63 PRB

[13-Sep-2004]

STATE OF VERMONT

PROFESSIONAL RESPONSIBILITY BOARD

In re: Kenneth Levine, Esq.

PRB File No. 2002.246

Amendment to Decision No. 63

On March 23, 2004, this Hearing Panel issued a decision suspending Respondent from the practice of law in Vermont for a period of three years for filing a false affidavit in connection with his application to appear pro hac vice in a Vermont court, in violation of Rules 8.4 (c) and 3.3(a)(1) of the Vermont Rules of Professional Conduct. In re Levine, PRB Decision No. 63 (March 2004). The decision was based upon stipulated facts and was accompanied by a recommendation from Disciplinary Counsel and Respondent that the Panel impose a public reprimand. Based upon the facts set forth in the stipulation, we found that Respondent's actions were intentional and declined to follow the recommendation.

Respondent filed a timely Motion to Reconsider and the parties filed an additional stipulation of facts, affidavits of Respondent and his treating psychologist and a joint recommendation on sanctions, again recommending that this panel publicly reprimand Respondent. The matter was heard on the issue of sanctions on August 19, 2004. Respondent was present and represented by his attorney John B. Kassel. Disciplinary Counsel Michael Kennedy was present. Respondent testified at length and his psychologist, Dr. Nicholas Corvino, testified by telephone.

With this additional evidence the Panel acknowledges that the facts are substantially different than they appeared from the first stipulation, and we now believe that our decision to suspend Respondent from the practice of law in Vermont for a period of three years was not justified. The Panel accepts the additional stipulated facts but again declines to accept the recommendation for public reprimand and orders that Respondent be suspended from the practice of law in Vermont for a period of 30 days.

Facts

The following facts incorporate those set forth in the original stipulation as well as the second stipulation, the affidavits filed in connection with the hearing and the testimony before the Hearing Panel.

Respondent is not admitted to practice law in Vermont. He is, however,

admitted to practice law in Massachusetts and frequently takes cases in the area of obstetrical medical malpractice both in Massachusetts and in other jurisdictions in which he is admitted pro hac vice. In April of 2001, a Vermont attorney, who was representing plaintiffs in an obstetrical medical malpractice case, asked Respondent to assist him with the case. The Vermont attorney filed a Motion for Admission Pro Hac Vice, and Respondent filed a sworn declaration in support of the motion. The declaration, dated April 30, 2002, included the following statement: "No disciplinary proceedings or criminal charges have ever been instituted against me." The motion was granted on May 13, 2002.

In fact, in August of 2001, Bar Counsel in Massachusetts had filed a Petition for Discipline against the Respondent. At the time he filed his Declaration in the Vermont matter, the Massachusetts Petition for Discipline was pending. Respondent's statement that "[n]o disciplinary proceedings or criminal charges have ever been instituted against me" was therefore false.

On June 14, 2002, opposing counsel in the Vermont matter moved for the revocation of Respondent's pro hac vice status, citing the Massachusetts Disciplinary Proceeding and Respondent's false statement on his declaration. On June 17, 2002, Respondent moved to withdraw. The court granted the motion but took no further action. Opposing counsel filed a complaint with the Professional Responsibility Program.

This was not the first time that Respondent had been faced with opposition from defense counsel in connection with an affidavit filed in support of a motion to appear pro hac vice. In September of 2001, in a Rhode Island matter, Respondent filed an affidavit almost identical to that filed in Vermont, stating that "[n]o disciplinary proceedings or criminal charges have ever been instituted against me." At the time of the filing of this affidavit the Massachusetts disciplinary matter was pending but not yet heard. Respondent knowingly signed this affidavit. Despite the plain language of his statement, Respondent took the position that since there was no final resolution of the Massachusetts matter, he did not need to reveal this fact in his affidavit. In March of 2002 opposing counsel filed a motion to remove him from the case based on his affidavit. On May 2, 2002, Respondent filed a lengthy objection to the motion, and later that month the court decided not to remove Respondent from the case, but referred the matter to the disciplinary authorities.

