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[14-May-2002]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

DECISION NO. 34

In re: Andrew Goldberg, Esq., Respondent
PRB File No. 2000.081

Respondent is charged with violating Code of Professional Responsibility provisions DR6-101(A)(3), by neglecting a legal matter entrusted to him; DR6-101(A)(1) by handling a matter that he knew or should have known that he was not competent to handle on his own; and DR1-102(A)(5) by engaging in conduct that was prejudicial to the administration of justice, in that his neglect resulted in dismissal of Complainant's case. The matter was heard on March 22, 2002. The Office of Disciplinary Counsel was represented by Michael Kennedy, Esq. Respondent, who no longer resides in Vermont, was represented by Kaveh S. Shahi, Esq. and also participated in the proceedings by telephone. Complainant also was given an opportunity to provide input via telephone, and communicated his opinions and concerns through Disciplinary Counsel.

Prior to the aforesaid hearing, the parties submitted a stipulation of facts and recommended conclusions of law, which the Panel accepts and which are incorporated below. Following the hearing, and colloquy concerning the most appropriate sanction at the hearing, the parties also submitted a stipulation dated April 1, 2002 as to a recommended sanction, which the Panel also accepts and incorporates into this decision. Briefly, components of that sanction involve a public reprimand, the transfer of Respondent's license to practice law in Vermont to "inactive status" for a minimum of four (4) months, and a two-year term of probation in the event of Respondent's return to active practice of law, with various conditions, all as more particularly set forth below.

FINDINGS OF FACT

The following facts are adopted from the Stipulation of Facts submitted by the parties:

1. At all times relevant to this case, the Respondent was an attorney licensed to practice law in the State of Vermont. Attorney Goldberg was admitted to practice law in Vermont in 1992.

2. Stuart Cheney has been operating a small dairy farm in Guilford, Vermont, for many years. The farm is leased by Stuart Cheney but his son, Fred Cheney, manages the operations on a day to day basis.

3. Fred Cheney does not have a ownership interest in the farm. The farm rarely has employees, but during the relevant time frame of 1995, Fred Cheney was assisted by a neighbor, Daniel O'Neil (now deceased).

4. In early 1995, Fred Cheney started feeding stale bread to the herd to supplement their diet. He knew other farmers purchased stale bread

from bakeries as an economic feed supplement. Fred checked with the farm veterinarian, Dr. Major who approved the use of bakery products as feed.

5. Fred Cheney started buying stale bread from F.R. LePage Bakeries, Inc., d/b/a Country Kitchen Bakers ("LePage"), in Brattleboro. The bread came in plastic wrappers as originally delivered by LePage to its customers but had been returned as unsold/stale. At the farm, Fred unwrapped each loaf and fed it to the cows.

6. Fred Cheney was eventually contacted by Great Northern Recycling, Inc., (GNR), a Maine company that offered to sell and deliver stale bread. Fred Cheney placed an order for 11 tons, and on April 28, 1995, delivery was made at the farm by Triple-T-Trucking, Inc., a trucking company hired by GNR.

7. There is a significant factual discrepancy as to what was delivered on April 28, 1995. Fred Cheney has testified that the pile consisted of compacted bread loaves, raw dough, and some "garbage"-soda cans, etc. The owner of Triple-T-Trucking, Norman Mallory and his driver, Dennis Pike, have testified that the order was for stale bread, like that previously purchased by Fred Cheney directly from the Bakery, and the same was delivered. Fred Cheney claims that upon delivery he demanded the load be returned, Triple-T denies this.

8. There were two large containers outside the Bakery, one contained stale bread, the other was a compactor that contained compacted stale bread and raw dough. Triple-T insisted that it picked up the container for stale bread; Fred Cheney's description is more consistent with the contents of the compactor.

9. The delivery in question was not made pursuant to any contract between Cheney and LePage. Nor was there a contractual relationship between Cheney and Triple-T-Trucking.

10. Fred Cheney determined within a day or two of the delivery that he could not feed the bread to the cows because it was not practical to unwrap the compacted bread. The pile then sat near the Cheney barn for some three weeks. As the weather warmed up and the pile started giving off an odor, the cows in the pasture several feet away managed a couple of times to reach the pile by stretching under the electric fence. Concerned about the cows gorging on the bread and becoming ill, Fred Cheney moved the fence back and shoveled the pile away from it. Even though the farm had the equipment to remove the pile to a safe location, this was not done.

