State of New Hampshire
Supreme Court

NO. LD-2011-0002

2012 TERM

APRIL SESSION

In the Matter of Timothy O'Meara, Esq.

LAWYER DISCIPLINARY MATTER
ON PETITION OF THE PROFESSIONAL CONDUCT COMMITTEE

CONDITIONAL BRIEF OF RESPONDENT, TIMOTHY O'MEARA, ESQ.

By: Joshua L. Gordon, Esq.
NH Bar ID No. 9046
Law Office of Joshua L. Gordon
75 South Main Street #7
Concord, NH 03301
(603) 226-4225

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STATEMENT OF THE FACTS

I. O'Meara Law, PLLC, Personal Injury Law Firm

Timothy O'Meara runs a small personal injury law firm in Keene, New Hampshire. At the time of events here he employed a staff including his wife Dorrie,[1] who worked as office manager and investigator.

After college Mr. O'Meara worked for Prudential Insurance, selling and underwriting insurance, and learning about the insurance industry. *4 Hrg.Com.* at 24.[2] Upon being admitted to the bar in 1993, he worked for a well-known Keene lawyer, and later opened his own firm. *4 Hrg.Com.* at 24-25. Since the mid-1990s, Attorney O'Meara has limited his practice to personal injury plaintiffs' representation. *4 Hrg.Com.* at 25-26, 39. He estimates he has negotiated settlements with insurance companies hundreds or even thousands of times. *4 Hrg.Com.* at 39. Many of his cases have been in federal court. *4 Hrg.Com.* at 107.

Attorney O'Meara conducts all his personal injury cases on a contingency fee basis, *4 Hrg.Com.* at 26, and would not accept a representation any other way. *4 Arb.Trn.* at 63. He structures his fees in this fashion because he has learned that some personal injury lawsuits "have a good recovery or a very nominal recovery, but the fact that you keep going and you keep trying to do this type of work, it averages out in the long run and that's the only way to make a living at it." *4 Hrg.Com.* at 27. Attorney O'Meara's marketing materials, logo, website, and street signage all

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[1]Because there are six members of the Conant family active in this case, they are referred to in this brief by their first names, Jim, Anita, Craig, Todd, Sean, and Ashley. Other parties whose full names do not appear in the record are also referred to by their first names. No disrespect is intended.

[2]There are two sets of transcripts in this case. The first is from the arbitration of a fee dispute between the Conants and Attorney O'Meara that occurred over five days in November and December 2006. It is cited herein as *#Arb.Trn.*, with the "#" indicating the day. The second is from the Hearings Committee panel of the PCC that occurred over six days in October, November, and December 2009, and May 2010. It is cited herein as *#Hrg.Com*.

advertise his business model. *4 Hrg.Com.* at 104.

The amount of his contingency fee varies from 20 percent in workers compensation, 25 percent for juvenile plaintiffs, one-third in most personal injuries, and for some medical negligence cases that pose extremely difficult, complex, or risky situations, as much as 40 percent. *4 Arb.Trn.* at 57-59; *4 Hrg.Com.* 26. Through experience O'Meara believes there are three factors giving a case value, and that it is rare to have all three together: injuries which can be proven, legal liability, and insurance coverage. *4 Hrg.Com.* at 27-28.

II. Conants Hire O'Meara

In May 2005 Attorney O'Meara got a call from Jim Conant, whose brother Craig was socially acquainted with O'Meara and Dorrie. *3 Hrg.Com.* at 64; *4 Hrg.Com.* at 28-29. Because Jim was flying out to meet his family, *1 Arb.Trn.* at 8, Jim and Attorney O'Meara arranged to meet at the McDonalds near the Manchester airport. *1 Hrg.Com.* at 62. O'Meara learned that Jim's wife Anita Conant had been badly injured in an automobile crash while visiting her family near Philadelphia, Pennsylvania. *4 Hrg.Com.* at 29-30. At the end of the short meeting O'Meara entered his standard representation agreement with Jim Conant both as a party and on behalf of Anita. *4 Arb.Trn.* at 61; The agreement provided in part:

> A. CLIENT RESPONSIBILITIES:
>
> The client has been offered legal services at an hourly rate, but has elected a contingent fee arrangement.
>
> B. AUTHORIZATION:
>
> The client authorizes and directs O'MEARA LAW, P.L.L.C. it's members and staff to take all actions which are reasonable and necessary in this matter.…The clients … will be consulted in advance as to any significant decision attendant to … developments in the case.
>
> C. LEGAL FEES AND EXPENSES:
>
> O'MEARA LAW, P.L.L.C. agrees to represent the client on a contingency fee basis. This means that should any member or employee of O'MEARA LAW P.L.L.C. recover, obtain, or secure agreement for any amount of money on behalf of the clients in this matter, the legal fees will be satisfied by 33.33% of the gross amount recovered.
>
> D. TERMINATION OF REPRESENTAT10N:
>
> The client may terminate representation at anytime…. If the Client terminates representation, O'MEARA LAW, P.L.L.C. shall have a lien against Client's settlement, award or verdict amount for fees and costs (expenses) incurred during the course of the representation. The lien will be calculated at the rate of $275.00 per hour for services rendered by any staff member, plus expenses incurred.

O'MEARA LAW FEE AGREEMENT (May 25, 2005), *Exh. 23* (only relevant portions quoted).[3]

Although O'Meara did not and could not know anything about the status of liability or insurance when he took the case, *4 Arb.Trn.* at 186, O'Meara recognized it might have all three elements for a successful personal injury recovery. *4 Hrg.Com.* at 27-28. Thus he immediately informed his staff, instructed them to acquire medical records and medical bills, gather and organize the file, and make arrangements for travel to Philadelphia as soon as possible. *4 Arb.Trn.* at 65. The Conants did consider hiring a lawyer in Pennsylvania, but decided not to. *1 Arb.Trn.* at 62-63.

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[3]Citation to documents in this case is susceptible to confusion.

There are 47 items in the PCC's "Index of Record," which are supplied in three separate volumes. Following the lead of the PCC in its brief (page 2, footnote 1), they are referred to herein as "*PCC #*" where # indicates the tab under which each is denoted in the volumes.

There are also 65 joint exhibits in this case, supplied in two additional volumes. Confusingly, these two volumes of exhibits are themselves items in the aforementioned PCC Index of Record, numbers *PCC 16* and *PCC 17* respectively. There are cited herein as "*Exh. #*" where # indicates the number of the tab in those volumes and marked on each exhibit. The markings on the exhibits themselves pose some confusion.

Many have been marked for more than one purpose and thus carry multiple numberings.

III. O'Meara Prepares Conant's Case

Because there was diversity and damages over the jurisdictional minimum, Attorney O'Meara knew the case could be filed in federal court. Because he had practiced many times in federal courts, O'Meara determined he was competent to handle the case and saw no need to associate with a local lawyer. *4 Hrg.Com.* at 106

Attorney O'Meara spent the next several months diligently preparing the Conants' case.

A. Travel to Pennsylvania and Elsewhere

He and Dorrie traveled to Philadelphia within a few days of being retained, *2 Arb.Trn.* at 184; *4 Arb.Trn.* at 65; *2 Hrg.Com.* at 17-18, 75, and three or four more times thereafter. *1 Arb.Trn.* at 60-63; *2 Arb.Trn.* at 149; *3 Arb.Trn.* at 28. During their first trip, O'Meara and Dorrie visited Anita in the hospital, learned as much as possible about her condition and prognosis, talked to doctors and physician assistants, and gathered evidence including x-rays, photographs, CAT scans, and medical records. They met with the family, filmed videos, and determined further visits and attentive monitoring would be necessary. *4 Arb.Trn.* at 10; *4 Hrg.Com.* at 31, 32.

Attorney O'Meara's second trip to Philadelphia spanned several days. *4 Hrg.Com.* at 36. Dorrie's presence to document Anita's condition was so frequent that the Conants began to get upset they were seeing her too often. *1 Arb.Trn.* at 64.

O'Meara traveled to other places as well. When Anita was in therapy and her family learning how to attend her needs, O'Meara visited in Atlanta, Georgia. *2 Arb.Trn.* at 151. Dorrie went there at least twice taking pictures for the day-in-the-life video. *3 Arb.Trn.* at 28. O'Meara visited Anita when she was being treated in Exeter, *2 Arb.Trn.* at 151, and at the Spaulding Rehabilitation Hospital in Boston. *4 Hrg.Com.* at 36. Both Dorrie and O'Meara visited the family in Hampton numerous

times. *2 Arb.Trn.* 151; *1 Hrg.Com.* at 124, 126.

O'Meara used the time from May to December 2005 to accomplish a number of tasks crucial to trial or settlement. After consulting with Anita's doctors and independent experts, he fully understood Anita's medical condition, and was able to converse about it in technical terms. *4 Arb.Trn.* at 62, 76-77; *4 Hrg.Com.* at 220-21; PLAINTIFF'S CONFIDENTIAL SETTLEMENT MEMORANDUM, *Exh. 32* at 2. When O'Meara was hired, there was no information about the identity of the defendants, their financial situation, or the presence or available amount of insurance. *4 Arb.Trn.* at 62, 187; *4 Hrg.Com.* at 33. O'Meara made inquiries and within about two weeks correspondence confirmed the defendant was a paving company that had a $1 million general liability insurance policy and a $10 million umbrella policy for a total coverage of $11 million. LETTER FROM CINCINNATI INS. CO. TO O'MEARA LAW (June 3, 2005), *Exh. 3.*

B. Preservation of Evidence

There was no police report generated at the time of the accident. O'Meara met with the Willistown, Pennsylvania police and learned that the story the truck driver told tended to spare the defendants from legal liability. But after O'Meara insisted, the "black box" data recorder in the paving truck was sent for analysis, and its data belied the driver's initial version. With it O'Meara was not only able to establish liability, *4 Arb.Trn.* at 185-186; *4 Hrg.Com.* at 33-35, but also probable punitive damages (available in Pennsylvania) because it showed the driver was going too fast, never applied his brakes until after impact, and had adequate opportunity to avoid the crash. *4 Hrg.Com.* at 33-35; PLAINTIFF'S CONFIDENTIAL SETTLEMENT MEMORANDUM, *Exh. 32* at 3-5.

O'Meara also took steps to assure the Conants' right of access to both the data recorder for independent analysis, and to the truck itself (the location of which O'Meara believed had been

deliberately obfuscated) for photographs prior to any repairs being undertaken for its planned return to service. LETTER FROM O'MEARA TO CINCINNATI INS. CO., *Exh. 4* at 2.

During his trips to Pennsylvania, O'Meara investigated the details of the accident. He spoke with EMTs, rescue personnel, the investigating officer, the police department, and others involved in the initial response. *2 Arb.Trn.* at 149-50; *4 Hrg.Com.* at 31, 33, 36. He located eye-witnesses and interviewed as many as he could. *4 Hrg.Com.* at 36. O'Meara visited the scene, took photos, and gathered physical evidence. *4 Hrg.Com.* at 31. He also gathered medical bills and ensured that Anita's health insurance would pay her care providers. *4 Hrg.Com.* at 32.

Anita's own automobile insurance company intended to destroy and salvage the car she had been driving. To prevent this, O'Meara bought the car. He had it shrink-wrapped to shield it from weather and mishandling, arranged with the insurance company and salvage yard to preserve it, and had it securely stored at a facility in Delaware. Saving the car was important for later accident reconstruction experts who can analyze crushed metal to determine issues such as speed, force of impact, and defects contributing to the crash thus preserving the possibility of additional defendants and deeper pockets. *4 Hrg.Com.* at 35-36.

Throughout all this, Dorrie took still and video pictures of everything associated with the case, *2 Arb.Trn.* at 151; *1 Hrg.Com.* at 126; *4 Hrg.Com.* at 31-32, for the purpose of assembling a "day-in-the-life" movie for an ultimate jury. *4 Hrg.Com*. at 67. She produced hundreds of hours of material and edited it to a workable form; O'Meara hired a company which produced the final movie. *4 Arb.Trn.* at 91. The Conants acknowledged it was comprehensive, contained pictures of things the family had never seen, and was very emotional. *2 Arb.Trn.* at 64; *4 Arb.Trn.* at 90.

C. Securing Advances

The Conants' day-to-day family finances were severely disrupted by Anita's disability. She was unable to work, Jim found it more cost-efficient to give up the income from his electrical business and provide Anita care himself than to hire around-the-clock nurses, *1 Hrg.Com.* at 77, and there was a sudden need for costly and unplanned medical expenditures. Although a community fund and family members helped, the Conants ran up credit card debt and were in financial distress. *1 Hrg.Com.* at 75-76. *2 Arb.Trn.* at 16; *5 Arb.Trn.* at 30-31.

Thus within days of being hired O'Meara attempted to get from the insurance company payments in advance of settlement under the defendant's policy. *2 Arb.Trn.* at 114. On June 2 he requested advances for enumerated expenses. *4 Arb.Trn.* at 65-67. LETTER FROM O'MEARA (June 2, 2005) (arbitration exhibit 22, referenced at *4 Arb.Trn.* at 65). The insurance company replied the very next day by letter denying advances. LETTER FROM CINCINNATI INS. CO. TO O'MEARA (June 3, 2005), *Exh. 3*; *4 Arb.Trn.* at 67; *4 Hrg.Com.* at 37. O'Meara tried again in mid-October to get advances to address the Conants' cash flow problems. The defendants' attorney responded by letter again denying payment. *4 Arb.Trn.* at 68. LETTER FROM O'MEARA TO DAVIS (Oct. 13, 2005) (arbitration exhibit 27, referenced at *4 Arb.Trn.* at 68).

Among the expenditures for which O'Meara requested advances were air medical ambulances to transport Anita to her doctors in various cities, *4 Arb.Trn.* at 65-67, travel, hotel, and restaurant expenses associated with the family being near her, *4 Arb.Trn.* at 65-67; *4 Hrg.Com.* at 37-38, a mechanized wheel chair giving Anita personal mobility, *4 Hrg.Com.* at 45, the van to accommodate it, *5 Arb.Trn.* at 30-31; *4 Hrg.Com.* at 45, an eye-gaze machine allowing Anita to communicate by eye movements, *4 Hrg.Com.* at 45, nurses and caretakers, *1 Hrg.Com.* at 77,

renovations to the Conant's home to accommodate Anita's medical equipment and movement to and around the house, *1 Hrg.Com.* at 75, and other items. LETTER FROM O'MEARA TO DAVIS (Dec. 8, 2005), *Exh. 11* (enumerating items necessitating advances); *2 Arb.Trn.* at 13, 14; *4 Hrg.Com.* at 45.

Although O'Meara understood the Conants were feeling financial pressure, *2 Arb.Trn.* at 145-46; *5 Arb.Trn.* at 25-26, he did not continue to pursue advances because they had been twice denied, *4 Hrg.Com.* at 37-38, because the insurance company had made clear advances were off the table until there was a settlement, *5 Arb.Trn.* at 26, and because it would telegraph to the insurance company the plaintiffs' desperation thus reducing their strategic position in negotiations. *4 Hrg.Com.* at 39.

Moreover, given his pre-law-school work in the insurance industry and his years of plaintiffs representation experience since, Attorney O'Meara was aware that regardless of the facts of any given case, insurance companies are reluctant to provide advances because it is a tacit admission of liability, they know a financially-strapped plaintiff may be less likely to go to trial and more willing to accept a lower settlement, *5 Arb.Trn.* at 25; *3 Hrg.Com.* at 171-172; *4 Hrg.Com.* at 38, and that in his experience insurance companies tend to delay, deny, and defend to find whatever way they can to pay as little as possible. *4 Hrg.Com.* at 39. Even insurance defense counsel conceded that payment of advances is not "statistically frequent." *3 Hrg.Com.* at 12-13.

The Conant family understood from Attorney O'Meara the difficulty of getting advances, the two denied attempts, and the probable reasons for the denials. *2 Arb.Trn.* at 16, 189. Despite this, the Conants consulted another lawyer, Alan Ganz of Seabrook, to help them get advances. *2 Arb.Trn.* at 12; *3 Arb.Trn.* at 111-112. When Attorney Ganz called O'Meara in November 2005, *5 Arb.Trn.* at 27; *3 Hrg.Com.* at 171, O'Meara was skeptical because Attorney Ganz had previously claimed

undelivered fundraising prowess when the community first learned of Anita's injuries, *5 Arb.Trn.* at 28; *4 Hrg.Com.* at 41-42, and because of the duty of confidentiality O'Meara owed to his clients. *3 Arb.Trn.* at 112; *3 Hrg.Com.* at 172; *4 Hrg.Com.* at 40, 43. O'Meara also doubted Mr. Ganz's experience in personal injury practice. *5 Arb.Trn.* at 29; *4 Hrg.Com.* at 42-43.

The Pennsylvania lawyer defending the paving company and its insurers was Robert Davis. Attorney Davis made clear to O'Meara there would be no advances until Davis and an upper-level insurance adjustor met with Anita, which eventually occurred at the Conant's home, *5 Arb.Trn.* at 26; *4 Arb.Trn.* at 69, and not until the company obtained itemized receipts, which O'Meara provided. *4 Hrg.Com.* at 48. Ultimately the insurance company paid advances, but only after Attorney O'Meara persuaded the defendants to concede liability in December. LETTER FROM O'MEARA TO DAVIS (Dec. 8, 2005), *Exh. 11*. In his lawsuit a month earlier, O'Meara included a count for bad faith refusal to provide advances. PETITION FOR DECLARATORY JUDGMENT, *Exh. 7*, ¶ 30 *et seq.* The Conants fully and contemporaneously understood the connection between the concession of liability and the receipt of advances. *2 Arb.Trn.* at 114; *1 Hrg.Com.* 81, 90.

The Conants nonetheless blamed O'Meara for tardy advances, *2 Arb.Trn.* at 12, and credited Attorney Ganz for their ultimate payment. *2 Arb.Trn.* at 18. O'Meara testified it was coincidence Ganz appeared just before advances were paid, *5 Arb.Trn.* at 30-31, and Jim conceded O'Meara probably would have been successful without Ganz's involvement. *2 Arb.Trn.* at 114.

D. Pre-Trial Litigation and Representation

In addition to gathering evidence and securing advances, during the period from May when he was hired to December when he successfully got the defendants to concede liability, Attorney O'Meara also worked on discovery and conducted pre-trial litigation in anticipation of trial.

Based on publicly available information, Attorney O'Meara believed the defendant paving company was profitable and held significant assets. *See* PLAINTIFF'S CONFIDENTIAL SETTLEMENT MEMORANDUM, *Exh. 32 attachments*. Based on this he was consistently optimistic that there would be significant funds available to pay damages above the limits of the company's insurance policy.

O'Meara nonetheless sought complete financial data from the company itself through discovery so he could be fully conversant with its financial position in negotiating a settlement or, if it went that far, arguing to a jury. The paving company refused to answer interrogatory questions about its finances, taking the position that because it had insurance there should be no financial disclosure. *4 Hrg.Com.* at 74. Thus O'Meara filed motions with the court to compel answers. *4 Hrg.Com.* at 74; CIVIL DOCKET SHEET ¶22, *Exh. 6*. O'Meara was also aware that the defendants had missed deadlines to disclose medical, economic or financial experts, and communicated this to the Conants. CIVIL DOCKET SHEET ¶18, *Exh. 6*; *4 Hrg.Com.* at 74-75.

O'Meara established relationships with defense counsel and others immediately upon being hired. There is communication from the defendants' counsel starting as early as June 3 referencing letters O'Meara sent on May 27, just two days after his meeting with Jim at the McDonalds in Manchester. LETTER FROM CINCINNATI INS. CO. TO O'MEARA LAW (June 3, 2005), *Exh. 3*. O'Meara maintained these relationships throughout the representation.

O'Meara's advocacy for the family went well beyond merely filing a lawsuit. Ashley, the

Conants youngest child, was a student at the University of New Hampshire. For the then-upcoming school year, O'Meara negotiated with UNH free tuition due to the family hardship. *4 Hrg.Com.* at 80. O'Meara also negotiated with several medical lien holders so that when damages were eventually awarded they would be paid a reduced sum. *4 Arb.Trn.* at 129-132.

E. Filing Suit in Pennsylvania Federal Court

Attorney O'Meara filed suit in the federal court in Philadelphia on November 3, 2005. CIVIL DOCKET SHEET ¶1, *Exh. 6.* He applied to become a member of the Pennsylvania bar, and filed the complaint the same day he was sworn in. The six-month delay between being retained and filing suit was not problematic, in O'Meara's opinion, because there was no imminent statute of limitations, and because there was little chance of pre-judgment interest because the Conants case was far more likely to settle than go to trial. *4 Arb.Trn.* 189-90. Moreover, O'Meara felt he did not have enough information for a complaint before he completed thorough background research regarding Anita's injuries and the defendant's liability exposure. *4 Arb.Trn.* 184, 190. O'Meara did not associate with a local lawyer because he felt he competently understood the relevant areas of Pennsylvania law, *4 Arb.Trn.* at 181, he had practiced in federal courts numerous times, *4 Hrg.Com.* at 107, the process of becoming a member of the Pennsylvania bar was routine as it is a reciprocal state with New Hampshire, *4 Hrg.Com.* at 108; *see also* <http://pabarexam.org>, and because he didn't know any Pennsylvania lawyers he could trust with this case. *4 Arb.Trn.* 180-183.

The federal complaint Attorney O'Meara filed for the Conants stated one count of negligence, and one count of loss of consortium. It is pled in first person, *respondeat superior*, and vicarious liability. O'Meara alleged punitive damages based on the driver's disregard for safety and his subsequent lying about the details of the accident. COMPLAINT (Nov. 3, 2005), *Exh. 5*.

F. Assembling the Damages Team

From experience O'Meara knew that life care plans and life expectancy evaluations are standard tools in personal injury cases, *4 Hrg.Com.* at 67, because they inform both sides about the value and risks of a case. Thus the defense had made clear liability would not be addressed until O'Meara had these tools in hand. The defendant's lawyer testified:

> I had to conduct an evaluation of the claim. I needed a life care plan completed by a competent life care planner, and I needed a life expectancy evaluation. Not to be grim, but Mrs. Conant received a thoroughly serious injury of a type that is often quickly fatal, and so I required both of those evaluations before I could determine what ought to be done.

3 Hrg.Com. at 18. Thus, as Anita's medical condition began to stabilize and the extent and severity of her paralysis became known, Attorney O'Meara assembled a team of experts:

> Doctor Stein was our life care planner, Ron Sullivan … for structured settlement agreements. Jennifer Kernan is a neurologist, neurosurgeon specializing in cervical spinal cord injuries. Edward Erickio (phonetic) is a neurologist that was going to talk about the extent and permanency of her injuries, as well as how to read and interpret the CAT scans and MRI and x-rays that had been obtained in the case.

4 Arb.Trn. at 76-77.

The life care plan enumerated the costs for nearly every conceivable category of medical necessity and assumed a life expectance of 35 years. It added up to $15 million necessary to sustain Anita's life and medical needs, and represented the damages the Conants would be able to present to a jury. LIFE CARE PLAN FOR ANITA CONANT (Dec. 26, 2005), *Exh. 12*.

The financial expert helps structure damage payments, whether by settlement or verdict, so that the Conants could receive adequate periodic payments into the future. STRUCTURED SETTLEMENT FOR JAMES CONANT AND ANITA CONANT (Jan. 25, 2006), *Exh. 20*; *2 Arb.Trn.* at 57.

IV. Six Months from Intake to Confession of Liability

Robert Davis, the defendants' lawyer, made clear he wanted to interview Anita before the issue of liability was addressed because, O'Meara calculated, the defense needed to assess how good a witness Anita would make. *4 Hrg.Com.* at 44; *4 Arb.Trn.* at 69. Thus O'Meara arranged a meeting in Hampton, which included Davis and the insurance company's senior claims representative, as well as O'Meara, Anita, her family, and her day-to-day care nurse. *1 Hrg.Com.* at 87; *2 Hrg.Com.* at 21; *3 Hrg.Com.* at 19, 20. Because of this, coordinating schedules took some time, and O'Meara began arrangements as soon as he filed suit in November. *5 Arb.Trn.* at 26; *4 Hrg.Com.* at 43-44. Ahead of the meeting O'Meara prepared the family on how to make a strong presentation regarding medical care, how to educate the insurance adjuster and lawyer regarding Anita's day-to-day needs, and the inclusion of Anita's nurses to address these matters. *4 Hrg.Com.* at 44-45.

The meeting occurred on December 1, 2005 at the Conants' home in Hampton. O'Meara made his presentation regarding the extent of Anita's injuries, her prognosis, what the doctors were saying about her medical needs at the time and into the future, and what renovations would be necessary to accommodate Anita living at home with her medical equipment. *4 Hrg.Com.* at 45-46. Also, Anita exchanged a heart-felt communication with the insurance people. *4 Arb.Trn*. at 70.[4]

During the meeting Davis informed the Conants the insurance company would not contest

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[4]At the close of the December 1 meeting, after liability had been conceded and the defense people had left, an event occurred which initially formed the basis for one of the ethics violations against Attorney O'Meara. During his fee arbitration testimony, O'Meara testified that the family had congratulated Anita and that her performance "should have won an Emmy." *4 Arb.Trn*. at 70. O'Meara twice repeated having heard the comment during the hearing in this proceeding. *4 Hrg.Com*. at 72, 203. O'Meara said he did not find the comment crass or inappropriate because Anita had been sincere. *4 Hrg.Com.* at 72. Jim, Anita, and their son Sean denied the comment was made. *5 Arb.Trn*. at 110-111 (Jim); *2 Hrg.Com*. at 9 (Anita); *4 Hrg.Com*. at 24 (Sean). Later, however, the Conant's other son, Todd, admitted that it probably occurred. *4 Hrg.Com*. at 9. Disciplinary Counsel in this proceeding initially charged O'Meara with deceit for having invented the comment. The Hearings Committee determined the allegation was unfounded, however, and thus it has not been presented to this Court. FINDINGS OF FACT AND RULINGS OF LAW ¶¶ 120, 173, PCC 25.

liability. *1 Hrg.Com.* at 88-89; *2 Hrg.Com.* at 8; *3 Hrg.Com.* at 20; *4 Hrg.Com.* at 47; *see also* ORDER ¶7 (Apr. 25, 2006), *Exh. 50* (defendant "100% responsible"). O'Meara was not particularly surprised, because at that point he had the black box analysis, the full police report, and witness and police interviews: He knew he was going to be able to prove liability. *4 Hrg.Com.* at 47.

The implication of the confession was immediately clear. To the Conants it was that the insurance company would pay advances. *2 Arb.Trn.* at 114; *1 Hrg.Com.* at 90. To O'Meara, it was that from then on the case was solely about damages. *4 Arb.Trn.* at 187; *4 Hrg.Com.* at 47, 111. O'Meara perceived four remaining issues in Anita's case:

> [T]he only real issue, was what was [1] her medical care today, [2] what were her past medical bills, [3] what was she going to need on a monthly or annual basis for maintenance care, and [4] what was her prognosis for the rest of her life.