In the Spring of 2002 Respondent was dealing with the breakup of his marriage of 19 years. The decision to separate from his wife proved extremely difficult for Respondent. Two years before the separation Respondent consulted Dr. Corvino for assistance in dealing with the deterioration of his relationship with his wife. Respondent's initial objective was to continue in the marriage since he did not believe that divorce would be good for his children. In March of 2002 Respondent left the family home and moved into a house one mile away from his former home. At that time Respondent had physical custody of his three daughters, born

two years apart beginning in 1986, for three to four nights per week. When his children were with him, he did not arrive at the office until 9:00 a.m. and left by 5 p.m. This was a drastic change from his previous schedule. Prior to the separation he would often go to the office early and usually met with his staff and the other lawyers in his office after 5:00 p.m. to review cases and to answer questions they might have about pending cases.

It was at this time that the affidavit filed in Vermont was signed. The affidavit had been prepared by Vermont counsel, copied from a filing in another case in which Respondent had assisted Vermont counsel. Respondent has no recollection of signing the affidavit. His practice at that time was to rely completely on others to prepare documents. He trusted their work and would sign whatever they put in front of him. By his own admission, more than 90 per cent of what he signed he had not read. His practice with documents that required notarization was to sign them and then a member of his staff would later bring them to an attorney who rented space from Respondent who would notarize the document.

At this time there were 80 to 100 cases pending in Respondent's office, all of which were contingent fee cases. In 2002 Respondent tried 6 cases in Massachusetts and Rhode Island.

The disciplinary case in Massachusetts resulted in a hearing panel recommendation that Respondent receive a public reprimand. Massachusetts Bar Counsel appealed the panel's decision, and, on December 8, 2003, the

Massachusetts Board of Bar Overseers affirmed the sanction of public reprimand and amended the conclusions of law, finding that Respondent had failed to seek the lawful objectives of his clients, had neglected a client matter and had failed to communicate with his client. Bar Counsel v. Kenneth M. Levine, Esq., BBO File Nos. C1-98-0475 & C1-00-0309, (December 8, 2003). This decision was affirmed by the Massachusetts Supreme Court.

The Rhode Island disciplinary matter resulted in a public reprimand in May of 2003.

Since 2002 when these matters arose, Respondent has made changes to his practice. Whereas in 2002 almost all documents were prepared by others, he now prepares many himself. He also reads all documents before he signs them. He now has an associate to whom he has delegated responsibility for some cases. Her schedule is flexible, and she is able to meet with him on weekends or at other times when he does not have responsibility for his children. He now takes fewer cases and is more selective about the cases that he does take. He does not take new out of state cases and at present has only 5 such cases pending in his office.

As a result of the Massachusetts finding of neglect, Respondent instituted a redundant calendaring system which he finds effective.

Both Respondent and his psychologist believe that Respondent is now better able to handle the details of his practice and his family

obligations than he was in 2002.

In addition to his prior discipline, there are several aggravating factors present. Respondent has substantial experience in the practice of law and substantial experience practicing in other states under pro hoc vice provisions. We now agree with the parties that the facts do not support the finding of a dishonest or selfish motive. We do not find this to be either a mitigating factor or an aggravating factor. Respondent did not believe that the Vermont case was a particularly serious one. He did not intend to be the lead counsel, but agreed with local counsel to provide assistance. He continued to do so after withdrawing, but took no fee. We do not find a pattern of conduct since, though the Vermont and Rhode Island cases on their fact appear almost identical, they arose in very different circumstances and arose at the same time. In mitigation, we find that Respondent was experiencing substantial emotional problems in his personal life, has cooperated with Disciplinary Counsel and expressed remorse for his conduct.

Conclusions of Law

Our conclusions of law do not differ from our previous opinion. The fact that we no longer find that Respondent's filing of a false affidavit with the court was intentional goes to the issue of sanctions, but does not affect our finding of violation of Rules 8.4 (c) and 3.3(a)(1) of the Vermont Rules of Professional Conduct.

Sanctions

ABA Standards

We agree with the parties that the ABA Standards provide important assistance in sanction decisions, but we do not believe that these guidelines suggest the imposition of public reprimand.

Section 6.13 provides that "Reprimand is generally appropriate when a lawyer is negligent ¼ in determining whether statements or documents are false or in taking remedial action" (emphasis added). Section 6.12 applies, however, when the attorney's state of mind is knowing rather than negligent:

> Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding (emphasis added).