11. On May 16, 1995, the cows pushed down the fence, got into the pile, and managed to eat much of it before discovered. They became ill, and three cows died within 24 hours. Dr. Major determined the cause of the ailment to be alcohol poisoning from the yeast. Dr. Major testified the problem was the cows gorging on food stuff containing yeast; the cows would have become as ill by gorging on stale bread as ordered by Cheney or by gorging on the compacted bread/raw dough as allegedly delivered.

12. The Cheneys claimed that as a result of the ailment, six cows died and 19 had to be replaced because of lingering health problems. Dr. Major could only relate three deaths to the incident.

13. The State Department of Agriculture investigated. Douglas

Johnstone was assigned the task of determining whether GNR had violated the State's feed registration law/regulations. He testified that the sale of bread initially by LePage to Fred Cheney did not trigger the regulations. Any bakery waste including raw dough may be sold to farmers without the need for registration and labeling as long as it is unsolicited. However, solicitation and sale by GNR required registration and labeling of the product. On June 15, 1995, the Department of Agriculture issued a Withdrawal From Distribution Order to GNR.

14. In October 1995, the Cheneys through the efforts of Mr. O'Neil retained Attorney Goldberg, a local attorney in solo practice. On May 23, 1997, Mr. Goldberg brought suit in Windham Superior Court against LePage, GNR and Triple-T-Trucking. The complaint alleged 8 counts including claims for failure to register the feed, breach of contract, fraud, and intentional infliction of emotional distress. Prior to representing the Cheneys, attorney Goldberg had not tried a products liability case, a case involving claim of lost profits, or a case about milk production. Attorney Cheney did not consult with a more experienced attorney or seek to associate one during the pendency of the case before the trial court.

15. On August 22, 1997, Triple-T-Trucking filed a 12(b)(6) motion to dismiss which, despite opposition by Attorney Goldberg, was granted on March 13, 1998.

16. The remaining portion of the case was dismissed against the other defendants on August 14, 1998, after plaintiffs' failure to comply with Court Order dated July 28, 1998, to provide discovery responses and show cause. The sequence of event leading to the dismissal of the case is as follows.

17. In August 1997 GNR propounded on plaintiffs interrogatories and request to produce. Attorney Goldberg failed to provide timely responses; he was trying to obtain the information from the Cheneys with the assistance of Mr. O'Neil who was acting as a conduit. Mr. O'Neil had Stuart Cheney's permission to act on his behalf with attorney Goldberg. Stuart Cheney deposition, Vol. II, May 23, 2001, pp.140-141. Indeed, all the meetings between Mr. Goldberg and the Cheneys took place at Mr. O'Neil's house. Id. 143. Mr. Stuart testified he did not have much direct contact with attorney Goldberg, and most of the meetings and conversations took place between Mr. O'Neil and attorney Goldberg. Id. 155, 158.

18. In January 1998, GNR filed a motion to compel. Attorney Goldberg did not oppose the motion which was granted, requiring answers by March 31, 1998. Attorney Goldberg provided draft responses which were incomplete. GNR in April 1998, filed a motion for sanctions. LePage joined in the motion. The motion included a request that the complaint be dismissed. GNR also moved for partial summary judgment. However, attorney Goldberg failed to respond to these motions.

19. Attorney Goldberg met with the Cheneys and Mr. O'Neil and told them discovery had to be fully answered, but he did not tell the Cheneys that motions for sanctions were filed; Attorney Goldberg was too embarrassed by the developments in the case. He did, however, tell Mr. O'Neil that they could be sanctioned unless responses were provided. Goldberg deposition, p.57.

20. By an Order dated June 8, 1998, the Court noticed a hearing for July 9, 1998, on the pending motions. Attorney Goldberg did not attend the hearing on July 9, 1998, claiming that he had miscalendered the hearing. Id. at 55-56. Attorney Goldberg at some point told the Cheneys that he had missed the hearing, but could not recall the date. Id. at 62. Although attorney Goldberg denies telling the Cheneys that he had attended the July 9, 1998, hearing, he was under the impression that they assumed he had attended, and did not take any action right away to correct that assumption. Id. at 86-87. Attorney Goldberg denies making any misrepresentations to the Cheneys. Id. at 63.