4 Hrg.Com. at 47 (bracketed enumeration not in original).

It is thus apparent that in the space of just six months, Attorney O'Meara did the background work – and narrowed to four clearly-stated matters – what would have to be proved to a jury.

V. O'Meara's *Dumas* Demands

A. December 8 Letter from O'Meara to Davis – *Dumas* Demand

A week after the December 1 confession-of-liability meeting, O'Meara wrote a letter to Davis and the insurance company:

> As I have indicated on numerous occasions previously, this is a policy limits case. If said limits are not paid, the Conant family has instructed me to proceed to trial. [The paving] company simply have too much to lose if that happens.

LETTER FROM O'MEARA TO DAVIS (Dec. 8, 2005), *Exh. 11*. The letter indicates it was carbon-copied to Jim Conant, and Jim said he generally understood its content and import. *1 Hrg.Com.* at 199. Davis agreed with O'Meara's statement in the December 8 letter ("as I have indicated on numerous occasions") that it was a reaffirmation of prior discussions between he and O'Meara. *3 Hrg.Com.* at 21-22; *see also* LETTER FROM O'MEARA TO DAVIS (Nov. 7, 2005), *Exh. 11 attachment* ("the damages in this case [are] far in excess of your insured's policy limits"); *see also* LETTER FROM DAVIS TO O'MEARA (Feb. 3, 2006), *Exh*. 27 ("Your letter of October 3, 2005 … suggested settlement of the case for the policy limits … to eliminate the possibility of a large excess verdict"; "We subsequently spoke … on October 20, 2005.… In my letter of that same date I respectfully suggested that it seemed appropriate to me to determine whether the matter could be resolved by settlement before the case was placed into suit.").

O'Meara made the demand in the December 8 letter because the law in both Pennsylvania and New Hampshire (stemming from a case known as *Dumas*, discussed *infra*) allows plaintiffs to recover above the limits of a policy, if the insurance company unreasonably refuses to make a settlement offer within the policy limits. *Dumas* demands are routinely issued by plaintiffs' lawyers to insurers because the cause of action for bad-faith-refusal-to-settle does not arise until the *Dumas*

demand is made. O'Meara described the process as putting the insurance company in a "*Dumas* box." *4 Hrg.Com.* at 54, 117. More fully, he explained:

> [T]hey're dancing to try to avoid getting caught in that situation because if they … offered the policy limits or if they offered settlement within the policy limits, then they can avoid being caught in that negligent failure or that bad faith situation. But if they don't do that, if they don't make that offer, not only do they expose their own insured potentially, but they're also putting their own company on risk for the excess over that would result from a potentially larger verdict.

4 Hrg.Com. at 54.

O'Meara intended his December 8 letter as a *Dumas* demand, designed to solicit a written offer from the defendant's insurance company. *4 Arb.Trn.* 124-25; *4 Hrg.Com.* at 114-15, 117. O'Meara felt it was important to issue a *Dumas* demand in this case because, at the time, O'Meara believed the defendants had assets beyond their policy that would be available for the Conants if the insurance company did not comply with its *Dumas* duties. *4 Arb.Trn.* at 124-25. Although it has a different appellation in Pennsylvania, Attorney Davis was aware of the *Dumas* doctrine. *3 Hrg.Com.* at 41-42.

Finally regarding the December 8 letter, it is important to point out that O'Meara warned "[i]f said limits are *not* paid," the Conants will "proceed to trial." *Exh. 11*. (emphasis added). But O'Meara's letter did not concede that if the defendants made an offer at the policy limits, the Conants would accept it. Likewise, O'Meara did not concede that if the defendant paid at the limits, the Conants would issue a release. This is because O'Meara's understanding of *Dumas* is that in making a demand, the plaintiff does not automatically commit to accepting whatever offer follows. *5 Arb.Trn.* at 19, 52.

B. O'Meara's Duty to Make a *Dumas* Demand

It is undisputed that O'Meara never had authority to settle the Conant's case, at the policy limit or for any other amount. *5 Arb.Trn.* at 53; *4 Hrg.Com.* at 55, 122, 137 (O'Meara); *1 Arb.Trn.* at 42-43; *2 Hrg.Com.* at 13 (Anita); *2 Arb.Trn.* at 21-24; *1 Hrg.Com.* at 107- 108 (Jim). O'Meara never settled.

Whether he had authority to make a *Dumas* demand, however, is more involved.

Attorney O'Meara concedes he never got explicit authority from the lips of his clients to make a *Dumas* demand. *4 Arb.Trn.* at 125; *4 Hrg.Com.* at 117-119, 123. But the fee agreement he signed with the Conants generally provided that "[t]he client authorizes and directs O'Meara Law … to take all actions which are reasonable and necessary in this matter." O'MEARA LAW FEE AGREEMENT ¶ B, *Exh. 23.* Accordingly he understood he had implicit authority, *4 Arb.Trn.* at 121-123; *5 Arb.Trn.* at 7-8, 20, 23, 53; *4 Hrg.Com.* at 55, 117-120, 123, 127-128, 131, at least until January 13 when the Conants explicitly revoked it. *5 Arb.Trn.* at 20, 23, 53; *4 Hrg.Com.* at 118, 129, 134. Jim Conant did not disagree. *1 Hrg.Com.* at 199-200.

Moreover, O'Meara believes there is a duty to make a *Dumas* demand. O'Meara understands that plaintiffs' lawyers must talk to defendants' insurance companies about policy limits in order to create a risk to the company for exposing their insured to a large excess verdict, because when companies ignore that risk plaintiffs benefit. *4 Hrg.Com.* at 53-55. Thus O'Meara believes he acted properly in making the *Dumas* demand on behalf of the Conants. *4 Hrg.Com.* at 55.

C. January 11 Letter from O'Meara to Davis – Second *Dumas* Demand

A month after Attorney O'Meara's initial *Dumas* demand, on January 11 O'Meara wrote another letter to Davis regarding details of the life care plan and other matters. O'Meara closed the letter saying:

> [W]e repeat our *demand* for settlement of this case at your insured's policy limits of $11,000,000 minus the advances already made.

LETTER FROM O'MEARA TO DAVIS (Jan. 11, 2006), *Exh. 13* (emphasis added). The letter indicates it also was carbon-copied to Jim Conant. This reiteration of O'Meara's demand was likewise intended to solicit an offer under *Dumas*. *4 Arb.Trn.* at 123-124.

VI. January 13 Phone Call Between Jim Conant and O'Meara – Revocation of Authority to Demand or Settle

Two days later, on January 13, O'Meara and Jim Conant discussed the case on the phone. O'Meara floated the idea of settlement for the policy limits. *1 Hrg.Com.* at 94. Jim made clear that given the numbers in the life care plan, the Conants believed they needed more than $11 million to sustain Anita.

Given this, for the first time the Conants told O'Meara he did not have authority to settle for the policy limits, nor authority to make such a demand. *2 Arb.Trn.* at 22-23; *5 Arb.Trn.* at 23, 53-54; *1 Hrg.Com.* at 94, 96-97, 199; *4 Hrg.Com.* at 130-131.

VII. January 17 Letter from O'Meara to Jim Conant – Advantages of Early Settlement

A few days later, on January 17, O'Meara wrote a lengthy letter to the Conants.

After dealing with some calendaring issues, O'Meara reassured that "there has been no official offer at this point and certainly *no acceptance* of anything." LETTER FROM O'MEARA TO JIM CONANT (Jan. 17, 2006), *Exh. 14* (emphasis in original). O'Meara wrote that "Attorney Davis and I simply had a discussion that he was going to recommend the policy limits to his client. Even so, he has not sent me a fax despite my request to confirm that as an offer." *Id.*

O'Meara reassured the Conants he was "behind you 100%" and "fully prepared to go to trial if necessary." *Id.* O'Meara then said he nonetheless had some points of advice.

He first addressed trial schedules, estimating trial would occur no earlier than September 2006, eight months out. O'Meara predicted that "if the defendants know we are going to trial no matter what, they will try every stall tactic in the book to continue the trial, motions for summary judgment, motions in *limine*, motions for special jury instructions to avoid punitive damages, etc." *Id.* O'Meara noted that decision on these matters "pushes trial off well into 2007." *Id.*

O'Meara then anticipated that if there were a verdict beyond the policy limits, "there will be an appeal, guaranteed," which would take upwards of a year. He advised that "[i]nsurance companies always appeal verdicts over their limits because it delays payment for so many more years while they keep your money," and that "[n]o money is paid out until the appeal is heard." Thus he noted "[m]ost cases settle before the appeal because people just get worn out and they want to get on with their lives." *Id.*

Finally, O'Meara predicted that "[i]f the defendants know we are going to trial no matter what, they will just wait us out, hoping Anita will die before the trial." O'Meara spelled out the

implications: "If she does, her life expectancy is reduced to zero, as opposed to somewhere between 10 and 35.1 years, which is what we have now. Damages are then reduced to past medical bills, past pain and suffering, past lost earnings and past loss enjoyment of life. We are … forced to look back to calculate damages, not forward." *Id.*

As noted at the beginning of the January 17 letter, it appeared then that Davis was imminently going to offer the policy limits of $11 million. Though somewhat gruesome, O'Meara gave his best bird-in-hand advice – early settlement would be in his clients' best interest.

It is clear the Conants understood this issue:

> Q. But you understood that if she died in … surgery or before settling the case, the case would settle for much less?
>
> A. I believe that was indicated to us.

2 Arb.Trn. at 144 (testimony of Jim Conant).

VIII. Davis Misconstrues O'Meara's Demand as an Offer

A. January 24 Phone Call from Davis to O'Meara – Misconstruction of Demand

A week later, on January 24, Davis and O'Meara conversed again by phone. Both agree they had played phone-tag for a few days, and that Davis placed the call that connected them. *3 Hrg.Com.* at 26 (Davis); *4 Hrg.Com.* at 58 (O'Meara). They largely agree on the content of the call and the sequence of the conversation. Importantly, they agree they both expected based on previous conversations that any offers or acceptances had to be in writing. *3 Hrg.Com.* at 28, 47 (Davis); *4 Hrg.Com.* at 57, 59, 133-34 (O'Meara).

When asked to describe the call, Davis testified he had "conferred at length" with his clients and thus "began the conversation by saying that *we are offering* the policy limits of $11 million for resolution of the case." *3 Hrg.Com.* at 26 (emphasis added). In the same answer, he testified that "[r]elatively soon after *I accepted* the plaintiffs' offer, Attorney O'Meara stated that he was no longer authorized to settle the case. I told him it was already settled." *3 Hrg.Com.* at 27 (emphasis added). It is important to note that Davis interchangeably uses the words "offer" and "accept," and also applies the word "accept" to the *defendants'* action. It is also important to note that, despite O'Meara's insistence, Davis had not provided O'Meara with anything in writing.

O'Meara remembers the same sequence of events during the call. O'Meara testified that Davis told him Davis had "convinced his people at the home office to *offer* the policy limits on the case." *4 Hrg.Com.* at 58 (emphasis added). Upon hearing this, O'Meara testified he informed Davis that the policy limits were not sufficient and therefore the Conants could not "accept your *offer*," and moreover were immediately withdrawing their previous demands for the policy limits. *4 Hrg.Com.* at 58 (emphasis added); *5 Arb.Trn.* at 19. Thereupon, Davis told O'Meara "I thought we had a deal."

O'Meara was perplexed by Davis's interpretation of the conversation, which O'Meara found:

> very unusual because plaintiffs don't make offers. They don't have money. They have nothing to offer. Defendants make offers. And the way it usually works – or always works is the defendants make the offer to settle and then the plaintiffs accept that. What a demand is is a solicitation to make an offer. It's an invitation for them to go ahead and, you know, offer us – make us an offer on the policy. So for him to have used the words, we accept your offer, I felt that was a twist of words and a very unusual use of the phrase.

4 Hrg.Com. at 59-60. Davis testified there was a settlement agreement because Davis "beat him to the punch." *3 Hrg.Com.* at 44.

This difference in understanding regarding who can make offers and who can accept them underlies the rest of this case.

B. January 24 Letters Between Davis and O'Meara – Misconstruction and Withdrawal of Demand

Later that same day, Davis faxed a letter to O'Meara memorializing Davis's (mis)understanding of their conversation.

> I write to confirm my telephone *acceptance* of this date, on behalf the defendants and their insurer, of the plaintiffs' policy limits *offer* to settle all aspects of this case for the policy limits of $11,000,000.
>
> Subsequent to the above referenced *acceptance* of the plaintiff's settlement *offer* you stated that the plaintiffs now withdraw the *offer*."

LETTER FROM DAVIS TO O'MEARA (Jan. 24, 2006), *Exh. 15* (emphasis added). Note again Davis's use of the word "offer" to refer to plaintiffs' action, and "accept" to refer to defendants' action. O'Meara regarded Davis's letter as a memorialization of either a misconstruction or a self-serving interpretation designed to trap the plaintiffs. *4 Hrg.Com.* at 120-121.

Moreover, regardless of Davis's inverted language, *5 Arb.Trn.* at 76-77, for two reasons O'Meara considered this letter, rather than the phone call earlier in the day, as Davis's first *formal*

offer. First, both Davis and O'Meara had agreed that offers and acceptances were to be in writing. *3 Hrg.Com.* at 28, 47; *4 Hrg.Com.* at 57, 59, 133-34. Second, O'Meara had on the phone already withdrawn his demand, and thus O'Meara regarded Davis's telephonic "acceptance" as having no legal effect. *5 Arb.Trn.* at 24-25, 76-77.

O'Meara's first and immediate and spontaneous response was to object. The *same day* of Davis's fax, O'Meara faxed a letter back referring to their conversation that morning, saying "my clients have withdrawn their settlement *demand* for the policy limits of $11,000,000." LETTER FROM O'MEARA TO DAVIS (Jan. 24, 2006),[5] *Exh. 16* (emphasis added).

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[5]The letter was misdated January 20, but all parties acknowledge it was sent and received on January 24. See LETTER FROM DAVIS TO O'MEARA (Jan. 24, 2006), *Exh. 17* ("I trust that the date used on the letter was simply the result of inadvertence."); EMAIL FROM O'MEARA TO DAVIS (Jan 24, 2006), *Exh. 18* ("The date on my fax to you should have been today: 1/24/06 and not the 20th. My apologies"). *See also*, *3 Hrg.Com.* at 54-56 (Davis discussing sequence of correspondence); *4 Hrg.Com.* 142-43 (O'Meara discussing same). The error appears to have been an administrative snafu in O'Meara's effort to respond immediately.

C. The Conants Reaction to the January 24 Communications Between Davis and O'Meara

When the Conants heard about, *4 Hrg.Com.* at 100, and received the January 24 correspondence, they grew angry at O'Meara. They believed Davis's misconstruction, and regarded O'Meara's action as an unauthorized capitulation. They also believed the inadvertently misdated letter was a purposeful coverup. *3 Arb.Trn.* 115;*1 Hrg.Com.* at 98-99, 100; *2 Hrg.Com.* at 28; *3 Hrg.Com.* at 163-164.

During several conversations O'Meara tried to explain to the Conants that he had never settled the case and had not gone beyond his authorization, *2 Arb.Trn.* at 30-31, 192; *5 Arb.Trn.* at 22, that Davis had twisted O'Meara's *Dumas* demand as an offer, and that the issue would work itself out. *2 Arb.Trn.* at 30-31; *4 Arb.Trn.* at 85; *5 Arb.Trn.* at 22-23; *1 Hrg.Com.* at 119. O'Meara believed the Conants understood his *Dumas* demand as he had explained it to them in detail, but that they did not fully understand Davis's misconstruction of it. *4 Hrg.Com.* at 54-55, 164.

Thus the Conants began to believe they had lost leverage over the defendants, *3 Hrg.Com.* at 139, and also began to question O'Meara's competence and commitment to their case. Anita privately expressed an interest in firing O'Meara, *1 Hrg.Com.* at 103; *2 Hrg.Com.* at 10.

Whether justified or not, the Conant's unhappiness with O'Meara and the realization their case might settle for no more than $11 million prompted them to start questioning O'Meara's one-third contingency fee and thinking about keeping a greater share. *3 Arb.Trn.* at 116.

D. January 26 Draft Letters Written by O'Meara But Not Sent to Conants

Despite his belief that he had made an appropriate *Dumas* demand, O'Meara was naturally concerned that Davis's would successfully use the misconstruction to force a settlement at no more than the policy limits. Both his client and his opponent believed a settlement had been reached. In that context, when the Conants questioned his fee, O'Meara considered – at least for a moment – the possibility they were correct.

Thus on January 26 O'Meara drafted two letters to the Conants.

It must first be noted also that these letters were never sent, and merely indicate O'Meara's private thoughts. *4 Hrg.Com.* at 150. The letters indicate they would be sent by fax only, but the exhibits contain no fax header information. There exist no signed copies, and the Conants confirm they never received them. *2 Arb.Trn.* at 170. (Question by member of arbitration panel referring to exhibits 22 and 23, answer by Jim Conant: "Do you recall receiving letters at about this time? I don't recall these two letters. I don't remember seeing them come to us."); *4 Arb.Trn.* at 158 (O'Meara: "I didn't send this"); *4 Hrg.Com.* at 150 ("I wrote it, but these were never sent."). The draft letters are in the record only because O'Meara disclosed his electronic files as discovery in the arbitration proceeding. *4 Arb.Trn.* at 147.

In any event, one draft letter would have discussed the details of how a settlement might be structured, and the second would have promised if the case settled O'Meara would waive his fee on any portion of a settlement above $11 million, but that if the case went to trial he would return to the original one-third arrangement. Both letters would have said that, on the assumption an $11 million settlement had been reached, "at this point the Court would uphold my 1/3 fee of $3.666 million if you decided to terminate my services today," and that the hourly portion of the fee agreement was

therefore moot. The draft letters closed by saying litigation on such matters "always ends up in a very unhappy result for all," and that O'Meara did not anticipate "heading in that direction." UNSENT LETTER (1) FROM O'MEARA TO JIM CONANT (Jan. 26, 2006), *Exh. 22*; UNSENT LETTER (2) FROM O'MEARA TO JIM CONANT (Jan. 26, 2006), *Exh. 22*. Because they were not sent, the letters should be irrelevant, but they nonetheless form the basis for one of the PCC's conflict of interest allegations.

E. January 31 – Davis Files Motion to Enforce

A week later, on January 31, Davis filed a motion to enforce the agreement he claimed he and O'Meara entered. DEFENDANTS' MOTION TO ENFORCE SETTLEMENT AGREEMENT (Jan. 31 2006), *Exh. 25*

The motion alleged that: O'Meara had on several occasions communicated an "offer to settle," during the January 24 phone conversation Davis indicated "acceptance by the defendants," but then also during the phone call O'Meara "retracted the offer." *Id.* ¶7. In his accompanying memorandum, Davis cited Pennsylvania law regarding meeting of the minds necessary at formation of contracts. MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO ENFORCE SETTLEMENT AGREEMENT (Jan. 31 2006), *Exh. 25*; *3 Hrg.Com.* at 44-45.

O'Meara objected. PLAINTIFFS' OBJECTION TO DEFENDANTS' MOTION TO ENFORCE SETTLEMENT AGREEMENT (Feb. 6, 2006), *Exh. 29*. He alleged it was the defendants who made the offer, not accepted by O'Meara, who in any event did not have authority to accept. In his accompanying memorandum O'Meara reviewed the record of communications between he and Davis. O'Meara argued that Davis misconstrued O'Meara's demands which were "intended as an invitation for Defendants to make an offer," and pointed out that plaintiffs make demands and defendants make offers which plaintiffs may then accept. MEMORANDUM OF LAW IN SUPPORT OF

PLAINTIFFS' OBJECTION TO DEFENDANTS' MOTION TO ENFORCE SETTLEMENT AGREEMENT (Feb. 6, 2006), *Exh. 29* at 2. O'Meara also reminded the court that "[a] demand alone is not an agreement to settle," *id.* at 3, and that the purpose of offers being in writing is to prevent precisely what happened here – misinterpretations as to the meeting of minds, and trapping parties into agreements "merely because they were the first to speak." *Id.* at 6. O'Meara argued that the cases cited by Davis were not on point because they concerned contract formation rather than the matter at hand – which party in a personal injury case may demand, offer, and accept. *Id.* at 4-7. O'Meara attached to his objection Jim Conant's affidavit attesting that O'Meara never had authority to accept an offer for $11 million.

This objection represents O'Meara's considered reaction to Davis's misconstruction. His first spontaneous action had been withdrawal, his second was some measure of possible acceptance, and his third a realization that Davis had turned words around.

Attorney Davis filed a reply, but did not address his unconventional use of the words "demand," "offer," and "accept." REPLY BRIEF OF DEFENDANTS IN RESPONSE TO PLAINTIFFS' OBJECTION TO DEFENDANTS' MOTION TO ENFORCE SETTLEMENT AGREEMENT (Feb. 8, 2006), *Exh. 31*.

The court did not hear or decide the motion before the Conants' suit against the paving company and its insurers settled, thus making the motion moot, and leaving the issues unresolved. *3 Hrg.Com.* at 49.

F. February 3 Letter from Davis to O'Meara – Reiteration of Misconstruction

Finally regarding the language misconstruction, a few days later, on February 3, Davis wrote a letter to O'Meara noting O'Meara's initial *Dumas* demand: that in October 2005 O'Meara had "suggested settlement of the case for the policy limits." LETTER FROM DAVIS TO O'MEARA (Feb. 3, 2006), *Exh. 27*. More important here, the letter several times reiterated Davis's unconventional use of the word "offer" and "accept," but confusingly also used the word "offer" in its more conventional sense. In the last full paragraph Davis wrote:

> On January 24, 2006 we spoke again by telephone. … I had recommended to the insurer that the policy limits be tendered, accepting your settlement *offer*. I had received authority to do so and directly stated during our telephone conversation that the case would be settled consistent with your *offer* and the balance of the policy limits, reduced only by those items noted above, was <u>offered</u> to you. You subsequently retracted your *offer* to settle the case for the policy limits. Our letters of that date followed, including yours originally dated January 20, 2006 and subsequently corrected as to the date in which you acknowledge that there had been an *offer* by the plaintiffs to settle the case for the policy limits but that you had been directed by your clients to withdraw that *offer*.

LETTER FROM DAVIS TO O'MEARA (Feb. 3, 2006), *Exh. 27* (emphasis added: underscoring indicating conventional use, italics indicating unconventional use).

IX. January and February: Conants Question O'Meara's Competence, Cost and Commitment

As noted, the record of the January 24 Davis-O'Meara phone call and follow-up correspondence, along with Davis's motion to enforce, shook the Conant's confidence in O'Meara. Despite his attempts to reassure them, they believed O'Meara had sold them short, and that O'Meara should pay by forfeiting a portion of his pay.

Other factors added to this perception.

A. Belief in the Life Care Plans

The Conants's objective was to provide Anita with the best quality of life they could for her lifetime. *2 Arb.Trn.* at 45. It is undisputed that damages would largely consist of past medical costs plus future annual costs multiplied by Anita's life expectancy, and thus that an estimate of life expectancy was necessary to compute damages or a settlement figure. *4 Hrg.Com.* at 47 (O'Meara); *3 Hrg.Com.* at 43 (Davis).

Given her medical condition, at first Anita's life expectancy appeared short, and Dorrie had shared this with the family in the first weeks after the accident. *3 Arb.Trn.* at 29. Both Dorrie and O'Meara had generally discussed this with the Conants, which clearly made them uncomfortable or even angry. *2 Arb.Trn.* at 191; *3 Arb.Trn.* at 29.

But as Anita's surgeries were successful and her condition stabilized, it became possible that her life expectancy would be longer than first anticipated. *4 Arb.Trn.* at 218-219. Moreover, O'Meara knew a higher number would be better in negotiations.

Thus O'Meara insisted on a second life care plan which was received in late January. LIFE CARE PLAN FOR ANITA CONANT (Jan. 26, 2006), *Exh. 21*. Like the previous, it enumerated the costs for medical necessities and assumed a life expectancy of 35 additional years. Rather than $15 million

in the first plan, it estimated $23 million necessary to sustain Anita's medical needs for her actuarial life. The difference was largely due to the fact that once Anita survived the initial year after her injuries, the likelihood she would live longer greatly increased; while good news, it also increased the potential for complications and the need for expensive mobility devices. *4 Arb.Trn.* at 218-221; *see also*, LIFE CARE PLAN FOR ANITA CONANT (Jan. 26, 2006), *Exh. 21* at 8 ("Theoretically she can live another 40 years. The issue is one of preventing complications.").

Although the ostensible purpose of a life care plan is to estimate future costs, it is no secret that plaintiffs' plans must be magnified as much as possible within the constraints of reasonableness, *4 Arb.Trn.* at 216, 219; *1 Hrg.Com.* at 208, that they may state a number in excess of what the plaintiff expects to recover, and that the essence of their purpose is for leverage in negotiation. *4 Arb.Trn.* at 216.

The Conant family was fully aware of these multiple purposes. Jim testified that part of the purpose of the life care plan was to:

> create a situation of need, so to speak, the high number. The way [O'Meara] would explain[] was … these guys would have a low life expectancy [and] would generate a low financial need. We are going to go with a higher one to show a larger need. And typically what happens, you have need to working back and forth so you come to a level ground. So we did implement something along those lines.

2 Arb.Trn. at 172.

Despite this, it appears the Conant family began to believe their own litigation rhetoric – that anything short of $15 million or $23 million in the life care plans would be insufficient. Jim testified:

> When we think about the policy limits of 11 million dollars and think about the two life care plans, the lowest one of 15 million, it wasn't going to add up or be sufficient for our needs.

2 Arb.Trn. at 42.

Thus, in addition to the Conants's suspicion that Davis's misconstruction of O'Meara's demands meant their case might be settled for $11 million, they also concluded "knowing that with the life care plan, we weren't going to be okay." *2 Arb.Trn.* at 31-32.

Based on this, the Conants began to construct ways around or out of their contingency contract with O'Meara.

B. High Expectations of Damages

Another factor undermining the Conant's confidence in O'Meara was their expectations of damages.

Attorney Davis had been low-balling the value of the case. Davis described the defendant as a "a relatively small construction excavation, paving company, located in … what we generally refer to as the western suburbs of Philadelphia." *3 Hrg.Com.* at 7. He had expressed to O'Meara that the case would be worth $3 million to $4 million largely because quadriplegics tend to have short life expectancies. *4 Hrg.Com.* at 56-57.

O'Meara's expectations however, and thus the Conants', were much higher, for several reasons.

First, though liability had been confessed, the defense had good reason to not want the story told to a jury: It had been established the paving company driver had seen the red light and had plenty of opportunity to avoid the collision, Anita would make a good witness, and the defendants had ignored discovery deadlines suggesting to O'Meara they were not in a strong position for trial. *4 Arb.Trn.* at 83-84, 86.

