299, 303 (2009). Moreover, the sanction must take into account the severity of the misconduct." *Coffeys Case*, 152 N.H. 503, 513 (2005). In finding that mitigating factors sufficiently outweigh aggravating factors to justify a downward departure from the baseline sanction of public censure, the Panel finds that a reprimand would serve to protect the public and ensure confidence in the Bar. The Panel credits Mr. Greenlee's statement that he would prepare differently were the circumstances to arise again. The Panel understands Mr. Greenlee to be affirming that he would assure that all pleadings were complete and ready to be filed before entering a courtroom for a hearing. The Panel genuinely hopes that Mr. Greenlee has learned from the ADO process and will not repeat his failings.

In accordance with New Hampshire Supreme Court Rule 37(A)(III)(d)(1), the Panel unanimously recommends the New Hampshire Supreme Court Professional Conduct Committee impose the sanction of a reprimand for violation of New Hampshire Rule of Professional Conduct Rule 1.3. This sanction is in accord with the *Standards*. See e.g. *Shillen's Case*, 149 N.H. 132, 139 (2003) (although the Court has never formally adopted these Standards, the Court has considered them when imposing sanctions).

The Panel also recommends, as provided in a separate agreement which he signed, that Mr. Greenlee be ordered to pay the costs incurred by the ADO in the investigation and enforcement of this matter. See Supreme Court Rule 37(19).

Dated: June 1, 2020


Richard C. Gagliuso, Hearing Panel Chair