21. On July 24, 1998, the Court granted defendants' motion for sanctions. The Court also granted GNR's motion for partial summary judgment. The Court Ordered dismissal of the complaint on August 12, 1998, unless plaintiffs showed good cause for the failure to comply with Court Orders.

22. Attorney Goldberg received a copy of the Court Order, but failed to move to show cause or otherwise respond. Before August 12, 1998, Attorney Goldberg did not send a copy of the July 24, 1998, Order to the Cheneys. Id. 62. Attorney Goldberg could not recall whether he advised the Cheneys before August 12, 1998, of the Order dated July 24, 1998. Id. at 62-63. The complaint was dismissed on August 12, 1998.

23. Fred Cheney recalls that sometime in August of 1998 a court staffer told Mr. O'Neil that the complaint had been dismissed. Fred Cheney recalls calling Attorney Goldberg and asking whether the complaint had, in fact, been dismissed. When asked, Attorney Goldberg told his clients about the dismissal of the case. The Cheneys acting pro se filed a motion to reconsider the dismissal of the complaint. The motion was denied. The Cheneys through counsel pursued an appeal. The trial court was affirmed by the Supreme Court.

24. The Cheneys prosecuted a legal malpractice action against attorney Goldberg. That action was resolved for a monetary settlement.

25. According to Stuart Cheney, the 3 heifers had a replacement value of $1,000 each. The heifer were not milkers, and Mr. Cheney could have replaced them before experiencing loss of income from milk production. According to Mr. Cheney the net profit from the sale of milk from each cow ranged from break even to $400 annually. Even if it had taken a year to replace the heifers, Mr. Cheney's damages would have increased by $1,200. The compensatory damages suffered by Stuart Cheney was therefore under $5,000.

26. Attorney Goldberg cooperated in the resolution of the malpractice action against him. He has shown regret and remorse for the manner in which the Cheney case was handled. He believes he had difficulty effectively communicating with the Cheneys, and became fearful and embarrassed as the intensity of the dispute over discovery requests grew. Eventually, attorney Goldberg admitted to the Cheneys that he had made mistakes in handling their case. Goldberg deposition, p.66. Attorney Goldberg was experiencing a great deal of stress about the case, causing him inability to sleep well, self doubt, and uncertainty. Id. 69. Attorney Goldberg does not have a record of any other disciplinary action. The Panel heard from Respondent at its hearing on the cause, and makes the following additional findings of fact based upon that testimony:

27. Goldberg was chagrined by his mishandling of the Cheney case, and generally unhappy with his law practice as a solo practitioner. As a consequence of these experiences, Goldberg decided to "move on," closed his law practice in Vermont and has relocated to North Carolina. Goldberg is no longer engaged in the practice of law, and now works instead for a non-profit organization. Goldberg does not present believe that he will ever seek to resume the practice of law, although such a future eventuality cannot be completely ruled out.

CONCLUSIONS OF LAW

1. Prior to September 1, 1999, the Code of Professional Responsibility governed attorney conduct in Vermont. Thus, the Code applies to this case, in that the conduct at issue took place in 1997 and 1998.

2. DR 6-101(A)(3) of the Code of Professional Responsibility prohibited a lawyer from neglecting a legal matter entrusted to him or to her. Based upon the aforesaid facts, we conclude that Attorney Goldberg violated DR 6-101(A)(3) by neglecting the legal matter entrusted to him by Stuart Cheney and his family.

3. DR 6-101(A)(1) of the Code of Professional Responsibility prohibited a lawyer from handling a matter that he knew, or should known, that he was not competent to handle without associating with a lawyer who was competent to handle it. Based upon the aforesaid facts, we conclude that Attorney Goldberg violated DR 6-101(A)(1) by failing to associate with a competent attorney when he knew, or should have known, that he was not competent to handle the Cheney matter on his own.

4. DR 1-102(A)(5) prohibited lawyers from engaging in conduct that was prejudicial to the administration of justice. Based upon the aforesaid facts, we conclude that Attorney Goldberg violated DR 1-102(A)(5) in that his neglect caused the Cheneys' complaint to be dismissed.

DISCUSSION

As in many disciplinary matters, the most difficult task in this case is determination of the appropriate sanction. Of course, in performing this duty we consider and follow all relevant decisions of the Vermont Supreme Court. We are also guided by opinions of the Professional Conduct Board, which heard and decided such matters until Administrative Order No. 9 was amended on September 1, 1999, disbanding the PCB and establishing the present disciplinary system. Since that amendment, disciplinary cases have been decided by Hearing Panels appointed by the Professional Responsibility Board, and we also review and give due deference to published decisions by our fellow Hearing Panels.