Second, expectations for damages were based in part on the cost of medical care. O'Meara's estimate from numbers published by the Spinal Cord Institute were that medical costs for

quadriplegics were more than $1 million per year, *4 Hrg.Com.* at 56, and that if Anita were to live 35 years as speculated by the actuaries, mathematically damages could be many millions. *4 Hrg.Com.* at 47-48, 146. Given his confidential disclosures to the federal magistrate who conducted the mediation, O'Meara probably thought he could claim medical damages in the range of $16 million. *4 Hrg.Com.* at 146-47.

Third, the life care plan estimating at least the medical portion of damages at $23 million. As noted, the Conants were under the impression that the life care plan accurately reflected costs. *1 Hrg.Com.* at 92, 96-97. The Conants believed $18 million was the figure they would press at mediation, possibly because it was roughly the average of the two life care plans, PLAINTIFF'S CONFIDENTIAL SETTLEMENT MEMORANDUM, *Exh. 32* ¶ 7 at 7; *1 Hrg.Com.* at 80, and Jim discussed a possible $18 million settlement with his financial planner. *4 Arb.Trn.* at 49-50.

Fourth, whatever the medical bills and future estimates may total, that did not encompass the other damages alleged in the lawsuit – pain and suffering, loss of enjoyment of life's activities, and loss of consortium. *4 Arb.Trn.* at 215.

Fifth, there was the expectation that the defendant had resources beyond their $11 million insurance. Both Anita and Jim understood from O'Meara that the paving company would be able to borrow $5 million above insurance, and that the company would do so to avoid bankruptcy and laying off its employees. *2 Arb.Trn.* at 35; *1 Hrg.Com.* at 111-112, 118. Jim's brother Craig and son Sean felt they were led to believe that because the paving company was a subsidiary of another company, it would easily be able to pay in the range of $16 million or $17 million. *2 Arb.Trn.* at 211-212; *3 Hrg.Com.* at 101; *2 Hrg.Com.* at 37, 45. O'Meara shared these thoughts. *4 Hrg.Com.* at 146, 185-186.

Sixth, expectations were raised probably just based on hopes and bluster. O'Meara told the Conants he thought the case had the potential to get between $20 million and $40 million from a jury. *4 Arb.Trn.* at 84-86, 195; *4 Hrg.Com.* at 145. Although O'Meara tried to temper some of these speculations based on the limits of insurance and the risks of litigation, *2 Arb.Trn.* at 35, 39, 80*; 1 Hrg.Com.* at 78-79, 132, the Conant family largely believed them. *1 Arb.Trn.* at 42; *2 Arb.Trn.* at 20, 34-35; *2 Arb.Trn.* at 226-228; *3 Hrg.Com.* at 100-101; *see also*, FINDINGS OF FACT AND RULINGS OF LAW ¶ 30, *PCC 25.*

C. Over-Inclusive Budgets

Also affecting the Conant's confidence in O'Meara was their over-inclusive budget.

The Conants met with structured settlement experts to learn how settlements pay out over time. *1 Hrg.Com.* at 109, 111; *3 Hrg.Com.* at 75. In an effort to determine what total amount they might have to structure to care for Anita on a monthly basis, *2 Arb.Trn.* at 159; *1 Hrg.Com.* at 132-33; *4 Hrg.Com.* at 79, Jim began assembling spreadsheets. CONANT FAMILY MONTHLY EXPENSES (Feb. 25, 2006), *Exh. 36*.

Their budget shows total monthly expenses of $51,473. With the help of a financial expert, Jim calculated that to derive that amount, they would need to structure $8.7 million, not including attorney fees and costs. CONANT FAMILY MONTHLY EXPENSES (Feb. 25, 2006), *Exh. 36*; *4 Arb.Trn.* at 83. The Conants felt pressure because if the settlement were for $11 million, and O'Meara got one-third, it would leave the Conants less than these amounts. *2 Arb.Trn.* at 193-194; *4 Arb.Trn.* at 83; *4 Hrg.Com.* at 80.

Many items were reasonably included on the budget, such as medical expenses, various types of therapies, and nursing. But many items on the budget had nothing to do with Anita's injuries, *4*

Arb.Trn. at 82, including line items for:

> "Vacations (Total cost $97,688.00 divided into 12 months) . . . . $8,140.00"
> "Anticipated College Expenses . . . . $4,175.00"

CONANT FAMILY MONTHLY EXPENSES (Feb. 25, 2006), *Exh. 36*.

Other non-injury-related items that carried lesser monthly amounts included utilities, cell phone bills, internet, TV, groceries, car and life insurance, house repairs and maintenance, entertainment, clothing, and birthday and Christmas gifts. CONANT FAMILY MONTHLY EXPENSES (Feb. 25, 2006), *Exh. 36*; *4 Arb.Trn.* at 82. Jim acknowledged that the vacation the budget envisaged was to the Carribean, and included all three adult children, not just Anita and Jim. *2 Arb.Trn.* at 48-49. And O'Meara had already negotiated Ashley's free college tuition based on the family hardship. *4 Hrg.Com.* at 80.

Renovations to the Conant's seaside Hampton home, which were estimated at $650,000, included not only ramps and space for therapy, *1 Arb.Trn.* at 66-67; *2 Arb.Trn.* at 56-57, 97-99; *1 Hrg.Com.* at 75, but also doubled its original size of 3,000 square feet, *2 Arb.Trn.* at 156-58, to include a new bedroom for daughter Ashley who lived at college, mahogany decks, a new kitchen and a media room. *2 Arb.Trn.* at 158; *see* PHOTOGRAPHS OF CONSTRUCTION, *Exh. 63*.

Jim acknowledged that if just the vacation, college tuition, and motor home were taken out, the budget would add to $34,000 per month, well within a settlement figure of $11 million. *2 Arb.Trn.* at 154-156.

D. Advice of a Second Attorney

The final factor undermining the Conant's confidence in O'Meara was the advice of a second attorney.

Alan Ganz, a lawyer from Seabrook, met Jim Conant when Jim was doing electrical work at Ganz's office. *1 Hrg.Com.* at 82-83. As noted, O'Meara was already skeptical of Attorney Ganz from the time Ganz urged the Conants to get advance payments from the insurance company. *3 Hrg.Com.* at 171. Although Ganz claimed his law firm had no interest in representing the Conants in place of O'Meara, *3 Arb.Trn.* at 109; *3 Hrg.Com.* at 151, O'Meara did not trust Ganz's motives. *5 Arb.Trn*. at 29-31; *4 Hrg.Com.* at 42-43, 202.

The Conants conferred with Ganz about O'Meara's fee agreement starting in late January. *1 Arb.Trn.* at 29; *2 Arb.Trn.* at 84; *1 Hrg.Com.* at 192-93, 213; *3 Hrg.Com.* at 146, 163-164. Anita testified she felt she could fire O'Meara, regardless of any outside legal advice. *1 Arb.Trn.* at 42. Ganz nonetheless advised the Conants that they could exit the contract entirely. *1 Arb.Trn.* at 30; *2 Arb.Trn.* at 84; *3 Hrg.Com.* at 147. He also advised them they could terminate the contract and pay O'Meara either the hourly rate specified in the contract, *2 Arb.Trn.* at 84; *3 Arb.Trn.* at 116; *3 Hrg.Com.* at 147, or some unspecified amount in *quantum meruit*. *3 Arb.Trn.* at 124. Ganz advised the Conants on other matters as well. *3 Arb.Trn.* at 114; *1 Hrg.Com.* at 193; *3 Hrg.Com.* at 146-147; 163-164. This representation worried Ganz enough that he consulted with ethics lawyers, and then later insisted on a release from interference-with-contract liability by O'Meara as part of the ultimate settlement. *3 Hrg.Com.* at 168, 181, 201.

Overall it appears the Conants either disregarded or did not realize the extent of the work O'Meara did on their behalf up to that point, and instead may have believed that all O'Meara did was "fill out a bunch of forms." *4 Arb.Trn.* at 88.

E. Blame the Lawyer

As the Conants gradually realized their hopes might be greater than the defendant's assets, and that if the limits were fixed the only source of additional money was from O'Meara's share, they grew distrustful of O'Meara and dismayed at his fee, and began to suppose his and their interests were not aligned. *3 Hrg.Com.* at 136 (Jim: "we look at it like it's Conant versus …the trucking company, and we also see it as Conant versus O'Meara Law").

F. O'Meara Pledges to Reduce his Fee

Given the Conant's budgeting and expectations, they realized that an $11 million recovery after costs would net them about "seven and a half to $8 million [which] wasn't going to be adequate and it put them in a bind," *3 Hrg.Com.* at 70, because they believed they would need damages of "around 12, 12.5 million." *3 Hrg.Com.* at 76, 79.

That is when "the fee issue started coming into play" for the Conants. *2 Arb.Trn.* at 194; *2 Arb.Trn.* at 139-140, 198.

Thus in several conversations in late January, O'Meara committed to Jim that at the appropriate time O'Meara would reduce his fee. *4 Hrg.Com.* at 100.

X. February 25 Meeting in Hampton

A. Scheduling the February 25 Hampton Meeting

In early February, the federal court issued an order scheduling a mediation settlement conference on Monday, February 27 in Philadelphia. ORDER (Feb. 2, 2006), *Exh. 26.* Consequently Attorney O'Meara convened a meeting with the Conants during the weekend immediately before, on Saturday February 25, at the Conant's home in Hampton.

B. Meeting Morphs From Mediation Preparation to Fee Negotiation

The reason O'Meara called the meeting was to:

> prepare for the mediation, to get them ready, and to talk about what we were likely to encounter during the mediation because it was a major piece of litigation. I wanted them to know what to expect and what roles they should expect to play in that.

4 Hrg.Com. at 78-79. The Conants understood his purpose:

> Tim [O'Meara] wanted to do … a dress rehearsal, wanted to … go through what we could expect to be doing in mediation in two more days on the following Monday. The 25th was a Saturday, and then there would be the Sunday, the next day, and then the next day we'd be going down to mediation. … He wanted to go through a dress rehearsal, kind of give us an idea what's going on, show us the video for the first time, and just also kind of go over things.

1 Hrg.Com. at 128.

In preparation for the meeting O'Meara put together a detailed written agenda of the proceedings the Conants could expect at the mediation. LETTER FROM O'MEARA TO JIM CONANT (Feb. 24, 2006), *Exh. 67*. He also prepared a "preliminary calculation" of the amount likely to be available for structure if the mediation resulted in a settlement for $11 million. LETTER FROM O'MEARA TO JIM CONANT (Feb. 21, 2006), *Exh. 33*.

The Conants, however, had an agenda of their own for the meeting. They simultaneously held

high hopes, but also a budding disappointment that O'Meara had already settled for the policy limits of $11 million. Angry at O'Meara for a variety of reasons, they saw him as one of their problems:

> Yeah. I said, Tim, the way our family looks at it, again, I was being very candid once again, I said we look at it like it's Conant versus Lyons & Hohl, which is the trucking company, and we also see it as Conant versus O'Meara Law, because we're having to deal with another issue on top of this big issue that we've already got going, which was, you know, just this fee thing and the whole, you know, policy limits issue. I just felt we were battling him, too, you know.

1 Hrg.Com. at 136. Thus the Conants wanted to "talk about the fee issue, which was still on the front burner" for them. *1 Hrg.Com.* at 128.

The Conants prepared well for this discussion. They studied the fee agreement. *1 Hrg.Com.* 130. They consulted with Attorney Ganz during the week before the meeting, and also in the morning on the day of the meeting at Ganz's office. *3 Hrg.Com.* at 149-151. Ganz gave them advice regarding their ability to fire O'Meara, and how much they would owe him if they did. *1 Arb.Trn.* at 30; *2 Arb.Trn.* at 84-85; *1 Hrg.Com.* at 190-91; *3 Hrg.Com.* at 137, 147; FINDINGS OF FACT AND RULINGS OF LAW ¶¶ 56, 57, *PCC 25.*

In addition, the entire Conant family and a friend held a pre-meeting-meeting in the morning before O'Meara arrived. FINDINGS OF FACT AND RULINGS OF LAW ¶ 58, *PCC 25*; *3 Arb.Trn.* at 40; *4 Arb.Trn.* at 29; *1 Hrg.Com.* at 129; *2 Hrg.Com.* at 56, 78, 89-91; *3 Hrg.Com.* at 72. The agenda of the pre-meeting was the family's general dissatisfaction with O'Meara, *2 Hrg.Com.* at 28-29, whether to fire him, *2 Arb.Trn.* at 219; *1 Hrg.Com.* at 130; *2 Hrg.Com.* at 78; *3 Hrg.Com.* at 113-114, and if not, generally how to reduce his fee, *2 Arb.Trn.* at 218-219; *3 Arb.Trn.* at 40; *4 Arb.Trn.* at 36; *2 Hrg.Com.* at 56-58, 90; *3 Hrg.Com.* at 113-114, whether he should be paid $1 million for his services, *3 Arb.Trn.* at 46; *2 Hrg.Com.* at 93, or some other figure, *2 Hrg.Com.* at 65,

90, how best to raise these issues with him, *4 Arb.Trn.* at 29, and who should say what in raising them. *2 Hrg.Com.* at 90.

O'Meara intended the meeting for mediation preparation. Whether or not O'Meara should have seen it coming, however, during the meeting he found himself defending his fee, and felt ambushed. *5 Arb.Trn.* at 14, 18.

C. No Dispute Regarding Basic Sequence of Events

There is no dispute regarding the basic chronology of the meeting. PCC BRIEF at 10-12. Everyone agreed that February 25 was a very snowy day, and that O'Meara carpooled from Keene to Hampton with Craig Conant. *2 Arb.Trn.* at 64; *1 Hrg.Com.* at 129, *3 Hrg.Com.* at 73. Everyone agreed that the day-in-the-life film was well done and appropriately emotional. *2 Arb.Trn.* at 64, *4 Arb.Trn.* at 90. Everyone agreed that the Conants raised the issue of O'Meara's fee, and that during the meeting the amount in the fee agreement was amended to include the words "to be negotiated." PCC BRIEF at 11-12. Everyone agreed that during the meeting Craig said his informal research indicated $2 million might be a reasonable fee in the circumstances. PCC BRIEF at 11; *1 Arb.Trn.* at 42-43 (Anita); *2 Arb.Trn.* at 61 (Jim); *1 Hrg.Com.* at 134-35 (Jim); *2 Arb.Trn.* at 199-200 (Craig); *3 Hrg.Com.* at 81-83, 95 (Craig); *3 Arb.Trn.* at 33-36 (Sean); *4 Arb.Trn.* at 12 (Sarah); *2 Hrg.Com.* at 79-80 (Sarah). Everyone agreed that at the end of the meeting O'Meara "took Anita's hand and told her he would not let his fee get in the way." PCC BRIEF at 12.

D. O'Meara Answers Question: What Happens if we Fire You?

During the meeting Anita, as interpreted by Sean, asked O'Meara "why shouldn't I fire you?" *2 Hrg.Com.* at 14 (difficulties in interpreting witness's speech omitted from quotation); *2 Hrg.Com.* at 81 ("Tell me why I shouldn't fire you"). Sean added a query regarding O'Meara being paid an

hourly rate pursuant to paragraph D of the fee agreement. *2 Hrg.Com*. at 81. O'Meara was caught off-guard by the questions, as he did not think the relationship had that far degenerated. *4 Arb.Trn*. at 87.

O'Meara knew his fee agreement specified he was entitled to his contingency fee if he were able to "recover, obtain, or secure agreement for any amount of money on behalf of the clients," and that if Attorney Davis were correct – as the Conants alleged – there was already a settlement offer of $11 million on the table. *4 Arb.Trn*. at 177; *4 Hrg.Com.* at 168.

Thus O'Meara attempted to answer both questions. Sean testified O'Meara answered: "[H]e didn't want it to get into litigation and that if it did, he would go after his one-third fee." *2 Hrg.Com*. at 38. O'Meara described his answer:

> I think that arose in the context of Sean asking, well, what would happen if we were to fire you and revert to this clause D of the contract? And I said, well, that's – I don't think we're going down that route because this was the first that I knew that they were dissatisfied, allegedly, or apparently to that degree. And I said, well, one of the things that people do in a circumstance like that is the case can end up in litigation, but you know, obviously, we're not going down that road. And litigation is ugly; it usually ends up in an unhappy result for everyone. But I did not tell them that I would sue them and would win. That's not something that I would say.

4 Hrg.Com. at 100-01.

E. "To be Negotiated" Added to Agreement

At some point in the meeting, Sarah Sullivan, the family friend who was present and who had been designated in the pre-meeting to handle the issue, suggested crossing out the one-third language from the original fee agreement and replacing it with "to be negotiated." This was done. AMENDED O'MEARA LAW FEE AGREEMENT (Feb. 25, 2006), *Exh. 37*.

F. Possible Agreement to $2 Million During the Meeting

After this Craig raised the possibility that $2 million might be a fair fee based on conversations he had with some South Carolina lawyer friends, although he downplayed the reliability of the number because of the informal way he had come up with it. *2 Arb.Trn.* at 199-200; *3 Hrg.Com.* at 123. There were, however, no other numbers other than $2 million discussed that day. *4 Hrg.Com.* at 21-22.

Everyone present confirms that when confronted with the possibility of a $2 million fee, O'Meara agreed to it. *2 Arb.Trn.* at 61 (Jim); *1 Hrg.Com.* at 135 (Jim); *2 Arb.Trn.* at 200 (Craig); *2 Hrg.Com.* at 34, 67 (Sean); *4 Arb.Trn.* at 13 (Sarah); *2 Hrg.Com.* at 80, 91 (Sarah). Craig was surprised that O'Meara would be content with a $2 million fee, but testified it was clear he was. *3 Hrg.Com.* at 83. O'Meara felt that $2 million was fair even though it was a vast decrease from the $3.66 million he was due under the original agreement. *4 Arb.Trn.* at 158.

While the Conants during the meeting deny explicitly agreeing to a $2 million fee, there were some ambiguities. Both Craig and Sarah testified that when the idea was first floated, Anita and Jim did not explicitly reject it. *3 Hrg.Com.* at 83; *4 Arb.Trn.* at 13. Sean testified: "My father never told Tim you can't have 2 million." *3 Arb.Trn.* at 37. Craig testified Anita and Jim expressed that $2 million might be a "good idea." *2 Arb.Trn.* at 200.

G. Words and Gestures at the End of the Meeting

The Conants claim that at the end of the meeting, after O'Meara "took Anita's hand and told her he would not let his fee get in the way," he just left. PCC BRIEF at 12, 18. O'Meara contends, however, that there were additional words and actions that led him to believe he had formed an agreement with the Conants for a $2 million fee. This difference forms the basis for the remaining

allegation of deceit, which is perhaps the most serious of the charges O'Meara faces.

O'Meara twice testified in the arbitration proceeding regarding events at the end of the meeting. In direct examination to the arbitration panel, he explained:

> And then we were going to break up and leave. Craig and I were – it was so bad out that there was literally two feet of snow on the ground, that Craig and I decided we should get going. And then I went to say good-bye to Anita, and I told her that I wouldn't stand in the way of her receiving a reasonable fee, a reasonable settlement in recovery, that what I was prepared to do was if there was $11 million and that was all the money that was available at the end of the day and we were never going to get a penny more, then I would reduce my fee to $2 million. She said thank you. Jim said thank you. Craig said thank you. Sean said thank you. Jim said we really appreciate that, that means a lot to us. Packed up my bag, Craig and I cleaned off the truck, and left.

4 Arb.Trn. at 92. During the final day of the arbitration proceeding, O'Meara was cross-examined by the Conant's attorney, who asked him whether after the day-in-the-life video there was a discussion which resulted in a fee agreement for $2 million. O'Meara's testimony to the arbitration panel is set forth here at length:

A. Right. We had shown the day-in-the-life video, and then we talked about the mediation, because we didn't – my recollection is we didn't get to the mediation outline until the end of the meeting, because it was clear that that wasn't their agenda. We then discussed that very quickly. One thing to note was that I couldn't get out of there, because Craig was my only ride home, so I was, more or less, trapped there, and didn't have any other way to get home or to leave, for that matter, and then the discussion turned back. After we had put away the documents, packed the bags and were about to leave, then I went to Anita and gave her my commitment for the $2 million.

Q. So, that was your commitment, you were getting ready, your bags were packed, and you were ready to leave?

A. We were coats on, on our way out the door.

Q. That's when the $2 million discussion occurred?

A. Yeah.

Q. And it was between you and Anita?

A. Well, no. Jim was there, Sean was there, Todd was there, everybody was there. It was done in front of everyone.

Q. And that discussion, I take it, was very brief; you made that statement and they agreed to it and you left?

A. No, it was rather dramatic. You know, I wanted to express my whole-hearted commitment to reduce my fee from 3.66 million by a million-six down to 2 million, and that's when I took her hand and looked her in the eye and told her I wouldn't stand in the way of her receiving a fair and reasonable settlement, and here's my commitment to you. If there's 11, only 11, not a penny more, then I'll reduce my fee to $2 million, and it was my thought and she said, "Thank you," and Jim said, "Thank you," and we all – my assumption was that this was, you know, that's great, you know, that I had really done the right thing. Then, that's when we left after that, and my intention was, rather than to take off our coats and pull out the contracts and redo everything, was to get back to the office. I think you've read my handwriting, it's fairly terrible, I wanted it to be nice and clean, to put it in a Memorandum of Understanding as a codification of what we had just discussed, the next morning put it in writing, type it up, fax it to Jim, and that's what I did.

Q. So, do I understand correctly you're leaving the home and you go over to Anita and say that you'll – if it settles at 11 million, you'll reduce the fee to 2 million, is that what you said, or any settlement it would be 2 million?

A. No. The commitment at that time was that if, you know – and that's further indicative of this language in here. If the final settlement offer is no more than 11 million, that was my commitment to the family at that time, was that, if that's all we're left with at the end of the day, and they haven't come up with any additional money, despite our best-faith efforts, then my commitment to do so is to reduce my fee to $2 million, and I was committing right then and there to $2 million, and they accepted it by their actions.

Q. When you say "by their actions," do you mean by your testimony is they said, "Thank you"?

A. "We really appreciate that, that means a lot to us, thank you." I mean, I don't know what else to think.

Q. And that's your best memory of what they said?

A. Yes.

5 Arb.Trn. at 63-66. O'Meara repeated essentially the same testimony in the disciplinary proceeding below. *4 Hrg.Com.* at 85-88, 207-210.

H. O'Meara Thought an Agreement was Reached at the End of the Meeting

Although the Conants clearly do not corroborate that the end of the meeting occurred as O'Meara describes, they made several admissions lending support to O'Meara's understanding regarding the meaning of the words and gestures he recalls.

At the end of the meeting Anita admitted that O'Meara "put his hand on my hands and say he would not let his fee stand in the way." *2 Hrg.Com.* at 12-13 (difficulties in interpreting witness's speech omitted from quotation). Jim confirmed that this interchange occurred. He testified:

> I remember specifically that he went up to Anita's chair, put his hand on her hand, and said, I'm sorry you lost faith in me. I'm going to get you what you need. I won't let my fees stand in the way again. And thank you.

1 Hrg.Com. at 141. Sarah Sullivan, the family friend who was present at the meeting confirmed it also. She testified that just as O'Meara was leaving "he walked over to Anita and put his hand on hers, and he said, I promise you, I won't let my fee get in the way of your settlement, and then he left." *4 Arb.Trn.* at 20-21. Later she likewise testified:

> [E]veryone was getting ready to leave. Jim seemed much happier, offered Craig and Tim sodas for the ride back to Keene or something to drink, and everyone was getting their coats and everything. And Tim was in the room with Anita, and he put his hand on her hand and said, I promise you, I won't let my fee get in the way. [And then] [t]hey left.

2 Hrg.Com. at 85. Jim testified that at the end of the meeting as Craig and O'Meara left, there was some "chitchat." *2 Arb.Trn.* at 64. Craig testified he thanked Tim for "stepping up," *3 Hrg.Com.* at 123, and that "upon leaving":

> I know we had some talk, a short conversation about, well, you know, I hope everything goes well tomorrow. And I may have thanked him for taking some tension off the family and negotiating his fee at a later date.

3 Hrg.Com. at 87. Todd testified that at the end of the meeting right before Craig and O'Meara left, it is possible that people shook O'Meara's hand and thanked him. *4 Hrg.Com.* at 22.

Moreover, the family budget discussed during the meeting contains a handwritten line showing a budgeted payment to O'Meara for $2 million. CONANT FAMILY MONTHLY EXPENSES (Feb. 25, 2006), *Exh. 36* ("Tim: 2,000,000.00"). The copy of the budget passed around at the meeting had no $2 million handwriting, but the copy produced by the Conants in discovery did. This indicates it was added later by the Conants, and suggests they understood a $2 million deal had been reached that day. *4 Hrg.Com.* at 79, 211.

I. Jim Conant Talks to Attorney Ganz in the Evening After the Meeting

On Saturday evening after O'Meara left, Jim spoke with Attorney Ganz who said he would be available for consultation over the next two days. *3 Hrg.Com*. at 159.

More important, Jim sought Ganz's opinion on O'Meara's fee. *3 Arb.Trn.* at 96, 122-23; *3 Hrg.Com.* at 154. Ganz told Jim that the written "to be negotiated" agreement "was illusory" and unenforceable because "you cannot with certainty determine what the fee would be based on that language," *3 Hrg.Com.* at 156, 155-159; *3 Arb.Trn*. at 122-123, although O'Meara would have a right to recover some fee in *quantum meruit. 3 Hrg.Com.* at 155.

Based on this, the Conants learned they had done very well with the "to be negotiated" language they signed during that day's meeting, and thus became very pleased with it. *3 Arb.Trn.* at 164; *3 Hrg.Com.* at 159; *4 Hrg.Com.* at 211. O'Meara believes that after Jim's conversation with Ganz, the Conants realized they had "hit a home run" and at that point decided to bury the subsequent $2 million deal. *4 Hrg.Com*. at 211.

XI. Settlement on Monday Compelled by Surgery on Friday

The upcoming week was auspicious for the Conant family not only because Monday was federal mediation, but also because, as Jim testified:

> On Friday of that same week, Anita was going to be having major surgery, which was to basically take the plates, metal plates and screws that were in her neck area, because they were starting to be infected, infecting the area, and she was going to have those removed and then be put into a halo and obviously, she wasn't looking forward to that. What little movement she does have in her head was going to be completely taken away from her for several weeks and whatnot.… Obviously, surgery in this area of anybody is very serious and certainly was on the front burner for us to have to be worried about. She was actually going to be admitted on Wednesday.

1 Hrg.Com. 144-45.

Everybody, including the Conants, were aware that the surgery could be fatal, and understood that if Anita died before settlement, the value of the case would plummet. *2 Arb.Trn*. at 144; *3 Arb.Trn*. at 121; *1 Hrg.Com*. at 187-188; *4 Hrg.Com*. at 220-22. They understood the life care plans and life expectancy calculations would become irrelevant, and there would be no prospective damages. *5 Arb.Trn*. at 6. They understood the litigation would turn into a wrongful death case, which would require a new and different set of experts. *4 Hrg.Com*. at 222.

Thus the Friday surgery necessitated getting the case settled on Monday before any of that could happen. *5 Arb.Trn*. at 5-6.