The ABA Standards recognize three states of mind in setting out possible sanction: negligence, knowledge and intentional acts. Based upon our

reading of the previous stipulation, we concluded that Respondent acted intentionally and our sanction was based upon that state of mind. We now find that Respondent did not act intentionally, but we believe his actions were more than mere negligence. The Standards define "knowledge" as "the conscious awareness of the nature or attendant circumstances of the conduct without the conscious objective or purpose to accomplish a particular result." ABA Standards §III. Respondent did not read over the false affidavit and make a conscious decision to sign it, knowing that it was false, but there are several factors here which lead us to the conclusion that his conduct was more than mere negligence. Respondent was clearly conscious of the "attendant circumstances" surrounding his actions. He conducted his practice in a way that invited just this sort of problem. He had made a conscious and knowing decision to sign without reading virtually everything that was placed before him. In addition, he treated affidavits in the same way as other papers. Rather than acknowledging the document before a notary, which is what the document states on its face (FN1), he signed the document and left the matter of obtaining the acknowledgment to his staff.(FN2)

Acceptable office practice offered Respondent two opportunities to correct the false affidavit, once when he could have read the document prepared for his signature by others and once when he could have appeared before the notary who acknowledged his signature. Respondent passed up both of these opportunities.

We consider the timing of the signing of this affidavit and the proceedings in the Rhode Island case are also significant. Respondent signed the Vermont affidavit on April 30, 2002. One month earlier, opposing counsel in Rhode Island had filed a motion to remove Respondent from that case based upon his false affidavit. On May 2, just two days after signing the Vermont affidavit, Respondent filed a lengthy memorandum on the issue of whether or not the Massachusetts discipline should have been revealed on the Rhode Island affidavit. Further, these affidavits were not novel to Respondent. He was involved in a number of cases in other jurisdictions and was frequently filing petitions for pro hoc vice status. Because of the pending motion in Rhode Island, Respondent knew that there was the potential for difficulty in the wording of his affidavit, and at the very least this should have brought to his mind the need for concern about the Vermont affidavit.

Another matter of concern is the fact that Respondent's practice is limited to challenging the competence of other professionals. This should have instilled in him greater appreciation of the need to maintain high professional standards in his own practice.

Viewing Respondent's conduct in light of all of these factors, we believe that it is more consistent with knowing action than it is with mere negligence. This brings it clearly within the scope of the suspension provision of Section 6.12 of the ABA Standards for Imposing Lawyer Sanctions.

We have considered the aggravating and mitigating circumstances. In aggravation, Respondent has substantial experience not only in the practice of law, but in pro hoc vice practice in states other than the state of his admission. ABA Standards §9.22(i). He also has two instances of prior public discipline. ABA Standards §9.22(a). In mitigation we find that Respondent suffered from emotional problems during the time of the violation. ABA Standards §9.32(c). He cooperated with Disciplinary Counsel, ABA Standards §9.32(i), and has expressed remorse, ABA Standards §9.32(l). The facts do not support a finding of a selfish motive as we believed before, but we do not find this to be a either a mitigating or an aggravating factor. Weighing all of these factors does not change our decision to impose suspension.

Vermont Case Law

Based upon the evidence now before the Panel, we do not find that In re Daly, PRB Decision No. 49 (April 7, 2002) is controlling since there is no evidence of intentional misrepresentation to the court. We find the facts to be closer to that of In re Blais, PRB Decision No. 31 (January 31, 2002). The charges in Blais were that of neglect and failure to keep clients informed, but the Hearing Panel noted that an underlying cause was the fact that Blais was unable to effectively manage his practice. This fact came out more clearly in the decision on his reinstatement petition where the Hearing Panel found that "the root of Respondent's problem was

his failure to effectively manage his caseload." In re Blais, PRB Decision No 58 (October 1, 2003), approved by Supreme Court Entry Order October 21, 2003. Attorney Blais was suspended for longer than the thirty days we have ordered here, but his record of prior discipline was greater than that of Respondent.

We do not agree with Respondent that In re DiPalma, PRB Decision No. 44, (October 22, 2002), is controlling here. The Hearing Panel found that DiPalma's actions were negligent, rather than knowing and his only prior discipline was an admonition.

Were Respondent a resident of Vermont we would impose conditions of probation or otherwise which would insure that Respondent reviewed all of his office practices and instituted procedures designed for efficient office administration and case management. It seemed clear from Respondent's testimony that he has instituted changes in his office practices only in response to specific disciplinary proceedings. After the charges of neglect, he revised his calendaring system. After the two charges of filing false affidavits, he began to read all documents before he signed them. These are good practices, but it does not appear that Respondent has taken any steps to assess all of his office procedures by way of a risk management audit or other comprehensive survey.