Given the facts of this case, and the authorities cited herein, it is clear that a public reprimand at least is necessary. Consideration has been given to whether Respondent should have his license to practice law formally suspended for a time. Suspension was the sanction in the recent neglect case of In Re: Sunshine, PRB Decision No. 28, a Hearing Panel opinion filed December 5, 2001. In that matter, in keeping with the joint recommendation of the parties, the Respondent was suspended from the practice of law in the state of Vermont for four (4) months, followed by a

two-year term of disciplinary probation with various conditions, all as are more particularly set forth in the cited decision. A fair question is how closely Goldberg's sanction should mirror Sunshine's.

While a suspension was imposed in Sunshine, there have been other disciplinary cases involving similar examples of negligence in which a reprimand was deemed to be an appropriate and adequate form of sanction. The following cases, considered and decided by the full Professional Conduct Board in the final months of its existence, and in which the Board's recommendations were also reviewed and adopted by the Vermont Supreme Court, are illustrative: In Re Butterfield, 170 Vt. 592 (2000) (public reprimand); In Re Andres, 170 Vt. 599 (2000) (public reprimand); In Re Nawrath, 170 Vt. 577 (2000) (public reprimand and disciplinary probation for one year); In Re Bailey, 170 Vt. 616 (2000) (public reprimand and disciplinary probation for two years).

In making this decision, the Supreme Court has recommended consideration of the ABA Standards for Imposing Lawyer Sanctions (hereinafter the "ABA Standards"), see, e.g., In Re Warren, 167 Vt. 259, 261 (1997). The ABA Standards indicate that in determining a sanction consideration should be given at least to all of the following factors: (a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors. Id. §3.0. Accord: In Re Warren, supra.

Here, the primary duty violated was the obligation of an attorney to the client to represent that client diligently and competently. The ABA Standards inform that a reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client, §4.43, while a suspension is generally appropriate when a lawyer engages in a pattern of neglect and causes injury or potential injury to a client, §4.42(b). (emphasis supplied)

The ABA Standards cited in the foregoing paragraph do not factor in aggravating or mitigating circumstances. Here disciplinary counsel has acknowledged, and we concur, that a number of mitigating factors recognized by the ABA Standards are present: Respondent does not have a disciplinary record, §9.32(a). No dishonest or selfish motive appears, §9.32(b). Respondent was inexperienced in the practice of law, §9.32(f). He has cooperated with disciplinary counsel's investigation, §9.32(e), and has demonstrated remorse for his conduct, §9.32(l). Thus, even if §4.42(b) is more applicable here than §4.43, these mitigating factors can be cited to support the imposition of a reprimand rather than a suspension.

Our decision is also made with the knowledge that Respondent has closed down his solo practice in the wake of this unfortunate case, and is no longer practicing law. In this respect the most analogous of the aforesaid cited cases is In Re Butterfield, supra. On those charges, the Supreme Court approved the finding of the Professional Conduct Board "that a public reprimand is the appropriate sanction in these matters." Id. at 594. The Board explained that:

> While a suspension might be an appropriate sanction, given the underlying facts, the Board is not considering this sanction because respondent has taken appropriate steps to address the issues that brought about the violations. Id.

Those steps included the closing of his solo practice, as well as the understanding that Respondent would not renew his license to practice law when it expired.

We similarly conclude that a public reprimand is the most appropriate sanction in this case. The additional terms and conditions imposed below, which parallel those imposed in Sunshine, will provide Respondent with monitoring and supervision, to assist him and to protect the public, in the event that Respondent chooses to resume the practice of law at a future date.