XII. Continued Fee Negotiation During Drive to Philadelphia on Sunday February 26

A. Need to Reach Certainty in Fee Amount

While O'Meara remained flexible on precisely what his fee would be, given the pressure to settle on Monday, he felt there had to be some certainty before mediation. *3 Hrg.Com.* at 89-90. He had several reasons, which he communicated to the Conants.

First, O'Meara knew that both by statute and rule, contingent fee agreements must be in writing. *4 Arb.Trn.* at 93-94. Second, O'Meara knew that negotiations of large settlements involve structuring, that an exact amount to be structured would have to be determined as part of the negotiation, and that to determine that number there had to be a known and definite amount that comes off the top for fees and costs. *4 Arb.Trn.* at 95-96; *4 Hrg.Com.* at 65, 96. Third, O'Meara felt it would be tacky and inappropriate for him and his clients to air a fee haggle during the mediation in front of the judge and other parties. *4 Arb.Trn.* at 95-97; *4 Hrg.Com.* at 66, 96. Fourth, the existing fee agreement had already been marked up on Saturday with the "to be negotiated" language. O'Meara thought it would not be legible to further handwrite anything on that document, that the agreement needed to be re-drafted on a wordprocessor, and that as a practical matter it should be done in his office because the final agreement for $2 million was reached at the end of the February 25 meeting when there was a snowstorm and everybody was ready to leave with their coats on and briefcases packed. *5 Arb.Trn*. at 65-66. Finally, although the Conants had told O'Meara they had "no intention of stiffing" him, he needed some personal reassurance as well. *2 Arb.Trn.* at 207, 211; *4 Arb.Trn.* at 100-01. Even so, O'Meara would have maintained his fee flexibility if that would facilitate settlement at the mediation. 5 Arb.Trn at 13; *4 Hrg.Com.* at 80-81, 188.

B. Conversations about Memorandum of Understanding During Drive to Philly

O'Meara planned to drive to the Monday Philadelphia mediation because he had to bring his voluminous files. Given the distance, he drove on Sunday, February 26. *4 Arb.Trn.* at 95; *4 Hrg.Com.* at 64.

On Sunday morning before he left he typed up and faxed to both Jim and Craig a "Memorandum of Understanding" (MOU) which he believed was a memorialization of the verbal agreement they had reached at the end of the meeting the day before. He dated it February 27 because he figured it would be finalized the following day in Philly, and he pre-signed his copy. MEMORANDUM OF UNDERSTANDING REGARDING FEES (dated Feb. 27, 2006), *Exhs. 38 & 39*; *3 Hrg.Com.* at 90-91; *4 Hrg.Com.* at 90. The MOU states that it is "simply a codification of the verbal representations and commitments made on 2/25/06." It provides that if the settlement is for $11 million, O'Meara would get $2 million, but that if the case goes to trial the original 2005 one-third contingent agreement would apply. O'Meara believed the MOU was merely a novation, *4 Arb.Trn.* at 93, and felt generous by capping his fee if the case settled for $11 million because he would have forgone $1.6 million of his original fee. *4 Hrg.Com.* at 90-91.

During his drive, O'Meara had several conference calls with both Jim and Craig. O'Meara reiterated the reasons the fee issue should be finalized before the mediation. *3 Hrg.Com*. at 92. O'Meara learned that although Jim was ambivalent about the MOU, he understood the Conants would willingly sign it before the mediation the following day. *2 Arb.Trn.* at 66; *4 Hrg.Com.* at 91-92. *4 Arb.Trn.* at 95-96; *4 Hrg.Com.* at 91. Jim recollected that although O'Meara remained flexible on what the number would be, O'Meara reminded him it was important to agree to some fee certain before the mediation. *1 Hrg.Com.* at 194-197.

XIII. Pre-Mediation Meeting at Courthouse in Philadelphia on Monday February 27

As noted, in early February, the federal court in Philadelphia issued an order scheduling mediation for "February 27, 2006 commencing at 1:30 p.m." The order indicated "[t]he Court has also reserved time with counsel for March 21, 2006 for a reschedule date if needed."[6] ORDER (Feb. 2, 2006), *Exh. 26.*

When it became clear on the Sunday drive that the fee issue would not be worked out over the phone, Jim, Craig, and O'Meara agreed to meet at the courthouse at 10:00 Monday morning, giving them several hours to talk. *2 Arb.Trn*. at 212; *5 Arb.Trn*. at 68-69; *3 Hrg.Com*. at 92; *4 Hrg.Com*. at 64; 92-93. Jim and Craig arrived from the airport with Jim's daughter Ashley and his financial advisor Richard Neville. *2 Arb.Trn.* at 68-69; *4 Arb.Trn.* at 98; *3 Hrg.Com*. at 96; *4 Hrg.Com.* at 64; *4 Hrg.Com.* at 93. O'Meara convened the meeting they discussed the day before, *1 Hrg.Com*. at 146; *4 Hrg.Com*. at 92-93, while Ashley and Neville went to get breakfast and do some sightseeing, leaving O'Meara, Jim and Craig in a conference room at the courthouse. *4 Arb.Trn.* at 98. Neville was comfortable leaving Jim to negotiate his contract with O'Meara because Jim had his brother Craig who he considered a "sophisticated businessman," *2 Hrg.Com*. at 104-05; *4 Hrg.Com*. at 94, and because Neville's investment expertise was not relevant to Jim's fee agreement with O'Meara. *2 Hrg.Com*. at 102-103; *4 Hrg.Com*. at 94, 190-91. Jim was happy Craig was there with him. *1 Hrg.Com*. at 146-147.

O'Meara started the meeting by reiterating the necessity of finalizing their representation arrangement before mediation. *2 Arb.Trn.* at 69-70, 210; *4 Arb.Trn.* at 97, 100; *5 Arb.Trn.* at 69-72;

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[6]Disciplinary Counsel in this proceeding initially charged O'Meara with deceit for allegedly lying about the availability of a second mediation date. The Hearings Committee determined the allegation was unfounded, however, and thus it has not been presented to this Court. FINDINGS OF FACT AND RULINGS OF LAW ¶¶ 117, 172 PCC 25.

1 Hrg.Com. at 148, 150-151; *3 Hrg.Com*. at 97-99; *4 Hrg.Com*. at 94-95, 192. O'Meara produced a copy of the pre-signed and post-dated MOU he had sent to Jim and Craig on Sunday. *2 Arb.Trn.* at 210; *5 Arb.Trn.* at 60-62; *1 Hrg.Com*. at 147; *3 Hrg.Com*. at 97-98. They then discussed several options, including various contingent and flat-fee possibilities. *2 Arb.Trn.* at 72; *4 Arb.Trn.* at 99-100; *3 Hrg.Com*. at 134; *4 Hrg.Com*. at 94-96.

Jim testified he felt pressured, *2 Arb.Trn*. at 72; *5 Arb.Trn*. at 7; *1 Hrg.Com*. at 148-151, 153; *4 Hrg.Com*. at 96; *3 Hrg.Com*. at 171, and had good reasons for the feeling. Jim knew he had to reach a multi-million dollar decision by the end of the day, which would affect his wife and family for the rest of their lives. Jim testified:

> Well, I was pretty upset, to say the least, because you know, I was a little nervous just being in a federal courthouse to begin with, the idea of this mediation, the idea of Anita going into surgery, and it was, you know, a lot things going on.

1 Hrg.Com. at 148.

These pressures were mitigated by the possibility of delaying the mediation to a second date in March, which was noted on the court's scheduling order. Jim knew about the second date, *2 Arb.Trn*. at 144-45; *1 Hrg.Com*. at 204 (Jim), and had told Attorney Ganz about it. *3 Arb.Trn*. at 121; *3 Hrg.Com*. at 170. Jim was hesitant to use the second available date, he told Ganz however, because Anita might die due to her imminent surgery thus making the case worth less, *3 Arb.Trn*. at 121; *3 Hrg.Com*. at 170, and also because he had begun "thinking that the policy limits would be all we were going to get." *1 Hrg.Com*. at 154. Disciplinary Counsel in this discipline proceeding initially charged O'Meara with deceit for having invented the availability of a second mediation date, but the Hearings Committee below determined the allegation was unfounded and thus it has not been presented to this Court. FINDINGS OF FACT AND RULINGS OF LAW ¶ 172, *PCC 25.*

The pressures Jim faced were also mitigated by the presence and availability of Jim's family and legal support network while he was in Philadelphia. He was with Craig the entire time, and they left the conference room at least once to privately consult. *1 Hrg.Com*. at 147; *3 Hrg.Com*. at 98. Jim knew Attorney Ganz was available to him by phone all day Monday, *3 Arb.Trn*. at 168; *3 Hrg.Com*. at 159, and O'Meara knew also. *5 Arb.Trn*. at 68. O'Meara believed Jim was in touch with other lawyers as well, *5 Arb.Trn*. at 68, and knew that Richard Neville, Jim's financial advisor, was nearby. In addition, Jim and his family acknowledged that during the meeting, Jim stepped out and consulted with them at home in New Hampshire. *2 Arb.Trn*. at 71 (Jim); *2 Hrg.Com*. at 48 (Sean); *3 Hrg.Com*. at 99 (Craig). O'Meara was aware of the call. *4 Arb.Trn*. at 100-01; *4 Hrg.Com*. at 95-96.

Finally, O'Meara attempted to further mitigate the pressures Jim was facing by making clear that he would be happy to inform the judge about what was going on and to seek more time to sort it out. *4 Arb.Trn*. at 100-01.

In any event, during the morning meeting Craig suggested an "escalator" option, which broke the "logjam." *4 Hrg.Com.* at 195. It became what was ultimately written and signed at 11:30 after Jim had consulted with his support network and still with several hours before commencement of mediation. *4 Arb.Trn*. at 103*; 5 Arb.Trn*. at 68-69; *4 Hrg.Com*. at 97-98, 194-95; ORDER (Apr. 25, 2006) ¶ 2 *Exh. 50* (mediation "commenced at about 1:30"). The resulting fee agreement provided that O'Meara would get $2 million for any settlement up to $14.5 million, and 20 percent of any amount over that. MEMORANDUM OF UNDERSTANDING REGARDING FEES (Feb. 26 & 27, 2006), *Exh. 40*. This prompted Craig to congratulate Jim for bargaining O'Meara down to an 18% contingency. *4 Arb.Trn.* at 104.

O'Meara considered the fee issue wrapped up in good faith, and gave Jim a pep-talk so his team was excited and ready to go into mediation. *4 Arb.Trn.* at 104. Craig congratulated Jim for negotiating a contingency of just 18 percent. *4 Hrg.Com*. at 98-99. Jim nonetheless blamed O'Meara for his misfortunes. *1 Hrg.Com*. at 148.

XIV. Mediation and Settlement

The settlement conference "commenced at about 1:30 p.m. and concluded at approximately 8:00 p.m." ORDER ¶ 2 (Apr. 25, 2006), *Exh. 50*. Although the mediation itself is not relevant to this case, several matters that developed during it are.

First, Attorney Davis's motion to enforce the settlement which he claimed he and O'Meara entered never got heard or decided. LETTER FROM O'MEARA TO JIM CONANT (Feb. 28, 2006) ¶ 3 *Exh. 68.*

Second, during mediation "[t]he court determined that there was risk to defendant of exposure to liability beyond the extent of the available insurance coverage." ORDER ¶ 8 (Apr. 25, 2006), *Exh. 50*.

Third, during the mediation O'Meara demanded millions of dollars more than the $11 million policy limits because based on his research he believed the paving company had resources against which it could borrow. The court reviewed the company's financial statements and balance sheets *in camera*, however, and determined that if it were made directly liable for more than a half-million dollars, it would be better off entering bankruptcy. ORDER ¶¶ 8-10 (Apr. 25, 2006), *Exh. 50*; LETTER FROM O'MEARA TO JIM CONANT (Feb. 28, 2006) ¶ 1 *Exh. 68*; *2 Arb.Trn.* at 111-12, 214, 224; *1 Hrg.Com*. at 157; *3 Hrg.Com.* at 126. This produced a total settlement of $11.5 million – $11 million from the liability and umbrellas policies, and $500,000 directly from the paving company.

Fourth, as O'Meara had predicted, his fee was repeatedly discussed during the mediation, in the context of negotiations to arrive at the net figure for calculating the structure. *4 Hrg.Com.* at 69.

Fifth, the fee contingency, if it hadn't occurred before, clearly occurred at mediation.

Sixth, even though the Conants won an enormous settlement of $11.5 million, they still

weren't satisfied. *4 Arb.Trn*. at 50; *1 Hrg.Com*. at 163; *3 Hrg.Com.* at 70.

The next day Attorney Ganz called O'Meara on behalf of the Conants' and told O'Meara that Ganz would be representing the Conants in a fee dispute with O'Meara. *4 Hrg.Com.* at 99. O'Meara immediately referred Ganz to his lawyer and hung up the phone. *4 Hrg.Com.* at 100. This marked the ripening of the fee dispute between the Conants and O'Meara. *3 Hrg.Com.* at 176, 155 (Ganz: before February 28 "[t]here was no fee dispute at that time").

The settlement of the personal injury case between the Conants and the paving company was finally consummated by other lawyers on Friday March 3rd, the day of Anita's surgery. PCC BRIEF at 16; SETTLEMENT AGREEMENT AND RELEASE (May 2, 2006), *Exh. 52*.

XV. Arbitration of Fee Dispute

Simultaneous with settling the personal injury case between the Conants and the paving company, there was a second settlement. It released Ganz from liability to O'Meara for any interference with the Conant/O'Meara's fee contract, put a portion of the personal injury payout into escrow, and provided for arbitration pursuant to RSA 542 to determine the remainder of O'Meara's fee. SETTLEMENT AGREEMENT AND RELEASE ¶¶ 2 & 11 (May 2, 2006), *Exh. 53*.

Thereafter the Conants commenced an arbitration. It took five days in 2006, and included testimony of the participants and the Conants' expert.

The arbitration is important here because O'Meara's testimony to the arbitration panel, regarding the existence of a $2 million contract at the close of the February 25 meeting in Hampton, forms the basis of the PCC's allegation of deceit.

The majority of the arbitration panel appears to have accepted O'Meara's testimony, and awarded him $1,587,000 in total fees. It arrived at this number because:

> Both parties wished to achieve a recovery of $14.5 million. Both agreed to $2.0 million, or 13.8%, fee on such a recovery would be fair. Interpreting the final fee agreement and the circumstances surrounding it most favorably to the Conants, and considering that they were willing to pay a fee of 13.8%, and applying this rate to the $11.5 million recovery, the arbitrators find and rule that a total fee in th[e] amount of $1,587,000 is justified and not excessive in view of Attorney O'Meara having satisfied the contingency of obtaining an acceptable recovery.

In re: James and Anita Conant / Timothy O'Meara, ARBITRATION DECISION (March 2007), *Appx.* at 158. There was a dissenting opinion which would have awarded O'Meara less on the grounds that the underlying case was not uniquely risky or complex. *In re James and Anita Conant / Timothy O'Meara*, DISSENTING OPINION (Mar. 12, 2007), *Appx.* at 170.

The parties distributed the escrow in accord with the panel's findings.

STATEMENT OF THE CASE

In February 2007, based both on statements Attorney O'Meara made in the arbitration proceeding, and also his alleged conduct during the personal injury representation, the Conants through their lawyers referred O'Meara to the New Hampshire Attorney Discipline Office. LETTER FROM JAMES BASSETT, ESQ. TO LANDYA MCCAFFERTY, DISCIPLINARY COUNSEL (Feb. 6, 2007) (document not in PCC record).

In 2009 Disciplinary Counsel alleged 17 violations of New Hampshire Rules of Professional Conduct, which O'Meara denied. NOTICE OF CHARGES (Apr. 1, 2009), *PCC 5*; ANSWER TO NOTICE OF CHARGES (May 15, 2009), *PCC 6*.

In October and November 2009 a Hearings Committee convened by the Attorney Discipline System held a four-day evidentiary hearing. The Hearings Committee issued a summary report, finding unspecified violations of Professional Conduct Rules 1.2(a) (scope of representation), 1.7(b) (conflict of interest), 8.4(c) (deceit), and 8.4(a) (general rule). PRELIMINARY SUMMARY HEARING PANEL REPORT (Dec. 2, 2009), *PCC 28.*

In December 2009 the Conants, through their lawyers, filed a lengthy letter with the Hearings Committee setting forth their view of sanctions. They urged disbarment and disgorgement of fees. As to the disposition of the disgorged fees, although they mentioned some worthy causes, the Conants suggested payment to their lawyers with the balance to the Conants. LETTER FROM ATTORNEY BASSETT TO HEARINGS COMMITTEE (Dec. 10, 2009), *PCC 29.*

Also in December 2009 the Hearings Committee held a short non-evidentiary day regarding sanctions, and then issued its full report.

During the hearing O'Meara made an oral motion for mistrial based on the Conant's

December 2009 letter on the grounds that he had been denied an opportunity to cross-examine witnesses on the issue of disgorgement. *5 Hrg.Com.* at 5-20. The Hearings Committee denied mistrial, *5 Hrg.Com.* at 20-21, on the grounds that Disciplinary Counsel neither sought disgorgement nor alleged a Rule 1.5 violation regarding reasonableness of fees. It thus reported that regarding disgorgement, it gave "no weight to the [Conant's] letter in its deliberations." HEARING PANEL REPORT (Feb. 8, 2010) at 3, *PCC 31*.

In February 2010 the Hearings Committee issued its full report. It found one violation of Rule 1.2(a) regarding settlement without client authority, an unclear number of violations of Rule 1.7 regarding conflicts of interest, one violation of Rule 8.4(c) for testifying falsely to the arbitration panel, as well as a violation of Rule 8.4(a) for violating the other rules. The Hearings Committee recommended disbarment. HEARING PANEL REPORT (Feb. 8, 2010), *PCC 31*.

In May 2010, the Conants, again through their lawyers, requested participation in the disciplinary process as either intervener or *amicus curiae*, for the purpose of urging both disbarment and disgorgement. Attached to their pleading was a copy of their December 2009 letter which had already been rejected by the Hearings Committee. MOTION TO INTERVENE AND/OR TO FILE AN AMICUS CURIAE BRIEF FOR THE LIMITED PURPOSE OF SUBMITTING A MEMORANDUM REGARDING SANCTIONS (May 5, 2010), *PCC 35*. O'Meara objected on the grounds that the fee had been decided in arbitration as provided in the settlement of the underlying case. TIMOTHY A. O'MEARA'S OBJECTION TO THE CONANTS' MOTION TO INTERVENE (May 17, 2010), *PCC 37*.

Also in May 2010 the Professional Conduct Committee (PCC) held a short non-evidentiary day for oral argument regarding the Hearings Committee recommendation. *6 Hrg.Com.* (passim). It accepted the Committee recommendation and found one violation of Rule 1.2(a) regarding

settlement without client authority. It accepted some of the Committee recommendations and found four violations of Rule 1.7(b) regarding conflicts of interest. It accepted the Hearings Committee's recommendation and found one violation of Rule 8.4(c) for testifying falsely to the arbitration panel, as well as a violation of Rule 8.4(a) for violating the other rules. The PCC recommended a two-year suspension of Attorney O'Meara's license to practice law, plus assessment of costs. RECOMMENDATION FOR A TWO YEAR SUSPENSION (Aug. 23, 2010), *PCC 39.*

Disciplinary Counsel filed a motion to reconsider, in which it requested disbarment. MOTION TO RECONSIDER (Aug. 31, 2010), *PCC 40.* Disciplinary Counsel (who was by then a different lawyer than had conducted the hearings) also filed a motion requesting that the PCC recommend disgorgement as part of its sanction. The new Disciplinary Counsel argued that because the PCC had found O'Meara deceived the arbitration panel regarding the existence of an agreement between he and his client regarding fees, disgorgement would be akin to restitution. DISCIPLINARY COUNSEL'S MOTION FOR THE PROFESSIONAL CONDUCT COMMITTEE TO RECOMMEND FEE DISGORGEMENT AS A CONDITION OF ITS RECOMMENDED SANCTION (Sept. 10, 2010), *PCC 41.*

Attorney O'Meara objected to disbarment on the grounds that whatever O'Meara's conduct, there was no actual harm because the underlying settlement was for the maximum amount of money that would ever be available, even if the case had been tried to verdict. OBJECTION TO MOTION TO RECONSIDER (Sept. 10, 2010), *PCC 43.* He objected to disgorgement on the grounds that the fee dispute had already been resolved in arbitration, that former Disciplinary Counsel had made clear during the hearings it was not seeking disgorgement, that O'Meara had thus not been allowed to conduct cross-examination on the issue, and that revisiting fee forfeiture through disciplinary disgorgement would undermine the social objectives of arbitration. OBJECTION TO DISCIPLINARY

COUNSEL'S MOTION FOR FEE DISGORGEMENT (Sept. 13, 2010), *PCC 44*; MOTION TO STRIKE DISCIPLINARY COUNSEL'S MOTION FOR FEE DISGORGEMENT (Sept. 13, 2010), *PCC 44*; OBJECTION TO RESPONDENT'S MOTION TO STRIKE DISCIPLINARY COUNSEL'S MOTION FOR FEE DISGORGEMENT (Sept. 14, 2010), *PCC 45*.

The PCC denied disgorgement on the grounds that the earlier Disciplinary Counsel had committed to not seeking it, that raising the issue so late in the proceeding "raises fundamental due process questions because of the absence of notice and opportunity to be heard," and that the rules establishing the attorney discipline system do not contemplate restitution. ORDER (Oct. 14, 2010), *PCC 46*.

On the matter of sanctions generally, the PCC reported that upon reconsideration and a review of the record and the arguments for disbarment, it recommended a three-year suspension from the practice of law and directed Disciplinary Counsel to so petition this Court. ORDER ON MOTION TO RECONSIDER RECOMMENDATION FOR THREE YEAR SUSPENSION (Jan. 3, 2011), *PCC 47*.

Accordingly the PCC then petitioned this Court to suspend Attorney O'Meara's license for three years. PETITION FOR THREE YEAR SUSPENSION FROM THE PRACTICE OF LAW (Feb. 14, 2011).

In August 2011, simultaneous with the PCC filing its brief in this Court, the Conants through their lawyer sought leave to file and filed a brief of *amicus curiae* again seeking both disbarment and disgorgement. Attorney O'Meara objected to the participation of the Conants as *amicus*. In September 2011 this Court requested the PCC and the Attorney General file memoranda on the matter, and in October this Court issued an order denying the Conant's participation.

The issues now before this Court are whether Attorney O'Meara violated any ethics rules, and if so, what is the appropriate sanction.

SUMMARY OF ARGUMENT

In his Statement of Facts, Attorney O'Meara traces the entire course of conduct giving rise to the three allegations, and in his Statement of the Case, he describes the current posture of this matter.

In Part One of his argument, he draws a street-level view of how personal injury law is practiced in New Hampshire, and the expectations of the participants in settlement negotiations.

He then addresses each of the allegations in turn. In Part Two, he addresses the Rule 1.2(a) unauthorized settlement allegation, and concludes there was no ethical violation. In Part Three, he addresses the Rule 1.7 conflict of interest allegation, and also concludes there was no violation. In Part Four, he addresses the Rule 8.4(c) deceit allegation, and also concludes there was no violation.

In Part Five, he explores the sanctions available. He first explains that O'Meara should not be sanctioned at all, and concludes that at most a minor sanction is all that is deserved.

ARGUMENT PART ONE: Personal Injury Practice

I. O'Meara Got a Good Outcome

A. Personal Injury Cases are Conducted on Contingency

Other than requiring they be in writing and barring them in certain areas of practice, the law provides few limitations on contingent fee arrangements. *Couture v. Mammoth Groceries, Inc.*, 117 N.H. 294 (1977) (subjecting contingent fees to rule of reasonableness); *McCabe v. Arcidy*, 138 N.H. 20 (1993). Rather the law has long recognized the social benefits they bring. *Markarian v. Bartis*, 89 N.H. 370 (1938) ("There is no necessary and inevitable connection between improper litigation, hard bargains and solicitation … and the acquisition by a third party of an interest in a litigated case."); *Jordan v. Gillen*, 44 N.H. 424 (1862); *Shapley v. Bellows*, 4 N.H. 347, 355 (1828).

Personal injury cases in New Hampshire are rarely conducted on anything other than a contingent fee basis. Bruce W. Felmly, Esq., *Representing the Plaintiff in the Wrongful Death Case: Ten Practical Considerations for Maximizing Recovery*, at 102 (NHBA 1999), *Appx.* at 108 (hereinafter "BRUCE FELMLY").[7] The Conants' expert witness testified that hourly fee arrangements

[7]Practical practice pointers is often not the sort of thing taught in law school or the subject of extensive commentary, and thus is not generally accessible in ordinary primary and secondary legal materials. There is nonetheless a substantial body of practical and jurisdiction-specific practice advice in New Hampshire legal libraries – continuing legal education materials.

Continuing legal education (CLE) is required of all active attorneys in New Hampshire, N.H. SUP.CT. R. 52 and elsewhere, Annotation, *Discipline of Attorney for Failure to Comply with Continuing Legal Education Requirements*, 96 A.L.R.5th 23, and its importance has been repeatedly cited. *In re Proposed Pub. Prot. Fund Rule*, 142 N.H. 588, 591 (1998) ("[I]n our past exercise of our supervisory authority, we have been cognizant of our duty to protect the public and to promote confidence in and respect for the bar. Our establishment of rules on … continuing legal education … have helped fulfill those obligations; *Petition of Chapman*, 128 N.H. 24, 27 (1986) (among purpose of unified bar is "to carry on a continuing program of legal … education").

CLEs tend to be taught by knowledgeable and respected members of the bar who are expert in their practice-areas. CLE materials may be the only available published source of this information. *See* Susan J. Hemp & Cheryl Rae Nyberg, *Elder Law: A Guide to Key Resources*, 3 Elder L.J. 1, 64 (1995) ("State agencies, bar associations, and
(continued...)

in personal injury cases are "not the usual event." *3 Arb.Trn.* at 80 (testimony of Russell Hilliard, Esq.). One-third is the standard percentage. *Couture v. Mammoth Groceries*, 117 N.H. at 296 ("The court takes judicial notice that … a one-third fee is not unusual in civil actions of this nature."); *3 Arb.Trn.* at 80 (testimony of Russell Hilliard, Esq.); *In re James and Anita Conant / Timothy O'Meara*, DISSENTING OPINION, at 2-3 , *Appx.* at 170 ("The one-third contingency fee included in O'Meara's initial contract with the Conants is not an unreasonable fee; to the contrary; that percentage is used regularly in New Hampshire contingency fee contracts.").

B. Clients Try to Beat the Fee

"If the case is settled with two telephone calls, the fee remains the same as it would if it was tried for a five-week period and then appealed to the Supreme Court." BRUCE FELMLY at 102-03, *Appx.* at 110-111; *Couture v. Mammoth Groceries*, 117 N.H. at 296 (subject to the rule of reasonableness).