It is neither feasible nor appropriate for this Panel to impose any such conditions in this case, as there is no way for the Office of

Disciplinary Counsel to monitor compliance. In the event that the State of Massachusetts imposes reciprocal discipline based upon our decision, we would respectfully recommend conditions requiring assessment and monitoring of Respondent's office practices.

Order

Respondent, Kenneth Levine, is hereby suspended from the practice of law in Vermont for a period of thirty days commencing 45 days from the date of this order. Respondent shall promptly comply with the provisions of A.O. 9 Rule 23.

Dated: 9/10/04.

FILED 9/13/04

HEARING PANEL NO. 1

/s/

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Barry E. Griffith, Esq. Chair

/s/

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Martha M. Smyrski, Esq.

/s/

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Stephen Anthony Carbine

Footnotes

FN1. The document reads: "Subscribed and sworn to before me this 30 day of April, 2002. /s Notary Public"

FN2. While no violation is charged or found in connection with this practice, we note that failure to follow proper procedures in the acknowledging of a deed has been found to be a violation of the disciplinary rules. See In re Coughlin, 450 A.2d 1326 (1982), cited in the Commentary to Section 6.13 of the ABA Standards for Imposing Lawyer Sanctions.

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63 PRB

[23-Mar-2004]

STATE OF VERMONT

PROFESSIONAL RESPONSIBILITY BOARD

In re: Kenneth Levine, Esq.

PRB File No. 2002.246

Decision No. 63

On November 12, 2003, the parties filed a stipulation of facts, together with recommended conclusions of law and a recommendation on sanctions. Respondent also filed a waiver of certain procedural rights including the right to an evidentiary hearing in the event that the Panel accepts the stipulated facts. Respondent is charged with filing a false affidavit in connection with an application to appear pro hac vice in a Vermont proceeding in violation of Rules 8.4 (c) and 3.3(a)(1) of the Vermont Rules of Professional Conduct. The Panel accepts the stipulation of facts and the recommended conclusions of law, but declines to follow the parties recommendation for a public reprimand, and orders that Respondent be suspended from the practice of law in Vermont for a period of three years.

Facts

Respondent is not admitted to practice law in Vermont. He is, however,

admitted to practice law in Massachusetts and frequently takes cases in the area of obstetrical medical malpractice. In April of 2001, a Vermont attorney, who was representing plaintiffs in an obstetrical medical malpractice, asked Respondent to assist him with the case. The Vermont attorney filed a Motion for Admission Pro Hac Vice, and Respondent filed a sworn declaration in support of the motion. The declaration, dated April 30, 2002, included the following statement: "No disciplinary proceedings or criminal charges have ever been instituted against me." The motion was granted on May 13, 2002.

In fact, in August of 2001, Bar Counsel in Massachusetts had filed a Petition for Discipline against the Respondent. At the time he filed his Declaration in the Vermont matter, Respondent knew that the Massachusetts Petition for Discipline was pending. Respondent's statement that "[n]o disciplinary proceedings or criminal charges have ever been instituted against me" was false, and he knew it to be so.

On June 14, 2002, opposing counsel in the Vermont matter moved for the revocation of Respondent's pro hac vice status, citing the Massachusetts Disciplinary Proceeding and Respondent's false statement on his declaration. On June 17, 2002, the Respondent moved to withdraw. The court granted the motion but took no further action. Opposing counsel filed a complaint with the Professional Responsibility Program.

The disciplinary case in Massachusetts resulted in a hearing panel

recommendation that Respondent receive a public reprimand. Massachusetts Bar Counsel appealed the panel's decision, and, on December 8, 2003, the Massachusetts Board of Bar Overseers affirmed the sanction of public reprimand and amended the conclusions of law, finding that Respondent had failed to seek the lawful objectives of his clients, had neglected a client matter and had failed to communicate with his client.

In a case identical to the present matter, Respondent was reprimanded in Rhode Island for making a false statement on a declaration filed in support of a request for pro hac vice admission in that state. As in Vermont, Respondent's declaration falsely stated that no disciplinary charges had been filed against him. At a hearing held on May 14, 2003, Respondent consented to a reprimand.

Conclusions of Law

Respondent is subject to the disciplinary jurisdiction of the Professional Responsibility Board, and the Vermont Rules of Professional Conduct apply.