SANCTION

Respondent shall be and is hereby publicly reprimanded for violating the Code of Professional Responsibility while handling the matter entrusted to him by Fred Cheney. As a further part of this sanction, Respondent shall forthwith transfer his license to practice law in the State of Vermont to "inactive status" for a minimum term of at least four (4) months. Should Respondent thereafter reactivate his license to practice law in the State of Vermont, Respondent shall serve a two-year period of disciplinary probation, upon the following terms and conditions:

a. Period of Probation: The terms of this probation shall take effect upon the date that the Respondent reactivates his license to practice law in the State of Vermont and shall run for two years;

b. Notice to Disciplinary Counsel: When he notifies the Court Administrator's Office of his intent to reactivate his license, Respondent shall copy Disciplinary Counsel with the notice.

c. Selecting a Monitor: Upon reactivating his license Respondent shall select an attorney licensed to practice law in Vermont who will agree to serve as the Respondent's probation monitor during the period of the Respondent's disciplinary probation. The Respondent's choice must be approved by Disciplinary Counsel.

d. Monitoring Sessions: As a condition of probation, the Respondent shall meet with his probation monitor at least once every six weeks. At each meeting, the Respondent and his monitor shall review issues affecting the Respondent's practice, including:

: his caseload;
: client needs and expectations;
: quality of communications with clients;
: deadlines and schedules; and
: Respondent's plan to resolve the particular matter.

e. Attendance: The Respondent agrees that if he misses a scheduled meeting without informing his monitor, or, if he goes more than 2 months without meeting with his monitor, that the monitor shall report the Respondent's failure to attend a scheduled meeting to Disciplinary Counsel.

f. Implementing: The Respondent shall implement any recommendation that his monitor deems necessary to ensure the appropriate conduct of his office.

g. Reporting: The Respondent shall permit and authorize his monitor to respond to Disciplinary Counsel's requests for information relating to the Respondent's compliance with the monitoring arrangement and this probationary agreement. The Respondent shall secure from his monitor a report summarizing each meeting, including any recommendations made pursuant to paragraph f of this agreement. The report shall be filed with Disciplinary Counsel within two weeks of the meeting between the Respondent and the monitor.

h. Conflicts and Waivers: As part of the monitoring program, the Respondent shall provide litigation clients with an engagement letter that discloses the that fact he is on probation and has entered into a monitoring relationship with another attorney. The letter, which shall also be sent to all existing litigation clients, shall state:

> "I have agreed to represent you in this (lawsuit, claim, etc.) I will handle the case and will ensure that no client confidences are disclosed without your specific authorization. However, as I have advised you, I have established a monitoring relationship with another attorney in order to assist me in ensuring the highest quality of legal services will be provided on your behalf. I have specifically requested and obtained your permission to discuss generally your matter with my monitor without discussing the specific substantive basis of your matter.
>
> I will limit the discussions with my monitor to the general areas of my caseload, client needs, client expectations, client communications, deadline & schedules, and my plan to resolve your matter. If, in my opinion, it becomes advisable to discuss the substantive basis of your matter with my monitor, I will request that you give me specific permission to do so in writing, and will do so only after you have given me that permission.
>
> You will not be billed or charged in any way for the time I spend discussing your matter with my monitor."

The Respondent shall ensure that the monitor does not have a conflict in discussing a particular matter. If the monitor does have a conflict, the Respondent shall

immediately inform Disciplinary Counsel. The Respondent shall not accept a litigation client who chooses not to agree to sign the engagement letter.

1. Costs: The Respondent shall bear the costs and expenses related to his compliance with the probation and monitoring agreement.

2. Unavailability of Monitor: In the event that the monitor is not able to continue to serve as the monitor under this agreement, the Respondent shall immediately notify Disciplinary Counsel. In addition, Respondent shall, as soon as possible, find a replacement monitor. The Respondent's choice of a replacement monitor must be approved by Disciplinary Counsel.

3. Termination of Probation: This probation shall run for two years from the date that the Respondent reactivates his license. The probation shall not be terminated unless or until the Respondent complies with Rule 8(a)(6) of Administrative Order 9.

4. The Respondent agrees that any violation of the terms in this agreement may serve as the basis of a disciplinary prosecution.

5. This probationary agreement does not excuse the Respondent from complying with any other Court rules that apply when an attorney reactivates a license that has been placed on inactive status.

DATED at Rutland, Vermont this 14th day of May, 2002.

HEARING PANEL NO. 1

FILED MAY 14, 2002

/s/
_____
Barry E. Griffith, Esq., Chair

/s/
_____
S. Stacy Chapman, III, Esq.*

/s/
_____
Stephen Anthony Carbine

*Hearing Panel Member S. Stacy Chapman, III, Esq. was designated to serve on the Hearing Panel considering this case by Professional Responsibility Board Chair Robert P. Keiner, Esq. due to the unavailability of Martha M. Smyrski, Esq., a regularly assigned member of the Hearing Panel No. 1. Ms. Smyrski did not participate in the consideration or decision of this matter.