"The client has a right to terminate the attorney-client relationship at any time, but there are clients who do this in a manipulative manner in order to attempt to beat the fee." BRUCE FELMLY at 102-03; *Zaklama v. Mount Sinai Med. Ctr.*, 906 F.2d 650, 653 (11th Cir. 1990) (Zaklama's attempt to renege on a valid contingency fee agreement is reprehensible.… A client may not accept the

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[7](...continued)
continuing legal education programs represent reliable sources of current information on state legal issues and programs.").

Thus, although untraditional as legal authority, on this basis they are relied on here. The CLE materials cited were presented by the New Hampshire Bar Association (NHBA), the National Business Institute (NBI), Professional Education Systems, Inc. (PESI), and the then-named Franklin Peirce Law Center (FPLC). Citations have been limited to materials that would have been timely and available in 2005 and 2006 when the events in the case occurred.

The materials cited herein are available at the New Hampshire Law Library located at the New Hampshire Supreme Court, and the University of New Hampshire School of Law in Concord, as noted in the table of authorities. In addition, relevant portions are contained in the appendix to this brief.

benefits of a valid contingency fee contract and subsequently contest his obligations thereunder."); *Goodrich v. McDonald*, 19 N.E. 649, 651 (N.Y. 1889) (lien on judgments are "a device invented by the courts for the protection of attorneys against the knavery of their clients by disabling clients from receiving the fruits of recoveries without paying for the valuable services by which the recoveries were obtained."); *see generally*, Annotation, *Limitation to Quantum Meruit Recovery, Where Attorney Employed under Contingent-fee Contract Is Discharged Without Cause*, 56 A.L.R.5th 1 (discussion of clients firing lawyers without cause).

C. Diligence is in the Preparation

Continuing education materials make clear that for plaintiffs' lawyers the greatest part of their diligence is in information-gathering and preparation.

> Non-lawyers believe that the principal effort expended by a lawyer on their behalf is the participation of their lawyer at critical states of discovery or court proceedings.… In fact, the most important work done by a plaintiff's lawyer on behalf of the client is an appropriate evaluation of the case itself.

John T. Broderick, Esq. and Stephen E. Merrill, Esq., *How to Evaluate and Settle Personal Injury Claims in New Hampshire: Evaluation and Settlement from the Plaintiff's Perspective*, at I-2 (PESI 1990), *Appx.* at 5 (hereinafter BRODERICK & MERRILL).

Expert personal injury litigators suggest making sure there is insurance coverage. BRODERICK & MERRILL at I-31, *Appx.* at 39. A diligent plaintiff's lawyer should get police reports, medical reports, fatal accident investigation reports, and witness statements, and also should go to the scene. Gary M. Burt, Esq. and Brian C. Shaughnessy, Esq., *Trying the Automobile Injury Case in New Hampshire*, at 13-14, 54 (NBI 1997), *Appx.* at 72-73, 81 (hereinafter BURT & SHAUGHNESSY). Nurses' notes may contain particularly helpful information. BRODERICK & MERRILL at I-24-25, *Appx.*

at 33-34. The experts suggest a site visit, prompt conversations with the investigating police officers, and review of business records. They suggest the plaintiff's lawyer should go to the hospital where the client is recuperating, talking with the doctors, and taking photos while injuries are fresh. BRODERICK & MERRILL at I-19-22, *Appx.* at 28-31. They also suggest early hiring of whatever experts might be necessary, BRODERICK & MERRILL at I-32, *Appx.* at 40, including an accident reconstruction expert. BURT & SHAUGHNESSY at 24, *Appx.* at 77.

Insurance-defense practitioners suggest that engaging and forming relationships with defense counsel and the insurance company early in the process benefits plaintiffs because it increases the chance that full damages will be paid due to the insurer putting aside a sufficient insurance reserve. John A. Lassey, Esq., *Dealing with Insurance Company Claims Representatives*, at 4 (FPLC 2006), *Appx.* at 123, 127 (hereinafter LASSEY).

Plaintiffs experts warn against insufficient attention to damages. They suggest preparation of a life-care plan and life-expectance estimates to valuate them, and recommend a day-in-the-life film to illuminate them. BURT & SHAUGHNESSY at 88-89, *Appx.* at 87-88; Stephen Merrill and John Broderick, *Damages: Practical Tips from A Plaintiff's Perspective*, Winter 1989 TRIAL BAR NEWS 5, *Appx.* at 150. Plaintiff's lawyers should communicate these matters to the defense, with informational attachments. BRODERICK & MERRILL at I-22-23, *Appx.* at 31-32. Authorities also warn of tipping the plaintiff's hand by showing their financial distress.

During intake interviews and throughout the representation, the authorities tell plaintiffs' lawyers to talk realistically to clients about the value of their case, warn against giving overly-rosy assessments, and educate them about the difference between amounts demanded and actually recovered. BURT & SHAUGHNESSY at 3-10, *Appx.* at 62-69.

D. Most Cases Settle

By far most personal injury cases settle. Quick settlement benefits the plaintiff, whereas delay favors the defendant:

> A rapid judicial conclusion on the merits in plaintiff's favor will not occur. [S]ignificant backlogs within the Superior Court system, result[s] in … significant delays to an adjudication of a plaintiff's civil action. The client must be informed that as time passes, not only do emotions wane, but the memories of significant witnesses grow dim, medical end results are reached, and plaintiffs reach a point where this matter, however important, simply must be put behind them.
>
> Delay generally favors the defendant. … By insisting upon a trial on the merits, the plaintiff unknowingly assists the insurance company with its investment portfolio.

BRODERICK & MERRILL at I-2-4, *Appx.* at 11-13. Unless there are imminent statutes-of-limitations issues, there may be a plaintiff's advantage in waiting to file suit until these estimates are developed, which can create an opportunity for an insurance adjuster to make a more speedy settlement. LASSEY at 4-5, *Appx.* at 127-128. Insurance companies know plaintiffs may be in a tenuous financial situation and thus "don't need to pay you and your client as much as you and your client need to be paid." *Id.* at 4.

Finally, the experts discuss structured settlements, which are advantageous for large payout cases with long life-expectancies. There are problems with them as well, including putting counsel "in an uncomfortable and perhaps unethical bargaining position with his client for 'up-front' money to pay legal fees." BRODERICK & MERRILL at I-37-39, *Appx.* at 45-47.

E. Conants Did What Plaintiffs Do

O'Meara's statements to and actions on behalf of the Conants were in accord with the advice of New Hampshire experts.

His diligent preparation cannot be faulted – he repeatedly visited all the players, took pictures

and collected evidence, and created the litigation tools necessary to prove damages. Despite pressure from the Conants and Attorney Ganz, O'Meara resisted betraying the Conants' financial pressure by refusing to over-eagerly seek advances. He worked effectively with his opponents, both before and after filing suit. He acted quickly but judiciously. He kept his eye on an expeditious and advantageous settlement, and actually brought it about. The Conants got good representation. The settlement O'Meara produced was the maximum amount available.

O'Meara certainly made some mistakes. He was overly-optimistic about how much the paving company could privately raise for a damage award, began to believe his own rhetoric, allowed the Conants to believe they were likely to get more than the company could realistically pay, and did not adequately prepare them for the possibility of getting less than they hoped. He did not accurately or soon enough gauge his client's anxiety toward him or his fee. He used careless language in issuing his *Dumas* demand, and then did not quickly enough perceive that Davis misunderstood or cleverly misconstrued it. He misdated a letter, although he quickly corrected the mistake. He did not associate with a Pennsylvania attorney, if only to avoid the appearance of carpetbagging, and he underestimated Attorney Ganz's role in advising the Conants. At the end of the snowy February 25 meeting he did not take off his coat and insist that the revised contract be signed by the parties. He let himself be squeezed by deserving clients so that by the time of the Philadelphia mediation, he had no assurance of earning a fee. None of his mistakes however, individually or together, affected his excellent efforts on behalf of the Conants.

But the Conants did what windfall plaintiffs do. *See e.g.*, Susan Bradley, *Sudden Money: Managing a Financial Windfall* (2000). Trading on Anita's tragedy, they inflated their budget, planned Carribean family vacations, doubled the size of their house, installed media and mahogany.

Despite O'Meara's effective representation, when they perceived his fee they complained *he* was greedy and didn't care about them. Then they manipulated their agreement, trying to eliminate O'Meara's contingency and confine him to an hourly rate.

O'Meara reasonably responded by continually adjusting his percentage downward to meet their demands – from 33% in the original agreement, to a "to be negotiated" amount during the Hampton meeting, to a contested $2 million at the end of that day, to 18% at the Philadelphia courthouse, and finally to 13.8% by order of the arbitration panel. Still unsatisfied, and unable to attack the fee in court, the Conants lodged this PCC complaint attempting to disgorge O'Meara's fee entirely, and claim it for themselves.

ARGUMENT PART TWO: Rule 1.2(a), Allegation of Unauthorized Settlement

II. Davis Misconstrued O'Meara's Demand as an Offer

To put Attorney O'Meara's actions in perspective, it is necessary to appreciate the inherent tension between a plaintiff's lawyer and the insurance company's lawyer. These arise out of their respective roles, their client's potential liabilities, and their *own* duties and potential liabilities. Thus among personal injury practitioners – plaintiffs representatives and defendants representatives – there are understood conventions regarding who is the demander, who is the offerer, and who is the acceptor of agreements to settle. The conventions are not arbitrary; they are implicit in the status of the parties.

A. *Dumas* Tension Between Plaintiff's Lawyer and Defendant's Lawyer

"It is well settled that where an insurer, defending a claim on behalf of an insured, negligently and in bad faith fails to effect a settlement within the limits of the insurance policy, and a judgment in excess of such limits results, the insurer has violated a legal duty arising out of the insurance relationship and running in favor of the insured." Annotation, *Insured's Payment of Excess Judgment, or a Portion Thereof, as Prerequisite of Recovery Against Liability Insurer for Wrongful Failure to Settle Claim Against Insured*, 63 A.L.R.3d 627.

Although the doctrine has its roots a century ago, *see Cavanaugh Bros. v. Gen. Acc., Fire & Life Assur. Corp.*, 79 N.H. 186 (1919), in New Hampshire it is known among personal injury lawyers as "Dumas," named for the three decisions that established and refined the cause of action in the 1940s and 1970s. *Dumas v. Hartford Acc. & Indem. Co.*, 92 N.H. 140 (1942); *Dumas v. Hartford Acc. & Indem. Co.*, 94 N.H. 484 (1947); *Dumas v. State Farm Mut. Auto. Ins. Co.*, 111 N.H. 43 (1971) (carrier obligated to exercise reasonable care in defending its insured and settling claims

against it). The same cause of action exists in Pennsylvania, *Birth Ctr. v. St. Paul Companies, Inc.*, 787 A.2d 376 (Pa. 2001), and most other jurisdictions. Annotation, *Duty of Liability Insurer to Settle or Compromise*, 40 A.L.R.2d 168. The reason for the cause of action is to ensure that carriers act in conformity with their commitments to their insureds. *Id.*

In determining whether the insurance company was negligent in failing to settle, scrutiny is aimed at the actions and inactions of the insurance company's lawyer. "The determination of negligence is made by a slow motion rerun of the insurer's actions leading up to the verdict." *Gelinas v. Metro. Prop. & Liab. Ins. Co.*, 131 N.H. 154, 161 (1988) (quotation and citations to *Dumas III* omitted). This includes conduct "during settlement negotiations." *Gelinas*, 131 N.H. at 166, and "a relevant consideration is the advice provided by counsel." Gordon A. Rehnborg, Esq. and Gary M. Burt, Esq., *Personal Injury Practice: Direct Actions Against Carriers*, at 37 (NHBA 1989), *Appx.* at 134, 139 (hereinafter REHNBORG & BURT). Elaine M. Michaud, Esq., *Personal Injury Law & Practice: Ethical Issues of the Tripartite Relationship*, at 319-21 (NHBA 2003), *Appx*. at 130, 131-132 (discussing duties and conflicts between defendant counsel and insurer); BURT & SHAUGHNESSY at 81-82 (recommending appropriate actions of defense counsel in receipt of *Dumas* demand).

This right to recover may be assigned to the tort victim in New Hampshire. "Indeed, that is the common practice." Christine Desmarais-Gordon, Esq. and Michael J. Kenison, Esq., *Handling the Automobile Injury Claim in New Hampshire*, at 144 (NBI 2004), *Appx.* at 107; REHNBORG & BURT at 38; BURT & SHAUGHNESSY at 83 ("Once an excessive verdict exists, the plaintiff will, in all probability, take an assignment from the defendant, and proceed directly against the insurance carrier."); *Allstate Ins. Co. v. Reserve Ins. Co.*, 116 N.H. 806 (1976); *Dumas*, 111 N.H. at 45 ("Dumas has assigned to plaintiff … his rights to recover this excess amount from defendant.");

Annotation, *Assignability of Insured's Right to Recover over Against Liability Insurer for Rejection of Settlement Offer*, 12 A.L.R.3d 1158; *Gray v. Nationwide Mut. Ins. Co.*, 223 A.2d 8 (Pa. 1966).

Accordingly, "the *Dumas* doctrine" is one of the "pockets to look in" for an under-compensated plaintiff. BRODERICK & MERRILL at I-31-32.

In summary, if an insurance company fails to settle a case within the policy limits, and then if the actual defendant (its insured) suffers a verdict in excess of the limit, the insured has a cause of action against its own carrier for failure to settle within the policy limits. The defendant/insured generally assigns its cause of action to the plaintiff/tort-victim, who uses it to satisfy its verdict damages in excess of the policy. Defense counsel's conduct is a measure of the insurance company's good faith.

Because of this, in cases where damages approach or may be in excess of the insured's policy limits, a *Dumas* tension exists between the plaintiff's lawyer and the insurance company's lawyer.

B. Personal Injury Settlements Practice: Plaintiffs Issue Demands, Defendants Make Offers, Plaintiffs Sometimes Accept

The *Dumas* tension is relieved by a practiced three-step conventional choreography between the plaintiff's lawyer and the insurance company's lawyer.

1. Plaintiff's Lawyer's Duty to Make *Dumas* Demand

In a case where liability is near or in excess of available insurance, the plaintiff's attorney has an interest in creating the possibility of an ultimate potential *Dumas* claim, because it would ensure payment beyond the policy limits in the event of a successful verdict. Thus:

> Plaintiff's attorneys, in an attempt to "raise the stakes" for insurers, often send what are known as "Dumas letters" to insurance carriers or the attorneys representing the insured. Such notice of a potential *Dumas* exposure can be a useful tool for plaintiff's counsel, provided the threat of excess exposure is credible.

Mary Ann Dempsey, Esq., David W. Johnston, Esq., and Margaret H. Nelson, Esq., *Emerging Issues in NH Insurance Coverage Law*, at 131 (NBI 2003), *Appx*. at 3. A *Dumas* demand is a "useful tool for plaintiff's counsel" because it puts the insurance company on notice that the value of the case is at or in excess of the policy limits, and that defense counsel may be negligent for not settling for the limits. In his testimony before the hearings committee, O'Meara described this as putting the insurance company in a "*Dumas* box." *4 Hrg.Com.* at 54, 117.

Personal injury CLE instructors strongly urge plaintiff's lawyers to issue demands. John P. Griffith, Esq., John B. Kenison, Esq., and Michael R. Mortimer, Esq., *Gaining the Best Settlement in Auto Injury Cases*, at 67-68 (NBI 2006), *Appx.* at 112, 118-119 (suggesting contents of "demand package"); LASSEY at 3 (explaining crucial role of well-organized and timely demand); R. Peter Taylor, Esq., *Handling the Smaller Personal Injury Case: When to Settle and When to Negotiate*, at 34-35 (NHBA 1996), *Appx.* at 144 (hereinafter TAYLOR) ("Demand letters should always be submitted").

Moreover, because *Dumas* may result in a potential source of damages for an otherwise uncompensated injury, issuing a *Dumas* demand is an obligation of a plaintiff's lawyer. A plaintiff's lawyer who fails to make it probably risks ethics and malpractice exposure. *See Miller v. Byrne*, 916 P.2d 566, 580 (Colo.App. 1995).

Finally, defense lawyers understand that plaintiffs' demands are just that – demands – and that "the plaintiff is not bound by the demand." BURT & SHAUGHNESSY at 81.

2. Defense Makes Offers

In response to the plaintiff's lawyer's demand, insurance company lawyers make offers to settle. Catherine Cuchetti, Francis Murphy, Jr., Esq., and Barry Scotch, Esq., *Adjusting the*

Automobile Injury Claim in New Hampshire, at 114 (NBI 1998), *Appx.* at 89 (hereinafter MURPHY & SCOTCH) (suggesting caution in amount of offer).

> It is generally held [in the context of an un-represented claimant] that the better procedure is to find out directly from the claimant what they are thinking in terms of value. This is similar to the procedure in which the plaintiff's attorney will submit a demand to which the adjuster then replies, usually with some type of settlement offer. … If the claimant then expresses a figure, the adjuster can decide whether to make an offer or not, depending upon whether the amount of the claimant's demand seems to be within reasonable limits or not.

MURPHY & SCOTCH at 114-15; TAYLOR at 35 (suggestions for determining amount defense attorney should offer).

3. Plaintiffs May Accept Offers

The third step in the settlement choreography is that plaintiffs may accept defendants' offers. MURPHY & SCOTCH at 121.

C. Conventional Use of Language: "Demand," "Offer," and "Accept"

Who is the demander, the offerer, and the acceptor is reflected by the conventional language applied to each of these steps in the settlements process. Practitioners, court decisions, and court rules all use the same language to apply to the expected roles and actions of each party.

Thus, throughout the CLE literature, *demands* come from the plaintiff, *offers* come from the defendant, and *acceptance* is the prerogative of the plaintiff. MURPHY & SCOTCH at 115, 117, 119-22 (repeatedly using word "demand" to describe action of plaintiff, and "offer" to describe action of defendant); BURT & SHAUGHNESSY at 10-11, 81-82; TAYOR at 32 (discussing high demands and low offers), at 34-35 (how plaintiff should pitch demand, how defendant should estimate offer).

For example, in their CLE on "Adjusting the Automobile Injury Claim in New Hampshire, insurance adjuster Catherine Cuchetti, and attorneys Francis Murphy and Barry Scotch present a

number of illustrative settlement vignettes:

> An attorney presents a *demand* for $4000 for instance and after some discussion of the case, the adjuster *offers* $1500. The attorney replies that he will submit the *offer* to his client but is quite certain the client will not *accept*. He will then inquire whether or not the adjuster would be willing to pay $2000. If the adjuster responds in the affirmative, whether he or she intended to, they have just increased their *offer* to $2000. If the case follows what seems to be the usual course, the attorney will come back and say that he couldn't get his client to *accept* the $2000, but he did secure[] his client's approval of $2500. Since the difference between the *offer* and the *demand* is only $500, the adjuster should not let such a small difference stand in the way of settlement.

MURPHY & SCOTCH at 121 (emphasis added). Regardless of the specific lesson the CLE presenters were imparting, the language they use is instructive. Plaintiff makes a demand, defendant makes an offer, which plaintiffs may then accept.

This Court likewise uses the conventional language to identify the parties and their expected actions. In *Huguelet v. Allstate Ins. Co.*, 141 N.H. 777 (1997), for instance, the plaintiff was injured in a car accident. Her insurance company mailed her a check, which she cashed. Later she discovered more injuries, and argued that simply cashing the check should not be considered a settlement. In deciding the matter, this Court noted that the insurance company "*offered* the plaintiff $525 to settle the claim." *Huguelet* at 778 (emphasis added); *see also*, *Gelinas v. Metro. Prop. & Liab. Ins. Co.*, 131 N.H. 154, 157 (1988) ("Before and during the tort trial, [the insurance company] made settlement *offers* ranging from $15,000 to $40,000. The parties could not reach a settlement, however, and the case went to the jury.") (emphasis added); *Smith v. Farm Bureau Ins. Co. of Concord*, 98 N.H. 420, 423 (1953) (insurance company's "letter to the plaintiffs was not an election to repair, but an *offer* to settle for the lower estimate unless the plaintiffs would permit repair in the place of the defendant's choice") (emphasis added); *Davidson v. Am. Cent. Ins. Co.*, 80 N.H. 552,

554 (1923) ("[t]here was in effect an *offer* to pay the plaintiff's loss in full; the sole matter in dispute being the amount of that loss") ("at the time of the *offer* the defendants had knowledge that the car was incumbered") (emphasis added). There is no known modern New Hampshire insurance settlement case where the language of offer is used in anything other than this conventional fashion.

Insurance settlement cases in Pennsylvania show the same conventional use of the words demand, offer, and acceptance. *See*, *e.g.*, *Brown v. Progressive Ins. Co.*, 860 A.2d 493 (Pa. Super. Court. 2004) (repeated use of "offer" referring to communications by defendant insurance company); *Patitucci v. Laverty & Pino*, (Pa. Com. Pl. Feb. 28, 1987) vacated sub nom. *Patitucci v. Laverty*, 548 A.2d 646 (Pa.Super. 1988) ("Plaintiff makes a *demand* of policy limits of $25,000. Defendant makes an *offer* of $2,000.") (emphasis added); *Smaligo v. Fireman's Fund Ins. Co*. 247 A.2d 577, 579 (Pa. 1968) (repeated use of "offer" referring to communications by defendant insurance company); *Gold v. Loyal Protective Ins. Co.*, 22 Pa. D. & C. 188 (Com. Pl. 1934) ("[T]he *offer* of compromise was by reason of the importunity of the Insurance Department. But the *offer* was not *accepted*. There is no averment in the statement that defendant gave evasive answers to plaintiff's *demand* for payment.") (emphasis added).

The federal rules of civil procedure also use the conventional language to identify the parties and their expected actions in settlement:

> At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an *offer* to allow judgment on specified terms.… If, within 14 days after being served, the opposing party serves written notice *accepting* the offer, either party may then file the *offer* and notice of *acceptance*.… An *unaccepted offer* is considered withdrawn, but it does not preclude a later *offer*.… When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an *offer* of judgment.

FED.R.CIV.P. 68. Use of the conventional language in federal rules shows that the conventional language is universal, and not somehow unique to New Hampshire practice.

New Hampshire superior court rules also use the conventional language to identify the parties and their expected actions in settlement:

> In proper cases, the defendant may pay into Court any sum of money which he admits to be due…; and, if the plaintiff shall refuse to *accept* the same with his costs, in full satisfaction of his claim, such sum shall be struck out of the declaration.

N.H.SUPER.CT.R. 60.

Although there are instances of loose language in the legal literature, personal injury litigators understand that a plaintiff's only asset is their claim and thus they make demands on a defendant. Defendants are liable, and thus they offer to settle. Plaintiffs may accept the offer, or go to trial. Turning the language upside-down is not logical – plaintiffs have nothing to offer.

D. Attorney O'Meara Used Language Conventionally, Davis Turned it Upside-Down, and the PCC Repeats the Error

Throughout his dealings with his clients, opposing counsel, the federal court, and before the arbitration panel and the Hearings Committee, Attorney O'Meara consistently used the language of "demand," "offer," and "acceptance" with their meanings that are conventional to personal injury settlements practice.

1. O'Meara Used Conventional Language

In his January 11, 2006 letter to Davis, O'Meara wrote, "we repeat our *demand* for settlement of this case at your insured's policy limits of $11,000,000. LETTER FROM O'MEARA TO DAVIS (Jan. 11, 2006), *Exh. 13* (emphasis added). After he realized Davis's mischaracterization of his demand as an offer, he wrote "my clients have withdrawn their settlement *demand* for the policy limits of

$11,000,000." LETTER FROM O'MEARA TO DAVIS (Jan. 24, 2006), *Exh. 16* (emphasis added). During their January 24 phone call, O'Meara told Davis he could not "*accept*" the insurance company's "*offer*." *4 Hrg.Com.* at 58; *5 Arb.Trn.* at 19 (emphasis added). In his objection to Davis's motion to enforce in federal court, O'Meara called his communications to Davis a *demand* and an "invitation" to "make an offer," and explained the reason was to put the insurance company into a Dumas box. MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' OBJECTION TO DEFENDANTS' MOTION TO ENFORCE SETTLEMENT AGREEMENT (Feb. 6, 2006), *Exh. 29* (emphasis added). He insisted on those same characterizations in his testimony. *See e.g.*, *4 Hrg.Com.* at 114. Some of O'Meara's language is quoted by the PCC in its brief. PCC BRIEF at 7, 9. When O'Meara heard his own clients use the language improperly, he attempted to educate them. FINDINGS OF FACT AND RULINGS OF LAW ¶ 40, *PCC 25.*

2. Other Lawyers Used Conventional Language

Attorney Ganz and the other lawyers involved in the case used the words conventionally as well. Craig Styer, the paving company's (rather than the insurance company's) lawyer, was involved in consummating the settlement because the federal mediation resulted in $500,000 direct liability in excess of insurance coverage. In an email he wrote to the other lawyers he said the paving company "will leave its *offer* to [settle the] case based upon its contribution of $500,000 until" a time certain, and warned that if timely acceptance is not received, "the *offer*" will be withdrawn. EMAIL FROM STYER TO DAVIS, O'MEARA, GANZ, GARFUNKEL (Mar. 2, 2006, 6:11PM), *Exh. 44* (emphasis added). Likewise, Attorney Ganz, then helping the Conants finalize the settlement, wrote two emails to Styer in which he expressed the Conant's desire "to settle the case…for the $11.5 million *offered*." EMAIL FROM GANZ TO STYER (Mar. 3, 2006, 6:49AM and 10:48AM), *Exh. 44* (emphasis added).

3. Davis Turned Conventional Language Upside-Down

Davis, however, turned the conventional language upside-down. He backwardly called O'Meara's communications an "offer," and his own "acceptance." During their January 24 phone call he said he "*accepted* the plaintiffs' offer." *3 Hrg.Com.* at 27 (emphasis added). In his letter the same day Davis wrote he was confirming his "*acceptance*" of O'Meara's "*offer*." LETTER FROM DAVIS TO O'MEARA (Jan. 24, 2006), *Exh. 15* (emphasis added). In his federal court pleading Davis alleged that O'Meara had made an "*offer* to settle" and that Davis had indicated "*acceptance* by the defendants." MOTION TO ENFORCE SETTLEMENT AGREEMENT (Jan. 31 2006), *Exh. 25* (emphasis added). In his testimony Davis repeated the upside-down language. *3 Hrg.Com.* at 44-45. Whether this was inadvertent or a deliberate misconstruction to gain an advantage is not known.

4. PCC Repeated Davis's Error

It may be understandable that the Conants were not familiar with terms of art used by lawyers in personal injury practice, and used language loosely. FINDINGS OF FACT AND RULINGS OF LAW ¶¶ 43, 44, *PCC 25*. But sadly the PCC sometimes repeats Davis's misconstruction.