A.O.9, Rule 5(A)(2) provides that the Professional Responsibility Board has jurisdiction over "[a]ny lawyer specially admitted by a court of the state for a particular proceeding. . . ." Since the conduct took place in the context of a Vermont court proceeding, the Vermont Rules of Professional Conduct apply. V.R.P.C. 8.5(b)(1). Respondent does not

contest the jurisdiction of the board or the application of the Vermont Rules of Professional Conduct. Respondent's conduct violated Rule 8.4(c).

V.R.P.C. 8.4(c) states that "[i]t is professional misconduct for a lawyer to . . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Less than one year after Massachusetts Bar Counsel had filed a Petition for Discipline against Respondent, Respondent represented to the Chittenden Superior Court in a sworn declaration, that "[n]o disciplinary proceedings or criminal charges have ever been instituted against me." Not only was Respondent's statement a clear misrepresentation of his standing with the State Bar of Massachusetts, but it related to material facts important to the court's exercise of its discretion to admit Respondent to practice pro hac vice.

V.R.C.P. Rule 79.1(e) provides:

> Any member in good standing of the bar of any other state of or the District of Columbia may, in the discretion of the court on motion of a member of the bar of this state who is actively associated with that attorney in a particular action, be permitted to practice in that action. (emphasis added.)

Had the Respondent been candid with the Chittenden Superior Court concerning the true facts of his standing in Massachusetts, he might not

have been admitted.

Respondent's conduct violated Rule 3.3(a)(1).

Rule 3.3(a)(1) provides that it is misconduct "to make a false statement of material fact or law to a tribunal." Respondent has admitted that he knew that his statement denying that disciplinary proceedings had ever been instituted against him was false, and that he knew it at the time that he filed his declaration with the court. This fact was clearly material to his admission and the Panel finds that Respondent violated Rule 3.3(a)(1).

Sanctions

The parties stipulate that the ABA Standards for Imposing Lawyer Sanctions provide guidance for determining attorney discipline in Vermont. 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)). They join in recommending that the Panel impose a public reprimand. While the Panel agrees that the ABA Standards provide the appropriate benchmark in determining attorney discipline, it disagrees with the parties' conclusion that those Standards suggest a public reprimand in this case. Instead, after consulting the ABA Standards, as well as the prior decisions of the Professional Responsibility Board, the prior Professional Conduct Board, and the Vermont Supreme Court, the Panel imposes a three year suspension of

Respondent's right to practice law in Vermont. The relevant ABA Standards when an attorney makes a false statement to the court are Section 6.13 and Section 6.12. Section 6.13 provides that "Reprimand is generally appropriate when a lawyer is negligent" in determining whether statements or documents are false or in taking remedial action. (emphasis added). Section 6.12 applies, however, when the attorney's state of mind is anything other than negligence:

> Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

In the instant case, Respondent knew that the declaration he filed was false, and he knew or should have known that his failure to reveal the Massachusetts disciplinary action was material to the court's decision to admit him pro hac vice. Respondent's action had the potential for adverse effect on the Superior Court proceeding and the Vermont client for whom he had been engaged. In fact, Respondent argues this very point in his Declaration to the Vermont court, stating that "[i]t would create serious and substantial hardship to the Plaintiffs if the applicant were not allowed to appear as counsel."

Our consideration of aggravating and mitigating factors, also leads us to believe that suspension is more appropriate than reprimand. As noted above, Respondent had been publicly reprimanded in Rhode Island in May of 2003 for making a false declaration in his application for admission in that jurisdiction.

In December of 2003 the Massachusetts charges were resolved by a decision of the Board of Bar Overseers which publicly reprimanded Respondent for failure to seek the lawful objectives of his clients, neglect and failure to communicate with his client. The ABA Standards for Imposing Lawyer Sanctions suggest that these two prior disciplines may be considered in aggravation of any sanction we impose. ABA Standards §9.22(a).

In addition we find Respondent acted with a dishonest or selfish motive, since the only effect of his omission of the earlier discipline was to enhance his application for admission, ABA Standards §9.22(b). His action in Vermont was identical to his misrepresentation for which was disciplined in Rhode Island, suggesting a pattern of misconduct. ABA Standards §9.22(c). The parties suggest that Respondent's prompt motion to withdraw from the case, when his misrepresentation was brought to the attention of the court, can be considered in mitigation. The Panel fails to see how his withdrawal had any beneficial effect on the client or the court. It appears to be merely a retreat in the face of discovery.

Vermont case law also suggests that suspension is the appropriate sanction in this matter. The Supreme Court, the Professional Responsibility Board and its predecessor the Professional Conduct Board have all concluded that misrepresentation to a court warrants serious discipline.

