

51 PRB

[7-Apr-2003]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: Charles Capriola, Esq.

PRB File Nos. 99.35 & 99.36

Decision No: 51

On January 27, 2003, the parties filed a stipulation of facts as well as conclusions of law and recommendations on sanctions. Respondent also waived certain procedural rights including the right to an evidentiary hearing. The panel accepts the facts and recommendations and Respondent is publicly reprimanded for borrowing money from clients without informing them that they had differing interests in violation of DR 5-104(a) and DR 1-102(A)(7) of the Code of Professional Responsibility. Since the misconduct took place prior to September 1, 1999, it is covered by the Code

rather than the present Vermont Rules of Professional Conduct.

Facts

Respondent was admitted to practice law in Vermont in October of 1970 and is presently engaged in solo practice. His wife serves as his secretary, and he has no other paid staff. His practice focuses mainly on criminal defense, divorce and real estate work, though until recently he did a lot of personal injury work.

In 1997 Respondent began to experience personal problems that continue to affect him today. His adult son was diagnosed with a cancerous brain tumor. His son's prognosis was poor, and his health has steadily declined. This situation caused significant stress in Respondent's family causing his wife to experience health problems of her own. Eventually, the toll on their personal lives prevented Respondent's wife from working at all and significantly limited the amount of time and attention that Respondent was able to devote to his practice. As a result, Respondent and his family fell behind on their mortgage and other obligations, at the same time incurring substantial medical bills.

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For more than thirty years, Respondent has been friends with P.M and has represented him and members of his family in various criminal and civil

matters over the years. In 1998 Respondent represented P.M. in a civil matter in which P.M. was sued as a result of an auto accident. Respondent settled the case and on the same day telephoned P.M. and asked him to come to the office the following day because he had a favor to ask him. P.M. went to Respondent's office, and Respondent asked to borrow \$1,500 from him. P.M. was grateful that Respondent had settled his case within the policy limits, felt pressure to make the loan and loaned Respondent \$1,500 in cash.

Respondent provided P.M. with a receipt dated October 22, 1998, that stated "received \$1,500 from P.M. this date." There was no other documentation for the loan, but Respondent told P.M. that he would pay him back soon. Respondent did not pay back the loan until September of 2000, and then only after an attorney intervened on behalf of P.M. Respondent paid back \$1,845.00 representing interest and principal. P.M.'s attorney filed a complaint with the Professional Conduct Board.

Respondent and P.M. had differing interests in this loan transaction. Respondent did not advise P.M. to seek independent legal advice prior to making the loan. Given their long relationship, P.M. reasonably expected Respondent to exercise his professional judgment to protect P.M. in the transaction.

For more than thirty years, Respondent has been friends with B.B. and has Represented him in various criminal and civil matters over the years. In June of 1997, Respondent asked B.B. to loan him \$15,000. At the time, he knew that B.B. was in a financial position to make the loan. B.B. agreed to lend him the money and, over the course of the summer, made a series of payments to Respondent totaling \$15,000. The last payment was made on September 5, 1997, and on that date, Respondent executed a demand note in which he promised to pay B.B. \$20,000 by October 20, 1997. Respondent did not realize that the terms of the note were in violation of Vermont's laws governing interest rates.

Respondent did not repay the note when it came due despite B.B.'s repeated requests. By October of 1998, Respondent had only re-paid \$3,500, and B.B. hired an attorney to assist in recovering the balance. Respondent and the attorney negotiated a payment plan in which Respondent would pay the remaining principal of \$11,500, interest of \$1,614.41 and attorney's fees of \$400. The loan was paid off in July of 2000. B.B.'s attorney reported the matter to the Professional Conduct Board.

Respondent and B.B. had differing interests in the loan transaction. Respondent did not so advise B.B. nor did he advise B.B. to seek independent legal advice prior to making the loan. Given their long relationship, B.B. reasonably expected Respondent to exercise his professional judgment to protect B.B. in the transaction.

Other Relevant Considerations

Respondent has a prior disciplinary record. He was disbarred in 1976 and was reinstated in 1984.

While these matters have taken a great deal of time to resolve, the delay cannot be attributed to neglect by either party. After the investigation was opened, Respondent was diagnosed with cancer. The ensuing treatment prevented him from responding to requests from Disciplinary Counsel and, as a result, the investigation stalled. See PRB Decision No. 29 (November 29, 2001).

Respondent's personal problems have abated somewhat. While both he and his son remain afflicted with cancer, the family has come to grips with the situation. Respondent and his wife have returned to work and are no longer facing the financial problems that resulted from their inability to focus on Respondent's practice.

Conclusions of Law

DR 5-104(a) of the Code of Professional Responsibility prohibited a lawyer from entering "into a business transaction with a client if they have differing interests therein and the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client consents after full disclosure."

With respect to the loans from P.M. and B.B., Respondent entered into a business transaction with a client in which the client had differing interests. P.M. and B.B. expected Respondent to exercise his judgment to protect their interests. Respondent did not fully disclose to P.M. and B.B. the potential for a conflict, nor did he advise them to seek independent legal advice. Respondent's conduct in these two loan transactions violated DR 5-104(a).

DR 1-102(A)(7) of the Code of Professional Responsibility prohibited lawyers from engaging in conduct that adversely reflected on their fitness to practice law. Respondent was not aware that it was improper to ask for and accept loans from clients. His failure to understand this ethical precept adversely reflects on his fitness to practice law and violates DR 1-102(A)(7).

Sanction

The Panel accepts the recommended sanction. While there is no Vermont case law directly on point, the recommended sanction conforms to the guidelines set forth in the ABA Standards for Imposing Lawyer Sanctions. The Supreme Court has indicated that it is appropriate to use the ABA Standards for Imposing Lawyer Sanctions for guidance in reaching an appropriate sanction. See *In Re Warren*, 167 Vt. 259, 261 (1997); *In Re Berk*, 157 Vt. 524, 532 (1991) (citing *In Re Rosenfeld*, 157 Vt. 537, 546-47

(1991)).

Section 4.33 of the ABA Standards for Imposing Lawyer Sanctions provides that:

Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

Respondent was negligent in failing to realize that his loan transactions with P.M. and B.B. might cause his representation of their interests to be materially affected by his own. Respondent believed that he was asking for loans from friends and did not stop to consider the ethical implications of his behavior. His failure to do so constitutes a neglect of the duties imposed upon him by the ethical rules.

Respondent's negligence caused injury and potential injury to each client. Both were forced to engage an attorney to obtain repayment, and Respondent's negligence exposed B.B. to potential liability under the laws governing interest rates.

In imposing sanctions it is appropriate to consider aggravating and mitigating factors. ABA Standards for Imposing Lawyer Sanctions, §9.11. In

aggravation, Respondent has a prior disciplinary record and substantial experience in the practice of law, ABA Standards for Imposing Lawyer Sanctions, §9.22(a),(i). In mitigation, he was suffering from serious health and family problems which affected his judgment, ABA Standards for Imposing Lawyer Sanctions, §9.32(c). None of these factors compel us to deviate from the agreed sanction.

Order

Respondent is PUBLICLY REPRIMANDED for violation of DR 5-104(a) and DR-1-102(A)(7) of the Code of Professional Responsibility.

Dated: 4/7/03 FILED

HEARING PANEL NO. 2

/s/

Douglas Richards, Esq., Chair

/s/

Lawrin P. Crispe, Esq.

/s/

Michael H. Filipiak