At times the PCC has used the language in its conventional fashion. FINDINGS OF FACT AND RULINGS OF LAW ¶ 27, *PCC 25* (O'Meara's "demand"); *Id.* at ¶ 35 (O'Meara's "demand"); *3 Hrg.Com.* at 43 (Davis's "offer"); *4 Hrg.Com.* at 114 (O'Meara's "demand"); *4 Hrg.Com.* at 133 (O'Meara's "demand to settle"); PCC BRF. at 16 ("the defendants offered to settle"). But at others it has adopted Davis's bastardization. FINDINGS OF FACT AND RULINGS OF LAW ¶ 26, *PCC 25* (O'Meara's "offer"); *Id.* ¶ 33 (O'Meara's "offer," Davis's "acceptance"); *Id.* at ¶ 34 (O'Meara's "offer," Davis's "acceptance"); *Id.* ¶ 39 (O'Meara's "offer"); *Id.* ¶ 47 (O'Meara's "offer"); *Id.* ¶ 129 (O'Meara's "offer"); *Id.* ¶ 132 (O'Meara's "offer"); *Id.* ¶ 134 (Davis's "acceptance"); *Id.* ¶ 135

(O'Meara's "offer"); PCC BRF. at 19 ("O'Meara made a settlement demand").

At other times the PCC seems to use the words "demand" and "offer" interchangeably, without regard to their conventional meanings in personal injury practice. FINDINGS OF FACT AND RULINGS OF LAW ¶ 27, *PCC 32* ("O'Meara did not communicate with Mr. Davis that his December 8 *demand* to settle for the policy limits was revoked, or that any other subsequent *offers* to settle for the policy limits were withdrawn.") (emphasis added).

But most notably, the PCC repeatedly uses the backward language throughout its brief. PCC BRF. at 6 ("O'Meara's offer to settle"); PCC BRF. at 8 ("O'Meara had made an offer to settle") ("specifically his offer to settle") ("O'Meara's error in offering to settle"); PCC BRF. at 19 ("O'Meara … further offered to settle"); PCC BRF. at 22 (O'Meara's "previous offers to settle") ("Cincinnati Insurance accepted the Conant's offer to settle").

Because the PCC's usage of technical language is not consistent, O'Meara does not accuse it of perfidy. Nonetheless, O'Meara believes it shows inaccurate contextualization of O'Meara's actions, betrays a lack of basic understanding of personal injury settlements practice, and is a prejudgement that O'Meara did something wrong.

E. Attorney O'Meara Issued a Demand, not an Offer

Attorney O'Meara represented plaintiffs. Plaintiffs have nothing to offer, and he did not and could not make an offer. Rather he made a *Dumas* demand. Davis then misconstrued it – either inadvertently or cleverly – as an offer. Considering O'Meara's demand an offer ignores both his intent and well-accepted personal injury settlements practice. It simply was not an offer and should not be misconstrued as one.

III. O'Meara Did not Settle, With or Without Authority

The PCC alleges that during a conversation with Davis on January 24, Attorney O'Meara settled without authority. O'Meara did not settle, there was no deal with Davis on the phone, and at most O'Meara made a demand which Davis misconstrued as an offer.

A. Essentials of a Binding Settlement

1. Settlements are Contracts

"Settlement agreements are contractual in nature and, therefore, are generally governed by principles of contract law." *Poland v. Twomey*, 156 N.H. 412, 414 (2007). Thus "[a] valid and enforceable settlement, like any contract, requires offer, acceptance, consideration and mutual assent." *Hogan Family Enterprises, Ltd. v. Town of Rye*, 157 N.H. 453, 456 (2008).

2. Offer

"An offer is a statement by the offeror of what he will give in return for some promise or act of the offeree." *Starr Farm Beach Campowners Ass'n, Inc. v. Boylan*, 811 A.2d 155, 158-59 (Vt. 2002) (quotation and citation omitted). "An offer must be definite and certain." 17A AM. JUR. 2d *Contracts* § 47.

"[A] mere expression of intention or general willingness to do something … does not amount to an offer." *Searles v. Trustees of St. Joseph's Coll.*, 695 A.2d 1206, 1212 (Me.1997) (quotation and citation omitted). The First Circuit held in *Trifiro v. New York Life Ins. Co.*, 845 F.2d 30, 32 (1st Cir. 1988), that a prospective purchaser's letter expressing an interest in buying land and enclosing a $150,000 deposit was not sufficiently definite and certain and thus "did not even constitute an offer but only an interest in making an offer." Even in Pennsylvania, from where Attorney Davis hails:

> A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent. Whether a statement is intended as an offer must be examined in light of the surrounding circumstances. A request for bids or an invitation for others to make an offer is not an offer.

Reed v. Pittsburgh Bd. of Pub. Educ., 862 A.2d 131, 135 (Pa. Commw. 2004) (quoting and citing RESTATEMENT (SECOND) OF CONTRACTS § 26 (1979), and *Pennsylvania Standard Civil Jury Instructions*, PA. SSJI (Civ) § 15.00(A) (rev. January, 2003)).

3. Acceptance

"[A]n acceptance, in order to be effective, must be positive and unambiguous." 2 WILLISTON ON CONTRACTS § 6:10 (4th ed.); *Kansas Heart Hosp., L.L.C. v. Idbeis*, 184 P.3d 866, 888 (2008) ("It is well established that, in order to create a contract, an acceptance must be unconditional and unequivocal."); *Leigh v. Smith*, 86 A.2d 567, 567 (Conn. 1952) ("To create a contract, acceptance must be unequivocal."). "[A]n acceptance after an effective revocation of an offer is ineffective. 17A AM. JUR. 2d *Contracts* § 67.

4. Meeting of the Minds

"[T]o form a binding contract," there "must be mutual assent or a meeting of the minds on all the essential elements or terms." 17A AM. JUR. 2d *Contracts* § 30.

> In order for a contract to be formed there must be a meeting of the minds as to the terms thereof. The parties must have the same understanding of the terms of the contract and must manifest an intention … to be bound by the contract. Mere mental assent is not sufficient; a "meeting of the minds" requires that the agreement be manifest.

Fleet Bank-NH v. Christy's Table, Inc., 141 N.H. 285, 287-88 (1996).

5. Written Offer, Written Acceptance

When an offer requires a written acceptance, to form a contract the acceptance must be in writing. This is so even in Pennsylvania. *See*, *Steinke v. Sungard Fin. Sys., Inc.*, 121 F.3d 763, 767, 771 (1st Cir. 1997).

B. Attorney O'Meara Did not Settle

By accusing him of unauthorized settlement, it appears that the PCC understands O'Meara's demand letters, his January 24 phone conversation with Davis, and both lawyers' letters following-up on the phone call, as collectively constituting an unauthorized settlement of the Conant's case. For a long list of reasons, that is simply not so.

First, it is manifest that settlement did not occur until after the federal court mediation. If settlement had already occurred in January, nearly everything thereafter would have been superfluous, including the February 25 snowy meeting and the February 27 mediation. The parties obviously considered those necessary, however, as demonstrated by all of them having shown up in Hampton and Philadelphia.

Second, the federal court mediation session lasted 6½ hours. That's a long time, and shows it was not a perfunctory inking of papers. The parties learned during the session that the defendant would face bankruptcy if ordered to directly compensate the Conants beyond $500,000. All the congregants testified that real bargaining took place, complete with high demands and low offers, room-to-room visits by the mediator, calculation of net payouts after fees, costs and liens, and direct conversations among the parties. And nothing was signed. Even Davis was not so confident in his position – why else would he participate, negotiate, and then offer $500,000 more than the policy limits out of company assets.

Third, it is undisputed that the actual signing of papers was consummated by the Conants through substitute counsel, after O'Meara was fired, in early March.

Fourth, during the mediation "[t]he court determined that there was risk to defendant of exposure to liability beyond the extent of the available insurance coverage." ORDER ¶ 8 (Apr. 25, 2006), *Exh. 50*. Although Davis's motion to enforce was not ruled on, the court's finding suggests there was some good chance that it would be denied. If the motion were clearly going to be granted, the defendant would not have any "exposure to liability beyond the extent of the available insurance coverage." The finding undermines any claim that O'Meara had already settled.

Fifth, O'Meara's *Dumas* demands did not cause the Conants any prejudice. Whatever he said in making the demand, it did not affect the nature or amount of the ultimate settlement. No bargaining power was lost and no crucial facts or legal positions were conceded. There was a cap on the maximum amount of money available – $11 million in insurance plus $500,000 in direct cash – and nothing O'Meara did or said detracted from that.

Sixth, as noted, O'Meara made only a demand. A demand is a solicitation for an offer, not an offer. At most O'Meara made "a mere expression of intention or general willingness to do something [which] does not amount to an offer." *Searles*, 695 A.2d at 1212. Thus Davis's purported "acceptance" did not create a contract.

Seventh, even if O'Meara's demand can be construed as an offer, during the January 24 phone call O'Meara unequivocally withdrew it. Thus by the time of Davis's same-date letter following-up on the phone call and claiming to accept, the offer had already been withdrawn.

Eighth, Davis's claim that he accepted an offer, and thus created a binding agreement, is premised on his phone conversation with O'Meara, and the fact that Davis proudly "beat him to the

punch." *3 Hrg.Com.* at 44. Talking first and fastest, however, is not the law of contract. Contract requires firm and definite offers, followed by positive and unambiguous acceptances, which must manifest a meeting of the minds on the essential terms. There was none of that here.

Ninth, there was no meeting of the minds on the consideration for settlement. In O'Meara's demand letter, he warned, "[i]f said limits are *not* paid," the Conants will "proceed to trial." *Exh. 11*. (emphasis added). But O'Meara did not promise that if the limits *are* paid the Conants will *not* go to trial, or that if the limits are offered the Conants would accept it, or that the Conants would issue a release of liability. What the Conants would give up to the defendants is an essential term of such an agreement, yet there is no evidence of a bargain. Thus there was no binding agreement to settle.

Tenth, there was nothing in writing. Both Davis and O'Meara knew and agreed that offers and acceptances were to be in writing. The very first written communication was Davis's January 24 fax-letter claiming a deal had been made on the phone. Because there was no written offer, there can be no contract.

Eleventh, in claiming a deal had been reached on the phone on January 24, Davis assumed O'Meara had authority to settle. But because O'Meara thought he was only making a demand, he had not yet broached the topic of settlement authority with his clients, and had no such authority.

Accordingly, it cannot be reasonably argued that O'Meara's *Dumas* demand constituted an offer, nor that settlement was reached in January or anytime before the mediation.

C. O'Meara Had Authority to Make a *Dumas* Demand

1. O'Meara had No Authority to Settle

It is easily conceded that (before February 27 in Philadelphia) Attorney O'Meara lacked authority to *settle*.

When an attorney settles a claim on a client's behalf the settlement in most cases is binding. *See e.g.*, *Manchester Hous. Authority . v. Zyla*, 118 N.H. 268, 269 (1978) (in absence of showing that counsel acted outside scope of authority, settlement enforced). But when the lawyer has no authority, a settlement will not be enforced. *Ducey v. Corey*, 116 N.H. 163 (1976). The lawyer-authority cases recognize the severity of the rule.

Because of this, insurance company representatives know that authority to settle should not be assumed. When an adjuster is "dealing with the [plaintiff's] attorney, he or she is dealing with a limited agent who normally has no authority to settle the case without the specific authorization from his client." MURPHY & SCOTCH at 117.

Also because of this, plaintiff's litigation experts strongly urge lawyers to "to have *written* authority from your client before concluding a settlement," to "communicat[e] all settlement proposals in *writing* to the client," and if "proposals are rejected by a client … to get the rejection in *writing*." BRODERICK & MERRILL at I-33-34, *Appx.* at 42-43 (emphasis in original). Insurance companies know that plaintiff's lawyers generally have to consult their clients before accepting an offer. MURPHY & SCOTCH at 121.

It would therefore not be credible to believe that a practiced insurance defense attorney would neglect caution, and blithely assume that a poorly-worded *Dumas* demand carries the authority to settle – especially here when liability amounts are so many millions. When faced with Davis doing

just that, O'Meara was caught by surprise and did not immediately notice what had happened. But when O'Meara got Davis's letter referencing the conversation, he recognized the misconstruction, and immediately and vociferously objected.

O'Meara never had authority to settle, and never settled.

2. O'Meara had Authority to Issue *Dumas* Demand

Because there was never a settlement, and it is conceded that O'Meara did not have authority to settle, the only issue is whether he had authority to issue a *Dumas* demand before it was explicitly revoked by Jim Conant on January 13. For two reasons, he did.

First, the representation agreement signed by O'Meara and Jim Conant in June 2005 provided that "[t]he client authorizes and directs O'MEARA LAW, P.L.LC. it's [sic] members and staff to take all actions which are reasonable and necessary in this matter." O'MEARA LAW FEE AGREEMENT ¶ B, *Exh. 23*. Making a *Dumas* demand preserves a client's ability to later make a *Dumas* claim, and thus is "reasonable and necessary" to the representation. Moreover, absent a misconstruction such as Davis tried here, there is no down-side to making a *Dumas* demand, and therefore it is not a "significant decision" under the representation agreement on which the client "will be consulted in advance." *Id.*

Second, O'Meara had a duty to make a *Dumas* demand, especially given the facts here. If a client achieved a verdict in excess of available insurance, but the insurance company had negligently failed to previously make an offer for the policy limits – a *Dumas* situation – yet the client was barred from recovering the remainder of the verdict from the carrier because the lawyer waived the *Dumas* cause of action by not making a demand, that would constitute both malpractice and a violation of the lawyer's ethical duties. Thus New Hampshire personal injury litigation experts urge

lawyers to make a *Dumas* demand whenever they have a case where it looks like recovery may be near or in excess of available insurance coverage.

D. Reasonableness of Demand

The PCC forwards a novel argument against O'Meara's claim that he made a *Dumas* demand. The PCC writes:

> If Mr. O'Meara was proceeding pursuant to *Dumas* as he suggests, then he must have been representing to Mr. Davis that the Conants were putting forth a reasonable demand and that their case could be settled by Cincinnati Insurance for an amount within the policy limits.

PCC BRF. at 22

Deconstructing this, the PCC is saying that when a plaintiff simply makes a *Dumas* demand, that necessarily and simultaneously means that: 1) the demand is reasonable, and 2) the plaintiff is ready to settle.

There is a lot wrong with this. First, a plaintiff's lawyer has a duty to make a *Dumas* demand. Fulfilling that duty does not represent anything to anybody.

Second, there is no connection between the amount of the demand and what might be "reasonable." *Dumas* requires only that the policy limits be demanded. It does not require the amount be reasonable. At the time of a *Dumas* demand early in the litigation, moreover, it is unlikely that the plaintiff's lawyer has expert reports that might provide any basis to determine reasonableness.

Third, what is a "reasonable demand," and from whose point of view? Enough to compensate for all injuries? What the plaintiff or her lawyer privately hopes the case might pay? What the insurance company hopes it won't pay? Something in between?

Fourth, there is absolutely no connection between making a demand and signing the dotted

line on a release. A demand is a routine, early, and necessary part of any litigation. Settlement, on the other hand, is at the core of the client prerogative – it is, after all, the client's injury. By asserting that making a *Dumas* demand means "the plaintiff is ready to settle," to a disturbing degree the PCC conflates the routine with the profound.

IV. Allegation Should be Dismissed

O'Meara did not settle without authority, and did not violate Rule 1.2(a). There is not clear and convincing evidence to support the allegation, and it should be dismissed. *In re Wyatt's Case*, 159 N.H. 285, 297 (2009) ("The PCC's findings of violations of the Conduct Rules must be supported by clear and convincing evidence. Sup.Ct. R. 37A(III)(d)(2)(C). In attorney discipline matters, we defer to the PCC's factual findings if supported by the record, but retain ultimate authority to determine whether, on the facts found, a violation of the rules governing attorney conduct has occurred.").

ARGUMENT PART THREE: Rule 1.7, Allegation of Conflicts of Interest

V. Allegations do Not Pose a "Significant Risk" of the Conant's Interests Ever Being "Materially Limited" by O'Meara's Interest

A. No Such Thing as a Pure Attorney-Client Relationship

There is no such thing as a pure, conflict-of-interest-free lawyer-client relationship. Regardless of the type of fee agreement, always in the background there is a contract waiting to be enforced.

> A direct conflict of interest exists between attorneys' desires to make money and clients' interests in receiving quality legal work at the lowest possible cost. … Except in pro bono cases, a lawyer will always have some level of cash conflict with the client (or third party payor) when the lawyer charges a fee.

William J. Gamble, Jr., *Cash Conflicts: Reconciling Conflicts of Interest Between Attorneys' Fees and the Needs of the Client*, 23 J. LEGAL PROF. 347, 347, 357 (1999). Even in *pro bono* cases, when handled by an organizational litigator, there may be institutional or ideological interests that are not necessarily shared by an individual client.

Contingent fee arrangements in civil cases help align client and attorney interests.

> There is a general understanding between attornies and their clients, that the former shall retain their fees and disbursements out of the sum that may be recovered of the opposite party. And it is not uncommon that attornies commence actions for poor people and make advances of money necessary to the prosecution of the suit upon the credit of the cause. Thus a person in indigent circumstances is enabled to obtain justice in cases where, without such aid, he would be unable to enforce a just claim. And we have no hesitation in adopting the language of Lord Kenyon, on this subject, and saying 'that the convenience, good sense, and justice of the thing require' that attornies, should have a lien, upon the judgments they obtain for their clients.

Shapley v. Bellows, 4 N.H. 347, 355 (1828) (spelling in original); *see also*, Catherine Cuchetti, Francis Murphy, Jr., Esq., and Barry Scotch, Esq., *Adjusting the Automobile Injury Claim in New Hampshire*, at 118 (NBI 1998), *Appx.* at 89, 100.

Fee re-negotiation during representation is commonplace, Annotation, *Validity and Effect of Contract for Attorney's Compensation Made after Inception of Attorney-client Relationship*, 13 A.L.R.3d 701, and is not an ethical disqualification.

Rule 1.7, of which Attorney O'Meara is accused of violating, provides that a lawyer may not represent a client if "there is a significant risk that the representation of [the] client[] will be materially limited by … a personal interest of the lawyer." N.H. R. PROF. CONDUCT 1.7(a)(2).

Of course a well-functioning attorney-client relationship with a large and fully-paid up-front retainer may not create a "significant risk" of being "materially limited" by the attorney's money-making interest. But the moment a current client complains about a fee, especially one not collectible until sometime in the future, and most especially a really large-looking fee when there is a deserving plaintiff, the bubbling conflict is an existential fact for any working lawyer. When, as here, a fee is being re-negotiated during the representation, some sort of arms-length conduct is inescapable.

As can be discerned from the listing below, the PCC's allegations are merely the daily manifestations of that inherent conflict. Each of them presented uncomfortable feelings, but none posed a "significant risk" that the Conant's interest was ever "materially limited" by O'Meara's. The PCC has succeeded in shining a light on the workaday realities of personal injury practice, and has perceptibly suggested how they brush up against the rules prescribing conflicts. But imposing a sanction pretends either a purity which ignores the inherent nature of the lawyer-client business relationship, or a wistfulness for champerty. *Butler v. Legro*, 62 N.H. 350, 352 (1882) ("The contract of the attorney with Dominique was, in effect, to prosecute a suit in which he had no previous interest, for persons who had no means to pay for his services, and receive as compensation all that might be recovered not in excess of $1,000, regardless of labor, expense, or time bestowed.

Agreements of this kind are contrary to public justice and professional duty, tend to extortion and fraud, and are champertous and void.").

B. Difficulty Discerning Precise Nature of PCC's Allegations

Unfortunately, the PCC's brief does not make clear what precise conduct it considers conflicts of interest. Its allegations are presented in a general manner, using sinister-sounding facts and relying on supposedly self-evident conclusions. But the PCC never draws together exactly when or how the client's interest was going east simultaneous with the lawyer's interest going west. Without such precision, the exact nature of the allegations are unclear.

To address this, listed below Attorney O'Meara first parses each of the statements the PCC makes in its brief. As much as possible he follows the order of the PCC's paragraphs.

Second, he raises preservation exceptions to each. *Wyatt's Case*, 159 N.H. 285, 306 (2009) (PCC waived allegations when not fully explained in its brief). O'Meara considers adequate preservation to require a statement of the issue in two places before this Court: 1) In the Questions Presented,[8] page 1 of the PCC's brief; and 2) In the second half of the PCC's Petition beginning on page 28 entitled "Rulings of Law," which purports to list the specific allegations. PETITION FOR THREE YEAR SUSPENSION FROM THE PRACTICE OF LAW ¶¶ M4-M7 at 28-31 (Feb. 14, 2011) (hereinafter PETITION). The first half of the PCC's Petition is headlined "Factual Findings." *Id.* ¶¶L1-L111 at 3-28. It appears to be only a listing of facts found by the PCC and not an attempt to specify that any particular fact constitutes the charged conduct, and thus does not operate as preservation of any *allegation*.

[8] The Questions Presented page of the PCC's Brief violates rules of this Court, which require: "After each statement of a question presented, counsel shall make specific reference to the volume and page of the transcript where the issue was raised and where an objection was made, or to the pleading which raised the issue." N.H. SUP.CT. R. 16(3)(b).

Third, he refutes each allegation. He explains how, during each allegedly conflictual transaction the PCC identifies, the client's and the lawyer's interests were well aligned. Fourth, for each allegation he suggests there was no violation of the rules.

While perhaps tedious, O'Meara repeats this pattern for each of the eight allegations he can discern.

VI. List of Allegations of Conflicts; Refutation of Each

A. Allegation: Having to Salvage a Settled Claim

1. Nature of PCC's Allegation

The PCC alleges that "[a] conflict emerged when Mr. O'Meara's interest in keeping the case and maximizing his fee collided with the Conants' interest in salvaging a claim that had been compromised by Mr. O'Meara's unauthorized settlement demand." PCC BRF. at 23.

It is not clear whether this is an allegation of a specific ethical lapse, or whether it is merely a statement of the PCC's general outlook.

2. Allegation is Not Preserved

The allegation is not preserved in this Court. No mention is made of it in that portion of the PCC's Petition listing specific allegations. PETITION ¶¶ M4-M7 at 28-31. The question does appear, however, in the Questions Presented portion of the PCC's brief. PCC BRF. at 1.

3. Allegation Does Not State a Conflict of Interest

To the extent it is a specific allegation, there are several problems with it.

First, the PCC assumes the Conants had to "salvage" their claim. O'Meara did not settle the Conant's claim until the February 27 mediation, never before that. Moreover, the federal court never acted on Davis's motion to enforce, and during the mediation the federal mediator-judge indicated that it would have probably been denied. Thus there was never a settlement, and therefore never anything that had to be undone or "salvaged."

Second, the PCC asserts that the Conants had to salvage their claim which it alleges O'Meara had "compromised." There is no allegation however, and no such allegation could be sustained because all the money that could be paid was paid, that O'Meara ever prejudiced the Conant's claim,

regardless of what he is alleged to have done. Therefore O'Meara did not "compromise" anything.

Third, the PCC says the Conants claim which needed salvaging was compromised by O'Meara's "unauthorized settlement demand." As has been discussed at length above, a *demand* is inherently authorized by a lawyer's ethical duty, and was also specifically authorized by the fee agreement here. Thus there was never any "unauthorized settlement demand" which could have compromised anything.

Fourth, the PCC alleges that O'Meara's "interest in keeping the case and maximizing his fee collided with the Conants' … claim." The PCC makes no attempt to explain how O'Meara's interest was any different from the Conant's, nor does it say how or when the supposed divergence "emerged." Rather, to the extent it is an issue, the PCC's statement of it makes clear that O'Meara's interest and the Conant's interest were aligned. O'Meara's fee would be maximized only if the Conant's claim were maximized. Thus there was no collision of interests.

4. Allegation Should be Dismissed

To the extent the allegation is preserved, it fails to state an issue. There is not clear and convincing evidence to support the allegation, and it should be dismissed.

B. Allegation: Settling Without Authority

1. Nature of PCC's Allegation

The PCC alleges that "[s]hortly after the Conants learned that Mr. O'Meara had offered to settle their case for an inadequate amount and without any authority to do so, James Conant suggested to Mr. O'Meara that he should consider reducing his fee." PCC BRF. at 23.

It is not clear whether this is an allegation of a specific ethical lapse, or whether it is merely a statement of the PCC's view of the facts.

2. Allegation is Not Preserved

The allegation is not preserved in this Court. No mention is made of it in that portion of the PCC's Petition listing specific allegations. PETITION ¶¶ M4-M7 at 28-31. It also does not appear in the Questions Presented portion of the PCC's brief. PCC BRF. at 1.

3. Allegation Does Not State a Conflict of Interest

To the extent it is a specific allegation, there are several problems with it.

First, it perpetuates and assumes the validity of attorney Davis's upside-down language, discussed at length above. It calls what O'Meara did an "offer to settle," when what he did was make a *Dumas* demand designed to invite an offer and set up the company for a failure to make one.

Second, it subsumes an allegation that O'Meara settled the claim, which he did not, as it was not settled until after the federal mediation.

Third, to the extent that O'Meara allegedly settled, it suggests that the $11 million policy limits is an "inadequate amount." Eleven million dollars is a lot of money.

Fourth, whether $11 million is "inadequate" cannot be known. Is adequacy measured by the life care plans, which are plaintiff's tools for persuasion of a jury and are necessarily magnified as much as possible? And if so, which life care plan? Is it instead measured by a prediction of what a jury might ultimately award? And if so, how much is that? Is it maybe measured by the total available from the defendant, which was $11.5 million? And if so, is $11 million that far off the mark? Or is it measured perhaps by the hopes and expectations of the Conants, which appear to have been unreasonably inflated?

Fifth, the fact that Jim suggested that O'Meara should consider reducing his fee is the behavior expected by plaintiffs when their contingency lawyer is on the cusp of getting a big payout.

As noted above, a client complaint does not a conflict make.

4. Allegation Should be Dismissed

To the extent the allegation is preserved, it fails to state an issue. There is not clear and convincing evidence to support the allegation, and it should be dismissed.

C. Allegation: Promising to Reduce his Fee

1. Nature of PCC's Allegation

The PCC alleges that after Jim "suggested to Mr. O'Meara that he should consider reducing his fee," and "knowing that the Conants had a potential claim against him for professional negligence and that they had the right to terminate him at any time, assured the Conants he would reduce his fee." PCC BRF. at 23-24.

It is not clear whether this is an allegation of a specific ethical lapse, or whether it is merely a statement of the PCC's view of the facts.

2. Allegation is Not Preserved

The allegation is not preserved in this Court. No mention is made of it in that portion of the PCC's Petition listing specific allegations. PETITION ¶¶ M4-M7 at 28-31. It also does not appear in the Questions Presented portion of the PCC's brief. PCC BRF. at 1.

3. Allegation Does Not State a Conflict of Interest

To the extent it is a specific allegation, there are several problems with it.

First, it assumes the Conants "had a potential claim … for professional negligence" against O'Meara.