While these narrow facts constitute a case of first impression in Vermont, it is not the first time the Vermont disciplinary system has dealt with misrepresentation in connection with admission to the bar. In In re Daly, PRB Decision No. 49, (April 7, 2002), the attorney received a three year suspension for making a false statement on his application for admission to the Vermont bar on motion. In response to a question on the application, Daly denied that he had "been charged with fraud, formally or informally, in any legal proceeding, civil or criminal, or in bankruptcy." Id. at 3.

Daly was in fact the defendant in a civil fraud complaint and the subject of investigation by the New York Committee on Professional Standards. The Hearing Panel in Daly stated that "[o]ur judicial system is premised on the fact that an attorney's relationships with courts, clients and fellow members of the bar will be truthful and candid. At attorney's failure to meet this standard on his application for admission is of grave concern." Id. at 7.

While it may be argued that a false statement on an application for

admission by motion is more serious that that on an application for pro hac vice admission, the underlying actions are the same. The attorney has made a knowing misrepresentation in order to obtain the privilege of practicing in the courts of Vermont, either for one case or on an ongoing basis. The pro hac vice application is more difficult for the courts to police since it relies solely on the truthfulness of the applicant, with no provision for investigation by the Board of Bar Examiners. Thus, it is important for the disciplinary system to underscore the absolute necessity for candor in these submissions to our courts and to put future pro hac vice applicants on notice that such misrepresentations are a serious matter.

A three year suspension was also imposed in In re Harrington, PRB Decision No. 53, (April 14, 2003). In that case Respondent filed false fee affidavits with the Social Security Administration, concealing the fact that he was charging fees in excess of the statutory limits, a practice apparently agreed to by his clients. This conduct was also a violation of federal law to which Respondent pled guilty, and thus involved commission of a crime in addition to false statements to a judicial body. Harrington had no prior discipline, and there were substantial mitigating factors present.

In In re Lancaster, PCB No. 103, (October 13, 1995), approved by Supreme Court Entry Order September 1996, an attorney was publicly reprimanded for knowingly making a false statement to a court in connection with her representation of a defendant in a criminal matter. The Panel

acknowledged that ABA Standard 6.12 was applicable because the conduct was knowing and not negligent. It declined, however, to impose that sanction and issued a public reprimand because of the numerous mitigating factors in that case. In In re Wysolmerski, PCB Decision No. 112 (December 6, 1996), approved by Supreme Court Entry Order July 25, 1997, the Board imposed a three year suspension for numerous misrepresentations over a substantial period of time. In making its recommendation, the Board stressed the same factors that we find important here. In its discussion of the appropriate sanction, the Board stated

> In this case, the primary duty violated is the duty of honesty and fair dealing with clients, other attorneys, and the court. The Board has found this duty to be paramount and central to the practice of law, and the maintenance of public trust in the legal profession and the legal system. Id. at 35.

The Board in that matter also believed that the record could have supported a recommendation of disbarment, but decline to do so based upon the presence of mitigating factors. When viewed in this context, the result in the Wysolmerski case does not appear to be too disparate from our decision.

Our decision here is consistent with the Board's more recent decisions in which public reprimands, as well as shorter suspensions, have been

reserved for cases of negligent rather intentional misconduct. In In re Capriola, PRB Decision No. 51 (April 7, 2003), the attorney engaged in business dealings with his clients which was found to result from negligence. Norman Blais received a six month suspension with probation for cases involving neglect and failure to keep his clients informed. In that case it was the cumulative effect of the violations that led to suspension. In re Blais, PRB Decision No. 48 (December 20, 2002). A similar result was reached in In re DiPalma, PRB Decision No. 44 (September 22, 2002), where the attorney was publicly reprimanded and placed on two years probation for neglect and failure to keep his clients informed.

Conclusion

Based upon our analysis of the ABA Standards for Imposing Lawyer Sanctions and Vermont case law we believe that a three year suspension is appropriate in this matter. Respondent Kenneth Levine is hereby SUSPENDED from the practice of law in Vermont for a period of three years commencing 45 days from the date of this opinion. Respondent shall fully comply with the provision of A.O. 9 Rule 23.

FILED MARCH 23, 2004.

HEARING PANEL NO. 1

/s/

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Barry E. Griffith, Esq. Chair

/s/

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Martha M. Smyrski, Esq.

/s/

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Stephen Anthony Carbine