> To establish legal malpractice, a plaintiff must prove: (1) that an attorney-client relationship existed, which placed a duty upon the attorney to exercise reasonable professional care, skill and knowledge in providing legal services to that client; (2)

a breach of that duty; and (3) resultant harm legally caused by that breach. *Carbone v. Tierney*, 151 N.H. 521, 527 (2004). O'Meara clearly had a duty to the Conants, but given the record of O'Meara's preparation of their case for trial or settlement, it would be nearly inconceivable to prove a breach. An even steeper climb would be to show a "resultant harm." At least in part through his diligence, O'Meara brought about a settlement for the maximum cash available. Nothing O'Meara did at any time lessened that amount by even a penny. Proving prejudice would be insurmountable. The PCC simply cannot assume the Conants had a viable malpractice action.

Second, although a client can terminate a lawyer at any time, *Adkin Plumbing & Heating Supply Co., Inc. v. Harwell*, 135 N.H. 465 (1992), that statement of the law does not create an allegation of misconduct.

Third, even if the Conants could state a malpractice claim, it assumes O'Meara knew of it. The PCC's allegation is that O'Meara would have known "shortly after the Conants learned [he] had offered to settle." PCC BRF. at 23. Presumably that would be the January 13 phone call, which is when Jim revoked O'Meara's authority to demand or settle. Nothing in the facts suggests that O'Meara knew on January 13 that the Conants were so unhappy with him, were contemplating firing him, or that their relationship had devolved to a lawsuit level. The earliest O'Meara might have suspected would have been the February 25 Hampton meeting at which the Conants made clear their dissatisfaction. The earliest he actually could have known was on February 28 when Ganz told him he would be representing the Conants in a fee dispute.

Fourth, given that O'Meara was an experienced personal injury attorney, he was aware of the unfortunate but common propensity for clients to take out frustrations on their lawyers. Although

surprised by the Conant's vehemence on February 25, O'Meara was planning for mediation two days later. He had diligently prepared the case for trial, created the day-in-the-life film and produced expert reports, and had organized his presentation for the federal mediation session. He was justified in believing the Conant's anger was nothing more than the standard litigant stress and frustration plaintiff's lawyers encounter daily, particularly on the eve of a momentous event such as the upcoming mediation, and especially given Anita's precarious medical condition.

Fifth, the most O'Meara knew even on February 25 was that the Conants were thinking of firing him. That is the question they asked during the meeting. There is no suggestion during the meeting (nor previously, nor thereafter) that the Conants were considering *suing* him.

Sixth, the PCC's allegation is that supposedly knowing all this, he nonetheless "assured the Conants he would reduce his fee." The PCC does not say why making such a promise is either a conflict or evidence of a conflict. If anything it shows an effort by O'Meara to be more fully aligned with his client's interest, in that the Conants would obtain more of the ultimate settlement and O'Meara less. *C.f. Terzis v. Estate of Whalen*, 126 N.H. 88, 93 (1985) (attorney's during-representation renegotiation of fee resulted in *increased* fee).

4. Allegation Should be Dismissed

To the extent the allegation is preserved, it fails to state an issue. There is not clear and convincing evidence to support the allegation, and it should be dismissed.

D. Allegation: Suggesting a Court Would Uphold One-Third Fee

1. Nature of PCC's Allegation

The PCC alleges that despite O'Meara's assurance that he would reduce his fee, O'Meara "wrote a letter to James Conant … articulating that 'the Court would uphold my 1/3 fee of $3,666

million if you decided to terminate my services today.'" PCC BRF. at 24.

It is not clear whether this is an allegation of a specific ethical lapse, or whether it is merely a statement that O'Meara drafted the letters which included the quoted language.

2. Allegation is Not Preserved

The PCC did preserve in its Petition the allegation that O'Meara told the Conants that O'Meara "would sue" and "would win." PETITION ¶¶ M5 at 30. But the PCC did not preserve the allegation that merely making a statement that *if* there was a suit, *then* the court would uphold the contingent fee. Thus the allegation is not preserved in this Court as an independent basis for a conflict of interest in that portion of the PCC's Supreme Court petition listing specific allegations. PETITION ¶¶ M4-M7 at 28-31. It also does not appear in the Questions Presented portion of the PCC's brief. PCC BRF. at 1.

3. Allegation Does Not State a Conflict of Interest

To the extent it is a specific allegation, there are several problems with it.

First, the letters were never sent – there is no fax header information, no signed copy, O'Meara testified he did not send them, and Jim testified he did not receive them. Thus at most they represent O'Meara's research and private thoughts, but not his considered advice.

Second, the draft letters were dated January 26, two days after the phone call in which Davis had misconstrued O'Meara's demand as an offer and the Conants were adamant that O'Meara had settled their case. O'Meara was both confounded by the misconstruction and worried his clients thought it might stick. Moreover, *if* Davis was right that a deal had been made, the notion and the sentiment expressed in the draft letters would be accurate. *See*, *Adkin Plumbing & Heating*, 135 N.H. at 468 (attorney not entitled to fee until occurrence of contingency).

Third, even if the draft letters are inaccurate, the Conants had independent counsel at the same time educating them regarding the enforceability of O'Meara's fee agreement. Ganz had told the Conants in late January they could indiscriminately fire O'Meara, which would result in O'Meara earning an hourly rather than contingent fee.

Fourth, regardless of whether O'Meara's draft letters were accurate, and supposing they were sent, the fact of their existence does not create a conflict of interest. For any number of reasons lawyers sometimes provide clients inaccurate assessments of the law. If there were breach of duty and prejudice, it could result in a malpractice action if the lawyer failed to "exercise reasonable professional care, skill and knowledge." *Carbone v. Tierney*, 151 N.H. 521, 527 (2004). But merely being wrong, without more, is not a conflict of interest. *Richmond's Case*, 152 N.H. 155 (2005).

Fifth, the allegation represents an instantaneous and misleading snapshot of O'Meara's evolutionary thinking regarding Davis's demand/offer misconstruction. O'Meara's spontaneous and immediate reaction was to object and, by withdrawing the demand, try to reset. LETTER FROM O'MEARA TO DAVIS (Jan. 24, 2006), *Exh. 16.* Two days later his second response, represented by the draft letters to which the PCC points, was to momentarily accept and try to manage (if they had been actually sent) the possibility that he had inadvertently settled. His third and most considered reaction is contained in his objection to Davis's motion to enforce. After a few days to think about the shrewd and clever way Davis had turned the language, and about the sheer wrongness of Davis's misconstruction, O'Meara fully set forth his thinking to the federal court. O'Meara realized he'd been rolled, but came up swinging. MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' OBJECTION TO DEFENDANTS' MOTION TO ENFORCE SETTLEMENT AGREEMENT (Feb. 6, 2006), *Exh. 29.*

One may wish for both wisdom and comprehensiveness in a first reaction to an unexpected

blow. But given the dynamic situation and the head-scratching nature of it, O'Meara did pretty well. He initially struck a counter-offensive, momentarily considered the possibility of an undesirable outcome, but then shortly discerned that he was right and why Davis was wrong. The PCC notices *only* O'Meara's momentary and unpublished second reaction, ignoring all that went on around it. Precisely opposite of a conflict, in giving a second – and then a third – thought to the matter, O'Meara demonstrated he kept his eye squarely on the Conants' interest.

4. Allegation Should be Dismissed

To the extent the allegation is preserved, it fails to state an issue. There is not clear and convincing evidence to support the allegation, and it should be dismissed.

E. Allegation: Failing to Keep Time Records

1. Nature of PCC's Allegation

The PCC alleges "O'Meara knew that he had not kept time records and that, if terminated, his ability to collect hourly fees pursuant to Paragraph D of the Fee Agreement, would be severely compromised." PCC BRF. at 24.

2. Allegation is Not Preserved

The allegation is not preserved in this Court. No mention is made of it in that portion of the PCC's Petition listing specific allegations. PETITION ¶¶ M4-M7 at 28-31. It also does not appear in the Questions Presented portion of the PCC's brief. PCC BRF. at 1.

3. Allegation Does Not State a Conflict of Interest

O'Meara conceded he did not keep time records and that he knew he didn't keep them. His law firm, like most personal injury practice in New Hampshire, ran its business on a contingency fee basis. Apparently never having been exposed to a client who terminated in "a manipulative manner

in order to attempt to beat the fee," BRUCE FELMLY at 102-03, O'Meara assumed he was being paid a percentage and it never occurred to him he would someday have to justify his time.

The PCC accurately states that O'Meara's lack of time records "severely compromised" his "ability to collect hourly fees pursuant to Paragraph D." PCC BRF. at 24. It may be loose law firm management, and would probably result in a relatively unprofitable *quantum meruit* recovery if the firm were terminated by a client prior to occurrence of the contingency. *Kelley's Case*, 137 N.H. 314 (1993); Annotation, *Limitation to Quantum Meruit Recovery, Where Attorney Employed under Contingent-fee Contract Is Discharged Without Cause*, 56 A.L.R.5th 1. And in a non-contingency arrangement, time records may be necessary to comply with the fee agreement. *Kalled's Case*, 135 N.H. 557, 561 (1992) ("[I]t is apparent that the respondent was ignorant of the necessity for keeping detailed daily records in order to accurately bill the client in accordance with the contract."); Annotation, *Measure or Basis of Attorney's Recovery on Express Contract Fixing Noncontingent Fees, Where He Is Discharged Without Cause or Fault on His Part*, 54 A.L.R.2d 604.

But it is not a conflict of interest. Failing to keep time records in a contingency fee case does not set lawyer against client, because it does not "have an adverse effect on the representation of [the] client." N.H. R. PROF.CONDUCT 1.7(b) cmt. 10, *quoted in* PCC BRF. at 23.

4. Allegation Should be Dismissed

To the extent the allegation is preserved, it fails to state an issue. There is not clear and convincing evidence to support the allegation, and it should be dismissed.

F. Allegation: Entering "To be Negotiated" Amendment

1. Nature of PCC's Allegation

The PCC alleges that "[a]fter another exchange over fees and possible termination on February 25, 2006, it was Mr. O'Meara who amended the Fee Agreement in an attempt to placate the Conants by inserting 'to be negotiated' where the contingent fee provision had been. Once again, Mr. O'Meara's suggestion that he would renegotiate his fee dissuaded his clients from exercising their right to terminate him."

2. Allegation is Not Preserved

The allegation is not preserved in this Court. Although it appears in the PCC's Supreme Court petition, PETITION ¶ M6 at 30, it does not appear in the Questions Presented portion of the PCC's brief. PCC BRF. at 1.

3. Allegation Does Not State a Conflict of Interest

There are several problems with this allegation.

First, by naming February 25, the PCC is referring to the meeting in Hampton, where it alleges there was "another exchange over fees and possible termination." This was not just "another" exchange. Although the Conants had generally expressed their uneasiness with O'Meara's fee in late January and O'Meara had committed to reducing it at the appropriate time, *4 Hrg.Com.* at 100, he had never been directly and specifically confronted with the matter until February 25. O'Meara came to Hampton expecting to display the day-in-the-life movie, discuss strategy, and prepare his clients for the upcoming mediation. He was blindsided by a family who had repeatedly received the advice of Attorney Ganz regarding O'Meara's representation, who had conducted a pre-meeting meeting, had brought along a non-family witness they considered experienced in such affairs, had explicitly

prepared to attack O'Meara for the purpose of reducing his fee, and had even decided in advance who should speak about particular issues in that attack.

Second, the PCC also alleges that the February 25 meeting was "another exchange over … possible termination." This is simply not accurate. February 25 was the first time O'Meara heard the Conants were considering firing him. He was surprised by Anita's question – and it was only a question – "Tell me why I shouldn't fire you." Although the Conants had gotten Ganz's advice on it, they had not before suggested to O'Meara the possibility. O'Meara was surprised and unprepared. He considered the entire matter a diversion from the discussion of the upcoming mediation, which was indisputably the most significant event in the case since O'Meara had persuaded the defendants to confess liability in December. He had been focused on preparation of the case, and was unaware the Conants believed the representation relationship had deteriorated that far.

Third, in answer to Anita's question regarding why she shouldn't fire him, O'Meara provided an accurate answer. O'Meara told Anita that "litigation is ugly" and "usually ends up in an unhappy result for everyone." *4 Hrg.Com.* at 100-01. The Conants at that point claimed to believe a settlement had been reached, and if that were so, the contingency had occurred and O'Meara would be paid on a percentage basis. Even if the contingency had not yet occurred (which it had not), the statement was not a threat, but a deft answer to an uncomfortable question.

Fourth, the PCC alleges that "it was Mr. O'Meara who amended the Fee Agreement." That is not accurate. It was the Conant's agenda to talk and bargain about fees, and it was the Conant's friend who suggested the language and took care of the paperwork. O'Meara went along with the amendment because he felt it was the right thing to do and the smoothest path to the important matter at hand – preparation for the upcoming mediation.

Fifth, the PCC alleges that O'Meara "amended the Fee Agreement in an attempt to placate the Conants," which "dissuaded [them] from exercising their right to terminate him." O'Meara conceded to the amendment in order to ensure his clients were happy. There were no nefarious motives, nor any attempt to undermine their rights. Inserting the "to be negotiated" language in the contract was an agreeable way to resolve the tension the Conants were feeling, so that O'Meara could get to the point of the meeting – preparation of his clients for the upcoming federal mediation where O'Meara believed the real negotiation would occur.

Sixth, whatever the reason for "to be negotiated" language, there is no dispute that it was greatly to the Conant's advantage. It is just not reasonable to suggest that an arrangement *better* for the client can create a conflict of interest.

4. Allegation Should be Dismissed

To the extent the allegation is preserved, it fails to state an issue. There is not clear and convincing evidence to support the allegation, and it should be dismissed.

G. Allegation: Entering $2 Million Amendment

1. Nature of PCC's Allegation

The PCC alleges that "on February 26, 2006, Mr. O'Meara undertook to recast the February 25 Amendment as an agreement binding the Conants to pay a fee of $2 million if the final settlement offer was no more than the policy limits. James Conant expressly rejected Mr. O'Meara's February 26 Memorandum, stating that it did not represent the terms of their agreement from the day before."

2. Allegation is Not Preserved

The allegation is not preserved in this Court. Although it appears in the PCC's Supreme Court petition, PETITION ¶ M7 at 30, it does not appear in the Questions Presented portion of the PCC's brief. PCC BRF. at 1.

3. Allegation Does Not State a Conflict of Interest

There are several problems with this allegation.

First, it assumes that " O'Meara undertook to recast" the February 25 agreement. He did not recast anything. Watching the heart-wrenching video, seeing the Conant family cry over it, and thinking about what Craig had said about $2 million being a fair fee, convinced O'Meara to make his dramatic offer on his way out the door. In words and gestures the Conants then roundly thanked him, and told him how much they appreciated it. Based on this O'Meara reasonably believed that the "to be negotiated" language had in fact been renegotiated, and that had he taken off his coat, opened his briefcase, and hand-written yet more on the agreement, the Conants would have willingly signed the $2 million agreement they had made right then.

Second, it ignores that it was the Conants who "undertook to recast" the agreement, not O'Meara. After the meeting the Conants immediately consulted Ganz. When they realized how advantageous the written "to be negotiated" language might be for them, they reneged on the end-of-meeting renegotiation. A majority of the arbitration panel, who heard all parties on the matter at length not long after the events, understood there was a $2 million fee agreed upon at the end of the February 25 meeting, and awarded fees accordingly.

Third, whatever the nature of the misunderstanding between O'Meara and the Conants, it is only that – a misunderstanding as to the meaning of words and gestures at the end of the February 25 meeting. As noted, fee negotiation during the course of representation is commonplace, and does not itself create a conflict of interest.

Fourth, O'Meara's course of conduct after the February 25 meeting shows he understood (or at worst misunderstood) that there was a $2 million agreement reached. The document O'Meara

prepared on February 26 was called a “memorandum of understanding,” and identified itself as “simply a codification of the verbal representations and commitments made on 2/25/06.” Knowing contingent fee agreements must be in writing, and to demonstrate he was serious about reducing his fee from $3.6 million to $2 million, O’Meara faxed and emailed it to the Conants on Sunday morning expecting it was uncontroversial.

4. Allegation Should be Dismissed

To the extent the allegation is preserved, it fails to state an issue. There is not clear and convincing evidence to support the allegation, and it should be dismissed.

H. Allegation: Entering Escalator Amendment

1. Nature of PCC’s Allegation

The PCC alleges that “[o]n February 27, 2006, just before the mediation was scheduled to start, Mr. O’Meara informed James Conant that he would not represent the Conants at the mediation without an agreement on his fee. Mr. O’Meara was aware that the circumstances of the February 27 mediation would place pressure on James Conant to accept his terms, and he continued to push for an agreement even after James Conant stated, ‘I feel like I don’t have any choice but to sign the agreement.’ Under the circumstances confronting the Conants at the courthouse, Mr. O’Meara’s own interest in securing his desired fee conflicted with the Conants’ interest in successfully resolving their case at the mediation.” PCC BRF. at 25.

2. Allegation is Not Preserved

The allegation is not preserved in this Court. No mention is made of it in that portion of the PCC’s Petition listing specific allegations. PETITION ¶¶ M4-M7 at 28-31. The question also does not appear in the Questions Presented portion of the PCC’s brief. PCC BRF. at 1.

3. Allegation Does Not State a Conflict of Interest

The allegation is riddled with problems.

O'Meara made plain to the Conants both during travel on February 26 and in the morning hours before the mediation on February 27, that it was imperative to arrive at a fee agreement before commencement of the mediation. O'Meara explained the reasons, but maybe the Conants didn't fully understand them or didn't appreciate O'Meara's guidance.

First, in order to structure an insurance settlement, attorneys fees have to be quantified with precision; otherwise the financiers cannot know how much to structure for the plaintiff and how much to disburse directly. Thus O'Meara's fee had to be firm and definite *before* the mediation in order to obtain accurate monthly structured settlement quotes *during* the mediation. Second, it would be unseemly and unstrategic to show any weakness between attorney and client when a successful negotiation required assertiveness against the defendant and its insurer. Third, and most compelling, there was a chance Anita would not survive the end of the week. Even though there was a second mediation date available, if settlement were not reached while she was alive, the possibility of a big recovery would disappear.

Thus there was great pressure to resolve the fee issue, and of course Jim felt like he didn't "have any choice but to sign." But that pressure came from his desire to settle while Anita was still alive, and had little to do with O'Meara. Resolving the fee issue before the mediation was directly in the Conant's interest, and pressing the matter showed good judgment by O'Meara.

Accordingly, O'Meara's interest in resolving the fee was directly aligned with the Conant's interest in resolving the fee. There was no conflict of interest.

Moreover, Jim had his entire posse at hand. His trusted "sophisticated-businessman" brother

was at his side and is the one who suggested the agreed-upon escalator language, his financial advisor was in town, his lawyer Ganz was reachable – and reached – by phone, and his family was consulted as well.

Finally, the PCC alleges O'Meara's "own interest in securing his desired fee conflicted with the Conants' interest." It must be remembered that the Philadelphia escalator option providing O'Meara an 18% contingency was roughly half the 33% that had been agreed in the original contract.

4. Allegation Should be Dismissed

To the extent the allegation is preserved, it fails to state an issue. There is not clear and convincing evidence to support the allegation, and it should be dismissed.

VII. All Conflict of Interest Allegations Should be Dismissed

Throughout the representation – from the moment he signed up in May 2005 until he was contacted by Ganz and the fee dispute ripened on February 28, 2006 – O'Meara's interests were aligned with the Conant's.

To the extent there was ever a conflict, it was a product of the Conant's own actions. When they realized the potential size of O'Meara's fee, formed a layperson's belief that he didn't deserve it, and grew jealous of it, with the help of a lawyer they began reaching for O'Meara's share. O'Meara responded by continually accommodating and acceding to their demands. He went from 33% in the original agreement, to a "to be negotiated" amount in Hampton, to a contested $2 million at the end of that day, to 18% in Philadelphia, and finally to 13.8% in arbitration. Still unsatisfied, and unable to go after it in court, the Conants filed this PCC complaint and attempted to disgorge O'Meara's fee entirely.

O'Meara had not only a demanding and avaricious client, but also a crafty adversary. He encountered three difficult junctures, each inherently creating a lawyer-client tension. At each O'Meara nonetheless took reasonable action.

In January, while at first dumbfounded, when he realized Davis had misconstrued his demands as offers, he successfully steered away from premature settlement and toward a real negotiation. Then in Hampton in February, when confronted by an family whose anger and organization he underestimated, he found (or thought he found) common ground on his fee. Later, in Philadelphia, O'Meara faced Jim's understandable stress, which tempted delay in finalizing the fee. He simultaneously faced Anita's impending surgery, the potential complications of which exhorted immediate settlement of everything. In order to fulfil his duties, he again accepted a

compromise which again decreased his fee, and ensured a timely settlement.

Whether he handled these situations clumsily or adroitly, O'Meara never abandoned the Conant's interests. There was never a "significant risk" that the Conant's interests were ever "materially limited" by O'Meara's. The PCC's efforts in this case assume that lawyers work in a pure, conflict-free world, when in fact some conflicts of interest are inherent and tolerable in most lawyer-client relations.

Accordingly, O'Meara did not engage in any sanctionable conflicts of interest, and did not violate Rule 1.7. There is not clear and convincing evidence to support the allegations, and they should be dismissed. *In re Wyatt's Case*, 159 N.H. 285, 297 (2009) ("The PCC's findings of violations of the Conduct Rules must be supported by clear and convincing evidence. Sup.Ct. R. 37A(III)(d)(2)(C). In attorney discipline matters, we defer to the PCC's factual findings if supported by the record, but retain ultimate authority to determine whether, on the facts found, a violation of the rules governing attorney conduct has occurred.").

PART FOUR: Rule 8.4(c), Allegation of Deceit

VIII. O'Meara Did not Deceive the Arbitration Panel

The PCC alleges that Attorney O'Meara "falsely testified that, at the end of the February 25 … meeting at their home, the Conants agreed that Mr. O'Meara's legal fee would be $2 million if the case settled for the policy limits." PCC BRF. at 27-28.[9] The testimony the allegation refers to is "when he testified at the arbitration hearing," not his testimony in this disciplinary proceeding. PCC BRF. at 27.

A. O'Meara Did Not Lie

O'Meara did not lie. At most he misunderstood.

To O'Meara's surprise and chagrin, the meeting opened with, from O'Meara's point of view, an unanticipated dispute about fees, during which Craig floated the idea of a flat two million dollars. The agreement was amended to include "to be negotiated." After viewing the video about Anita's accident, treatment, and day-in-her-life, O'Meara believed the family understood he was firmly on their side, ready to forcefully press their position against the perpetrators of Anita's conditions, and prepared to fully advocate for them in Philadelphia.

In this spirit of goodwill, at the end of the meeting O'Meara "took her hand and looked her in the eye and told her I wouldn't stand in the way of her receiving a fair and reasonable settlement, and here's my commitment to you. If there's 11, only 11, not a penny more, then I'll reduce my fee

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[9]It should be noted that in the PCC proceedings there were two additional deceit allegations. The first concerned O'Meara arbitration testify that the family had congratulated Anita and that her performance "should have won an Emmy" during the December 1 meeting in where the defendants confessed liability. After a witness corroborated the statement, the Hearings Committee determined the allegation was unfounded and it has not been presented to this Court. FINDINGS OF FACT AND RULINGS OF LAW ¶¶ 120, 173, PCC 25. It is detailed *supra* in footnote 4. The second concerned whether O'Meara lied about the availability of a second mediation date. After viewing records the Hearings Committee determined the allegation was unfounded and it has not been presented to this Court. FINDINGS OF FACT AND RULINGS OF LAW ¶¶ 117, 172 PCC 25. It is detailed *supra* in footnote 6.

to $2 million." This was followed by oral thank-yous and gestures indicating gratification, and O'Meara felt a palpable release of tension in the room.

Jim and others at the meeting corroborated an exchange occurred. The Conant's friend Sarah Sullivan testified that after this everyone "seemed happier" and offered O'Meara and Craig sodas for their ride back to Keene. Craig testified he thanked Tim for "stepping up" and for "taking some tension off the family." Todd testified that he recalled that it was possible there were thank-yous and hand-shakes.

At some point during that day the Conants knew O'Meara had agreed to reduce his fee to $2 million. The family budget discussed during the meeting contains a handwritten line showing a budgeted payment to O'Meara for $2 million. The copy of the budget passed around at the meeting did not have $2 million handwriting, but the copy produced by the Conants in discovery did.

The weather was terrible that day with several feet of snow. O'Meara had ridden from Keene to the Hampton meeting with Craig, and thus was not in control of his transportation. The exchange with Anita occurred after when Craig and O'Meara were on their way out the door – their coats and gloves were on, and O'Meara's briefcase was packed up and in his hand. The agreement had already been marked up that day with "to be negotiated," and O'Meara felt that trying to amend it yet again in pen would be both messy and unnecessary given his understanding of the amendment on the way out. Given these circumstances, O'Meara decided to just get in Craig's car and take care of reducing the $2 million agreement to the required writing later from his office.

He nonetheless believed that had he insisted on undressing, unpacking, and hand-writing, at the end of the meeting the Conants would have willingly signed a $2 million fee agreement.

In conformity with how he thought the meeting had ended, O'Meara returned to his office

and put in writing the understanding he thought they had reached. Thus he was surprised by the Conant's resistance to it the next day.

O'Meara either misunderstood the words and gestures, or the Conants changed their attitude after conferring with Ganz immediately following the meeting and learning that "to be negotiated" was a "home run" for them. But he didn't lie.

O'Meara understands that in being "accused of knowingly making a false statement of material fact," one cannot merely "cloak his statements in terms of 'belief' or 'opinion.'" *Budnitz' Case*, 139 N.H. 489, 492 (1995). Nonetheless, he thought a deal had been reached. He testified that as he was headed out into the weather, "I went to say good-bye to Anita, and I told her that I wouldn't stand in the way of her receiving a reasonable fee, a reasonable settlement in recovery, that what I was prepared to do was if there was $11 million and that was all the money that was available at the end of the day and we were never going to get a penny more, then I would reduce my fee to $2 million. She said thank you. Jim said thank you. Craig said thank you. Sean said thank you. Jim said we really appreciate that, that means a lot to us. Packed up my bag, Craig and I cleaned off the truck, and left." *4 Arb.Trn.* at 92.

B. Arbitration Panel Deserves Deference

As noted, the testimony the PCC alleges was untrue occurred in the arbitration proceedings. The arbitration hearings took place over five days in November and December 2006, just a few months after the events here. All the actors testified and memories were fresh.

Even the dissenting opinion does not cast doubt on the veracity of O'Meara's testimony. Two of the three members of the arbitration panel found that as between O'Meara and the Conants "both agreed to $2.0 million." After "[i]nterpreting the final fee agreement and the circumstances

surrounding it most favorably to the Conants," the panel awarded O'Meara most of the fees due under it. *In re: James and Anita Conant / Timothy O'Meara*, ARBITRATION DECISION (March 2007), *Appx.* at 158.

The 2006 arbitration panel was composed of one member selected by the Conants, one by O'Meara, and one consented by both. All three are respected and successful members of the bar, two have personal injury practices, and one is an ethics lawyer. But accusing O'Meara of lying to them simultaneously accuses them of believing a lie. It is not reasonable to suppose they would have failed to discern a falsehood, and even less reasonable to suppose they would have accepted one. Thus their findings deserve some deference. *See e.g.*, *State v. Ford*, 144 N.H. 57, 61 (1999) (this Court "relies on the unique position of the fact finder, who assesses first-hand all of the verbal and nonverbal aspects of evidence presented. Words printed on the sterile pages of a transcript do not convey the intangible dynamics or full sensory experience of trial that may influence evaluation of the facts.").

The Hearings Committee however, like this Court, had only the transcript of the arbitration proceedings in which O'Meara is accused of deceit, and also did not hear witnesses until October, November, and December 2009, about three-and-a-half years after the events, when memories were much older. Its task – to discern whether the previous testimony had been fabricated – requires re-creation of both the underlying case *and* the arbitration proceeding following it. The Hearings Committee proceeding was a trial-within-a-trial, with its attendant loss of freshness and detail.

Accordingly, this Court should defer to the arbitration panel, and follow its implicit finding that O'Meara testified truthfully about how he thought and believed the February 25 meeting ended.

IX. Allegation Should be Dismissed

Given the uneven evidence, there is not clear and convincing evidence that O'Meara deceived the arbitration panel or violated Rule 8.4(c). Accordingly the allegation should be dismissed. *In re Wyatt's Case*, 159 N.H. 285, 297 (2009) ("The PCC's findings of violations of the Conduct Rules must be supported by clear and convincing evidence. Sup.Ct. R. 37A(III)(d)(2)(C). In attorney discipline matters, we defer to the PCC's factual findings if supported by the record, but retain ultimate authority to determine whether, on the facts found, a violation of the rules governing attorney conduct has occurred.").

ARGUMENT PART FIVE: Sanctions

X. O'Meara Deserves No Sanction

Because there is not clear and convincing evidence of any rule violation, Attorney O'Meara should suffer no sanction. If nonetheless the Court finds a sanctionable allegation, the sanction should be minimal because O'Meara's actions were reasonable given the posture in which his adversary and client placed him. The discussion of sanctions below necessarily assumes this Court finds a rule violation, but does not concede the issue.

As noted by the PCC, the ABA Standards regarding sanctions prescribe a four-part analysis – the duty allegedly violated, the lawyer's mental state, the potential or actual or injury caused by the lawyer's alleged misconduct, and aggravating and mitigating factors. ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS § 3.0 (1992) (hereinafter ABA STANDARDS).

These will be addressed below in the context if each alleged violation, in the order presented by the PCC in the sanctions section of its brief. PCC BRF. at 30-31. It must be stressed however, that whatever O'Meara's errors, they are harmless. The conduct with which he is charged did not alter – not even a little bit – the litigation process, the scope or strategy of negotiations, nor the end result of the settlement.

Moreover, it must be kept in mind that when determining sanctions, this Court focuses "not on punishing the offender, but on protecting the public, maintaining public confidence in the bar, preserving the integrity of the legal profession, and preventing similar conduct in the future." *Conner's Case*, 158 N.H. 299, 303 (2009); *Morgan's Case*, 143 N.H. 475, 477 (1999).

XI. Deceit Allegation Warrants Reprimand at Most

The PCC suggests application of ABA Standard 5.1, and Attorney O'Meara does not disagree.

A. ABA Standards Define Deceit in Decreasing Levels of Severity and Sanction

Standard 5.1, suggesting sanctions for violation of Rule 8.4(c), is comprised of four subparts which describe deceitful acts in decreasing levels of severity, and prescribe commensurately decreasing levels of sanction.

Standard 5.11, which the PCC urges here, provides that "*disbarment* is generally appropriate" when:

> (a) a lawyer engages in serious *criminal conduct* a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or
>
> (b) a lawyer engages in *any other intentional conduct* involving dishonesty, fraud, deceit, or misrepresentation that *seriously adversely reflects* on the lawyer's fitness to practice.

ABA STANDARD 5.11(a) & (b) (emphasis added). Standard 5.11 calls for disbarment, and is limited by its terms to criminal conduct and intentional deceit that "seriously adversely reflects" on the lawyer's fitness.

Standard 5.12, which the PCC neglects, provides that: "*Suspension* is generally appropriate when a lawyer knowingly engages in *criminal conduct* which does not contain the elements listed in Standard 5.11 and that *seriously adversely reflects* on the lawyer's fitness to practice." ABA STANDARD 5.12 (emphasis added). It calls for a lower sanction of suspension, but still requires some

criminal conduct which "seriously adversely reflects" on the lawyer's fitness.

Standard 5.13, which the PCC also neglects, provides that: "*Reprimand* is generally appropriate when a lawyer knowingly engages in *any other conduct that involves dishonesty*, fraud, deceit, or misrepresentation and that *adversely reflects* on the lawyer's fitness to practice law." ABA STANDARD 5.13 (emphasis added). It calls for the lower sanction of reprimand, applies generally to non-criminal "conduct that involves dishonesty," and must "adversely reflect" but not "seriously adversely reflect" on the lawyer's fitness.

Standard 5.14, which the PCC also neglects, provides that: "*Admonition* is generally appropriate when a lawyer engages in any other conduct that *reflects adversely* on the lawyer's fitness to practice law." ABA STANDARD 5.14 (emphasis added). It calls for only admonition, applies to "any other conduct" and requires that it "reflect adversely" on the lawyer's fitness.

B. 5.11 Applies to Criminal Conduct Only

The PCC erroneously urges this Court to apply Standard 5.11, and neglects the lesser 5.12, 5.13, and 5.14. It is an inappropriate Standard.

First, Standard 5.11 does not apply here at all. Obviously subsection (a) applies only to criminal conduct, but the commentary on the entire standard suggests that even subsection (b) applies only when criminal conduct is in the picture. The entire commentary on Standard 5.11 discusses disciplinary action after criminal conviction, and cites cases that all involve significant criminal conduct – murder, murder-for-hire, tax fraud, perjury, addiction to cocaine and amphetamines. Nothing in the commentary suggests it applies outside the criminal context. ABA

STANDARD 5.11, *Commentary*,[10] *Appx.* at 153.

Second, even if Standard 5.11(b) applies outside of the criminal context, it is limited to conduct that "seriously adversely reflects on the lawyer's fitness to practice." Although there is no known court construction of what "seriously adversely reflects" means, by its terms it requires conduct that does not merely "adversely reflect," but *"seriously* adversely reflects." Moreover, the term "adversely reflects" is probably a substitute for the antiquated phrase "moral turpitude," thus suggesting the Standard requires conduct of that quality or magnitude. *See*, *In re Berk*, 602 A.2d 946, 952 (Vt. 1991) (*Morse*, J., concurring) (noting ABA Model Rule of Professional Conduct 8.4(b) eliminated moral turpitude as standard in 1984 with definition specifying misconduct that "reflects adversely" on lawyer's "honesty, trustworthiness or fitness") (possession of cocaine is crime of moral turpitude warranting 6-month suspension from practice). Thus the cases cited in the commentary suggest that the type of conduct it addresses is something that, even if it does not result in a conviction, necessarily approaches it.

A recent Florida case relying on Standard 5.1(b) provides a good example of its correct application. In *Florida Bar v. Hall*, 49 So. 3d 1254 (Fla. 2010), the lawyer forged a real estate sales agreement for her neighbor's pastureland, recorded it, continually harassed the neighbors, and maintained the fiction that she owned it for five years. The lawyer was charged with two felonies, one for grand theft and the other for uttering a forged instrument, but they were withdrawn by the state on condition the lawyer issue a quitclaim to the true owners, make restitution, and vacate her horses from the pastureland. In the disciplinary proceeding the lawyer was found to have violated

[10]For the Court's convenience, the portions of the ABA Standards and their commentary which are discussed herein are included in the appendix to this brief.

ethics rule 8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation), the same rule at issue in O'Meara's case. Employing ABA Standard 5.11(b) to disbar the lawyer, the Florida Supreme Court wrote:

> Respondent's brazen misrepresentations and continual harassment distinguish this case from other forgery cases. Although the referee found only one rule violation, Respondent's misconduct is egregious. Her misrepresentations caused the [neighbors] to lose two buyers for their property. Respondent's threats to the [neighbor's] realtor caused him to withdraw the [neighbors] real estate listing. Due to Respondent's continued harassment, the [neighbors] were forced to hire an attorney to defend themselves. Even though Respondent was not acting in a formal attorney-client relationship, she was still a member of the Florida Bar and bound by its ethical rules. Respondent misused her status as an attorney to harm the [neighbors]: (1) by recording the fraudulent document in the clerk's office, in order to tie up the [neighbors'] property; (2) by asserting that the [neighbors] and their realtor would suffer for not complying with her legal claims; and (3) by forcing the [neighbors] to hire counsel to resolve the legal problems that Respondent created.

Florida Bar v. Hall, 49 So. 3d at 1259 (Fla. 2010).

Florida Bar v. Hall is the type of case that warrants application of Standard 5.1(b). The lawyer's lie was not a single transitory act, but a five-year campaign to acquire by fabrication something she couldn't have honestly. Because it involved recordation of a document and threats to sue, it also directly involved her fitness as a lawyer. *See also*, *Astles' Case*, 134 N.H. 602 (1991) (lawyer disbarred for making "chain of misrepresentations" in effort to refinance his home "through dishonest and fraudulent means" with a "continuing intent to deceive" banks, lawyers, and attorney disciplinary system).

O'Meara's conduct falls far short of this. Even if it reflects on his fitness to some degree, because his testimony was the product of an understanding and belief that was at least partly corroborated by others, it was not fabricated such as *Hall*, and thus does not "*seriously* adversely reflect" on his fitness. In addition, O'Meara has never faced any possibility of criminal charges, and

at most he engaged in a single instance of alleged dishonesty. *Bosse's Case*, 155 N.H. 128, 133 (2007) ("In cases in which there has not been repeated deceit or dishonesty, we have not heretofore ordered the attorney disbarred.").

Accordingly Standard 5.1(b) does not apply here, and disbarment is too stiff a sanction.

C. Reprimand or Public Censure is the Appropriate Sanction

It remains to determine which of the other subparts of Standard 5.1 applies here.

Standard 5.12 (suspension) specifies it applies to "criminal conduct" of a lesser degree than the crimes listed in 5.11. The commentary cites cases involving child molestation, contributing to the delinquency of a minor, and drug possession. ABA STANDARD 5.12, *Commentary*, *Appx.* at 153. Because O'Meara's conduct was not criminal nor, as noted, does not "seriously adversely" reflect on his fitness, Standard 5.12 also does not apply. Thus suspension also is too great a sanction.

Standard 5.13 (reprimand) applies to "any other conduct that involves dishonesty" which "adversely reflects." The commentary to Standard 5.13 cites cases involving such matters as an assault not related to the lawyer's professional role, and a plagiarism that was professionally related. ABA STANDARD 5.13, *Commentary*, *Appx.* at 153 ("There can be situations, however, in which the lawyer's conduct is not even criminal, but, because it is directly related to his or her professional role, discipline is required.").

Standard 5.14 (admonition) (called "public censure" in New Hampshire, SUP.CT.R. 37(2)(g)) is for "any other conduct" which "reflects adversely."

Because O'Meara's conduct involves alleged dishonesty and thus adversely reflects on his fitness to some degree, Standard 5.13 (reprimand) or 5.14 (admonition) is probably appropriate. Moreover, it is like the example cited in the commentary involving the lawyer reprimanded for

plagiarism, *In re Lamberis*, 443 N.E.2d 549 (Ill. 1982), in that because it involved a dishonesty in a thesis submitted for his masters degree in law, it was related to his status as an attorney. Accordingly, Standard 5.13 or Standard 5.14 is the appropriate standard, and O'Meara should at most be reprimanded or publicly censured.

XII. Conflict of Interest Allegation Warrants at Most Public Censure

The PCC suggests application of ABA Standard 4.3, and Attorney O'Meara does not disagree.

A. ABA Standards Define Conflicts in Decreasing Levels of Severity and Sanction

Standard 4.3, suggesting sanctions for violation of Rule 1.7, is comprised of four subparts which describe conflicts of interest in decreasing levels of severity, and prescribe commensurately decreasing levels of sanction.

Standard 4.31, which the PCC urges here, provides for disbarment "when a lawyer, without the informed consent" of the client, "engages in representation of a client *knowing* that the lawyer's interests are adverse to the client's with the *intent to benefit the lawyer* …, and causes *serious or potentially serious injury* to the client." ABA STANDARD 4.31(a) (emphasis added). Thus the Standard requires that the lawyer: 1) knew his interests were adverse to the client's, 2) had an intent to benefit himself, and 3) caused serious injury.

Standard 4.32, which the PCC also suggests here, provides for suspension "when a lawyer *knows of a conflict* of interest and does not fully disclose to a client the possible *effect* of that conflict, and *causes injury* or potential injury to a client. ABA STANDARD 4.32 (emphasis added). Thus the Standard requires that the lawyer: 1) knew of the conflict, 2) didn't disclose its effect, and 3) caused injury.

Standard 4.33, which the PCC ignores, calls for reprimand when "a lawyer is *negligent* in determining whether the representation of a client may be *materially affected* by the lawyer's own interests, … and *causes injury* or potential injury to a client." ABA STANDARD 4.33 (emphasis added). Thus the Standard requires: 1) negligence, 2) the conflict can have a material affect on the

client, and 3) injury.

Finally, Standard 4.34, which the PCC also ignores, allows for admonition when "a lawyer engages in an *isolated instance of negligence* in determining whether the representation of a client may be *materially affected* by the lawyer's own interests, … and causes *little or no* actual or potential injury to a client. ABA STANDARD 4.34 (emphasis added). Thus the Standard requires: 1) isolated negligence, 2) the conflict can have a material affect on the client, but 3) no injury.

A table summarizing the subparts of Standard 4.3 is below:

Standard	**Sanction**	**Injury or potential injury**	**Nature of Adversity**	**Mental State**
4.31	Disbarment	Serious injury	To benefit self	Knowing adversity
4.32	Suspension	Some injury	Knows of conflict but does not disclose conflict or possible effect	Knows of conflict but does not disclose conflict or possible effect
4.33	Reprimand	Some injury	Client may be materially affected	Negligent in determining conflict
4.34	Admonition	Little or no injury	Client may be materially affected	Isolated negligence in determining conflict

B. Disbarment is Too Severe a Sanction

The commentary to Standard 4.31 makes clear that disbarment is for "lawyers who intentionally exploit the lawyer-client relationship by acquiring an ownership, possessory, security or other pecuniary interest adverse to a client without the client's understanding or consent." ABA STANDARD 4.31, *Commentary*, *Appx.* at 155. The cases cited by the commentary involved a lawyer who set up a "fraudulent scheme to obtain the client's property at a price well below market value," a lawyer who suggested his elderly widow client invest in a company he owned for a price double

what it was worth, and a lawyer who entered a loan transaction with the client by intentionally misrepresenting that funds were available to pay the note. ABA STANDARD 4.31, *Commentary*, *Appx.* at 155.

Courts that have applied Standard 4.31 to disbar are in this vein. *See e.g.*, *Discipline of Ennenga*, 37 P.3d 1150 (Utah 2001) (lawyer misappropriated one client's money by, upon being hired for a collections matter, successfully collected the money, and then spent it; and also took another client's money by accepting a retainer and doing nothing); *Disciplinary Action Against Crary*, 638 N.W.2d 23 (N.D. 2002) (lawyer who drafted will for elderly client which made attorney's family direct beneficiary, and also invested client's money in annuities for which lawyer received commissions from the investment company); *Richmond's Case*, 153 N.H. 729 (2006) (Rule 1.8 conflict, not Rule 1.7) (lawyer was counsel for business whose account not fully paid; after client terminated lawyer, without authorization lawyer sold stock held on behalf of business to satisfy retainer debt; lawyer also refused to relinquish client documents providing authority to make transactions on behalf of business); *Wolterbeek's Case*, 152 N.H. 710 (2005) (lawyer advised client to enter mortgage transaction in which the lawyer was party to mortgage, and did not disclose lawyer's personal interest); *Coffey's Case*, 152 N.H. 503 (2005) (lawyer convinced elderly client experiencing mental deterioration to convey to lawyer property worth over $200,000 as payment for clearly excessive legal fees).

These cases all meet the criteria of Standard 4.31 – intentional action by the lawyer to benefit the lawyer and caused serious and quantifiable injury to the client. Attorney O'Meara's situation has none of that. At all three difficult times he kept his eye squarely on the Conant's interest: 1) when he realized Davis had misconstrued his demands as offers, he successfully dodged the effort and

moved the case forward to real negotiation through mediation; 2) when confronted in Hampton by clients' whose frustration he underestimated, he substantially reduced his fee; and 3) when in Philadelphia he saw the possibility his client might essentially forfeit a large recovery by delaying, he ensured all the pieces were in place for an early and advantageous settlement which was well in excess of the defendant's policy limits.

Standard 4.31 also requires "serious injury." But O'Meara caused no injury at all. Unlike the cases cited, O'Meara did not engage in any conduct that intentionally took a single cent of his client's money.

Accordingly, disbarment is far too severe a sanction, and would be merely punitive.

C. Suspension is Too Severe a Sanction

Suspension is also too severe a sanction.

As noted, Standard 4.32 calls for suspension when a lawyer knows of a conflict of interest, does not disclose it, does not disclose its possible effect, and also causes injury to the client. The commentary to the Standard cites a case where a lawyer was suspended for 7 months for arranging a loan from one client to another, receiving a finder's fee from the lender, and not telling the borrower-client about either the conflict or that the loan was usurious and unenforceable. The commentary cites another case where a lawyer in a divorce representation was suspended for 9 months for lending money to himself from the sale of the client's house, and not advising the client to seek independent representation.

Since the ABA Standards were developed, cases imposing suspension have been similar. In *Disciplinary Action Against Giese*, 662 N.W.2d 250 (N.D. 2003), for instance, a lawyer was suspended for 90 days. The lawyer had bought a house from a client with a conflict-free mortgage,

but later the lawyer talked the client into giving him the deed, but failed to tell the client to get independent representation. The client was forced to legal action when the lawyer refused to pay the mortgage amount.

In all of these cases the lawyer was on two sides of a transaction, did not disclose his interest, and caused the client actual harm.

But in O'Meara's case, the Conants clearly knew of O'Meara's interest in the outcome of their litigation by virtue of having hired him on a contingency basis. Whatever interest O'Meara had in their case was no different from the interest any contingency lawyer has in the occurrence of the contingency. Moreover, starting at least in January and possibly earlier, the Conants sought and received the advice of Attorney Ganz with regard to their representation agreement with O'Meara. Finally, there was no injury. Accordingly, suspension is too great a sanction.

D. Reprimand is Too Severe a Sanction

Standard 4.33 provides for reprimand when the lawyer is "negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, … and causes injury or potential injury to a client." ABA STANDARD 4.33.

To the extent there was a conflict here, it was no greater than that suffered by contingency lawyers state-wide. O'Meara's mistakes, if any, concerned allowing his clients to be mislead into expecting more damages than they could have ever possibly recovered. Once their disappointment surfaced, however, they had independent representation who capably provided advice on whether their interests were materially affected by O'Meara's. Moreover, again, there was no injury. Consequently, reprimand also is too great a sanction.

E. Public Censure May be Appropriate Sanction

Standard 4.34 provides for admonition (called "public censure" in New Hampshire, SUP.CT. R. 37(2)(g)) where there is isolated negligence, the conflict may have a material affect on the client, but there is no injury. That describes O'Meara's case. As noted, O'Meara may have been negligent in inflating the Conant's expectations of damages, in not anticipating their dissatisfaction with him, and in not unpacking his briefcase and getting the $2 million agreement signed before he left the February 25 meeting. These isolated instances, however, had no material affect on the clients, and to the extent they might have, the Conants were separately represented. Public censure here is particularly appropriate because there was no injury. *Shillen's Case*, 149 N.H. 132 (2003)

XIII. Unauthorized Settlement Allegation

The PCC suggests application of ABA Standard 7.0, and Attorney O'Meara does not disagree.

In all known cases of disciplinary action based on unauthorized settlement, the client's claim was actually settled. This one was not.

Moreover, all known cases also involve other unethical conduct related to the unauthorized settlement, such as inadequate client communications, not telling the client the case was settled, or the lawyer taking the client's settlement proceeds. *See e.g. In re Dombrowski*, 376 N.E.2d 1007 (Ill. 1978) (lawyer disregarded client's instructions, and without authorization signed her name to various documents including power of attorney and release); *In re Weaks*, 118 S.W.2d 525 (Ky. 1938) (unauthorized settlement and taking of settlement proceeds); *In re Estes*, 212 N.W.2d 903 (Mich. 1973) (unauthorized settlement of client's cause, failure to advise client of force and content of settlement negotiations, failure to advise client of trial date and consent judgments); *Disciplinary Action Against Margolis*, 570 N.W.2d 688, 688 (Minn. 1997) (unauthorized settlement attempt and thwarting investigation by fabricating memo to file memorializing conversation in which client supposedly authorized settlement); *Disciplinary Action Against Getty*, 452 N.W.2d 694 (Minn. 1990) (unauthorized settlement and failure to tell client case was settled); *State ex rel. Nebraska State Bar Ass'n v. Steichen*, 584 N.W.2d 26 (Neb. 1998) (lawyer accepted unauthorized settlement of client's personal injury action, forged signatures on settlement check, and retained settlement proceeds); *In re Fields*, 319 N.Y.S.2d 993 (1971) (unauthorized settlement, and falsely certifying copy of order issued by court thereby converting client's funds); *In re Levine*, 202 N.Y.S.2d 391 (1960) (forgery and larceny in obtaining unauthorized settlement of his clients' claims, and misappropriating

the proceeds); *In re Belding*, 589 S.E.2d 197, 201 (S.C. 2003) (upon lawyer learning he missed hearing, "engaged in a charade to conceal his mistakes" by "orchestrat[ing] an unauthorized settlement" and attempting to be relieved as counsel); *Discipline of Tanner*, 960 P.2d 399 (Utah 1998) (making and using false power of attorney to settle case without contacting client, keeping settlement proceeds, and lying to investigator which resulted in conviction for false swearing); *In re Wysolmerski*, 702 A.2d 73 (Vt. 1997) (lawyer bound clients to unauthorized settlements, misrepresented to other attorneys authority to bind clients, and lied to clients about status of cases).

None of the cases shed any light on the situation here, where no settlement was actually consummated, and the alleged settlement was merely a demand.

Notably, the PCC does not urge any sanction for the violation, and Attorney O'Meara concurs that none is appropriate.

XIV. Mitigating and Aggravating Factors

There is no dispute that Attorney O'Meara was diligent in prosecuting the Conant's case. He successfully assembled the litigation tools necessary for settlement or trial, and timely produced first a confession of liability and then a settlement for the maximum amount of money available. His diligence in advocating for his clients is a mitigating factor.

Moreover, whatever O'Meara did, it had no affect on either the course of the litigation or its ultimate outcome. *C.f. Morse's Case*, 160 N.H. 538 (2010) (lawyer's action caused serious injury). The most it caused was some stress for the Conants, which is a normal and common feeling experienced by personal injury clients during the final negotiation of their claims. Even the PCC says that the Conant's harm was limited to "a loss of the loyalty and objectivity of their legal counsel." PCC BRF. at 30. Because O'Meara does not concede he violated any ethical obligations, he maintains

that even that harm was due to the Conant's own misgivings about O'Meara's contingent fee, and thus even the PCC's allegation of harm is overstated. O'Meara faced the same issues inherent in every contingent fee arrangement when the client complains about the fee, and should not be penalized for it.

The fact that O'Meara continued to negotiate his fee *downward* every time his clients complained is a further mitigating factor.

The PCC suggests that O'Meara's previous disciplinary action should be an aggravating factor. That occurred in the context of his divorce, which this court noted was a "highly charged and emotional proceeding in which he served as his own counsel." *O'Meara's Case*, 150 N.H. 157, 160 (2003). Moreover, the conduct involved a mistaken misdating, which O'Meara had failed to correct. *O'Meara's Case*, 150 N.H. at 158. It must be noted that in the Conant's case, when O'Meara inadvertently misdated a letter to Davis, he immediately corrected the error. Accordingly, O'Meara's prior discipline case should not be regarded as aggravating. The fact that until now his divorce was O'Meara's only brush with the attorney discipline system should be regarded as a mitigating factor.

O'Meara's "refusal to acknowledge the wrongful nature of his conduct" PCC BRF. at 32, is not an aggravating factor because he maintains he did not violate his ethical duties. Moreover, he has merely asserted his due process right in the retention of his professional license, *Schware v. Bd. of Bar Examiners*, 353 U.S. 232 (1957) (lawyer); *Appeal of Plantier*, 126 N.H. 500 (1985) (doctor), and his livelihood therefrom, which obliged him to defend himself against a well-financed and well-represented family which, even in this Court, sought disgorgement.

Accordingly, the most elevated sanction Attorney O'Meara should suffer is a public censure.

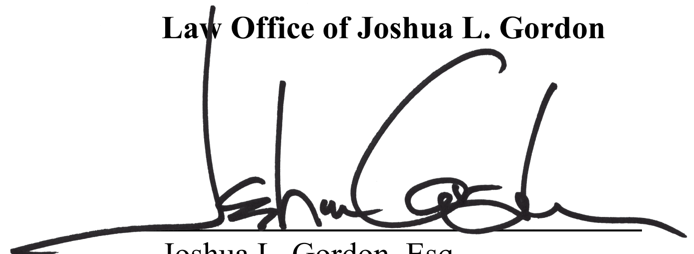
CONCLUSION

Based on the foregoing, this Court should find that Attorney O'Meara did not violate any ethical rules, and that if he did the violation was minor and the most his conduct warrants is a minor sanction.

Respectfully submitted,

Timothy O'Meara, Esq.
By his Attorney,

Law Office of Joshua L. Gordon



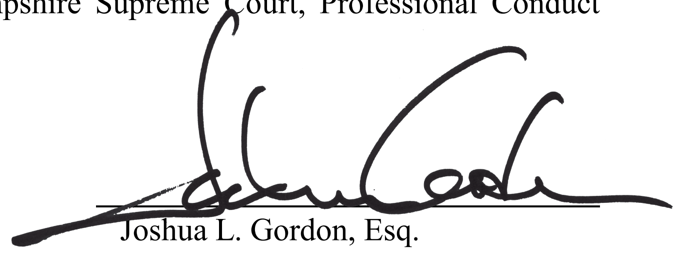
Dated: April 1, 2012

Joshua L. Gordon, Esq.
NH Bar ID No. 9046
75 South Main Street #7
Concord, NH 03301
(603) 226-4225

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Timothy O'Meara, Esq. requests that Attorney Joshua L. Gordon be allowed oral argument, and because of the scope of this case, that he be allowed as much time as necessary to present the issues to the Court. SUP.CT.R. 18(3).

I hereby certify that on April 1, 2012, copies of the foregoing will be forwarded to Julie Introcaso, Esq., Disciplinary Counsel, New Hampshire Supreme Court, Professional Conduct Committee.



Dated: April 1, 2012

Joshua L. Gordon, Esq.