PCB 90

[23-Mar-1995]

STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

In re: William M. McCarty, Jr., Respondent

PCB File No. 93.25

FINAL REPORT AND RECOMMENDATION TO THE SUPREME COURT

Decision No. 90

Pursuant to A.O. 9, Rule 8E, the Professional Conduct Board hereby reports to the Supreme Court its findings of fact, conclusions of law and recommended disposition in this matter.

On April 7, 1995, a hearing panel of the Professional Conduct Board issued a report following a hearing on the merits. The panel found that Respondent violated DR 2-110(A)(2) by failing to return client property to a client after termination of the legal representation. The panel further found that

the failure to return property was not justified by assertion of an attorney retaining lien because Respondent had not complied with his client's reasonable request for details regarding an outstanding bill. Because of a number of aggravating factors, the panel recommended that Respondent be suspended from the practice of law for one month. In addition, the panel recommended a period of probation during which Respondent be required to submit the requested billing information to his client and, if necessary, to submit the billing dispute to arbitration.

The Board held a hearing on this matter on May 5, 1995, pursuant to A.O. 9, Rule 8D. The Respondent, his counsel Douglas Richards, Esq., and Bar Counsel, Shelley A. Hill, Esq. appeared. The Board entertained oral argument from Respondent, through counsel, and from Bar Counsel. In addition, the Board considered the brief filed by Respondent. No brief was filed by Bar Counsel although she answered each of Respondent's arguments orally.

In his brief, Respondent raises four arguments, each of which will be addressed below.

First, Respondent claims that the hearing panel erred in failing to find certain facts as requested by Respondent. Respondent argues that since these facts were not controverted by Bar Counsel, the hearing panel was required to include them in its findings.

The hearing panel's report includes facts which it found, by clear and convincing evidence, to be relevant to the issues at hand. The hearing panel is not obligated to find facts it does not find relevant to the issue of

whether Respondent returned property to his client upon the termination of the relationship. The facts which Respondent claims were erroneously omitted concern the details of the client's business and the obnoxiousness of the client's behavior when he was unable to secure return of his property. While some of these details may be interesting, they are not directly relevant to whether Respondent provided client property to the client upon his request. The hearing panel appropriately exercised its discretion in omitting these details in its report.

Second, Respondent argues, without citation to specifics in a transcript, that the panel's findings of fact consistent with the client's version of events and contrary to Respondent's version was contrary to the evidence. Respondent argues that because the hearing panel rejected Respondent's submissions, it was biased against Respondent.

We see no evidence of bias by the hearing panel. It is the responsibility of the hearing panel to weigh the credibility of each witness appearing before it. The hearing panel's report indicates that it did so. We cannot find, based upon Respondent's submission, that the hearing panel's findings are contrary to the evidence. Indeed, the hearing panel's report evidences a considerable effort to sift through the various factual and legal contentions. We adopt the hearing panel's findings of fact as our own.

Third, the Respondent argues that the hearing panel's conclusions of law are erroneous. We disagree and adopt as our own the conclusions of law reached by the panel.

Fourth, the Respondent argues that the sanction of suspension for one month is inappropriate. We agree that a less severe sanction is appropriate.

Under Administrative Order 9, the Supreme Court promulgated rules which allow for two types of suspensions: suspension for six months or more and suspension for less than six months. The difference is critical because a suspension of less than six months ends with automatic reinstatement. A lawyer suspended for more than six months, however, is not readmitted unless and until he has proven by clear and convincing evidence that he has been rehabilitated. See Rules 6 and 20(b).

In the case of In re Bucknam, 160 Vt. 355, 365 (1993), the Supreme Court wrote that suspensions should be for a period of at least six months. The Court noted that suspensions of shorter periods of time serve merely as fines and do not insure rehabilitation. The Court made this determination in reliance upon the ABA Standards for Imposing Lawyer Sanctions.

This holding seems to be inconsistent with the Court's Permanent Rules Governing Establishment of Professional Conduct Board and its Operation as promulgated in A.O. 9. In addition, the Supreme Court has continued to suspend attorneys for periods of time shorter than six months. See, for example In re Doherty, Docket No. 94-379 (Oct. 7, 1994)(two month suspension imposed).

We feel that periods of suspension of less than six months are appropriate in some circumstances and should be authorized by the Court. In this case, however, the recommended suspension of one month would appear to be merely

punitive. It would do nothing to rehabilitate Respondent or protect the public. On the other hand, a suspension of six months would be too harsh for the conduct engaged in here. Accordingly we decline to follow the hearing panel's recommended one month suspension.

The conduct here is similar to the conduct sanctioned in the Bucknam case. We believe the similar sanction of public reprimand is appropriate here. We agree, however, with the hearing panel's recommendation regarding probation and adopt that recommendation as our own.

The Professional Conduct Board hereby adopts the findings of fact and conclusions of law of its hearing panel. It recommends to the Supreme Court that Respondent be publicly reprimanded for violating DR 2-110(A)(2). Respondent should be placed on probation for six months during which time he be required to provide to his client the requested detail regarding the outstanding bill for services rendered. If the client continues to dispute the validity of the charges, Respondent must submit the matter to arbitration through the VBA Fee Arbitration Committee. Failure to comply with these requirements within the six month period of probation should result in an immediate suspension until the requirements are met.

Dated at Montpelier this 2nd day of June, 1995.

PROFESSIONAL CONDUCT BOARD

/s/

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Deborah S. Banse, Chair

/s/

_____________________________ _____________________________

George Crosby Donald Marsh

/s/

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Joseph F. Cahill, Esq. Karen Miller, Esq.

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Nancy Corsones, Esq. Garvan Murtha, Esq.

/s/

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Paul S. Ferber, Esq. Robert F. O'Neill, Esq.

/s/ /s/

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Nancy Foster Ruth Stokes

/s/ /s/

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Rosalyn L. Hunneman Jane Woodruff, Esq.

/s/ /s/

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Robert P. Keiner, Esq. Edward Zuccaro, Esq.

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STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

In re: William M. McCarty, Jr., Esq., Respondent

PCB File No. 93.25

HEARING PANEL'S FINAL REPORT

TO THE PROFESSIONAL CONDUCT BOARD

We heard this case on February 1, 1995. Present at the hearing were: Respondent William M. McCarty, Jr., Esq.; his counsel, Douglas Richards, Esq.; and Bar Counsel, Shelley A. Hill, Esq. We heard sworn testimony from the following persons: Respondent, Attorney Raymond Perra, Spero Latchis, Susan Fleury, and Diane Van White. We received numerous documents as exhibits.

Based upon all of the relevant, credible evidence we find the following facts by clear and convincing evidence and reach the following conclusions of law:

FACTS

1. Spero Latchis (hereinafter referred to as "Latchis") is the chief executive officer, president and major shareholder of Latchis Corporation and D. Latchis and Sons, Inc. In 1986, he retained Respondent to represent the corporations. Respondent, who has been a member of the Vermont Bar since 1967, also assumed the role as secretary for the corporations for a brief time.

2. Latchis and Respondent did not enter into a written fee agreement. It was assumed between the parties that Respondent would bill Latchis for his legal services on an hourly basis.

3. Latchis was slow at paying his bills. In October of 1990, Respondent billed Latchis $151.25 for services rendered between March and September of

that year. (Exhibit 1.) That bill was still unpaid by the time of the annual meeting in January of 1991. At the annual meeting, Latchis paid that bill in full by check #7765. (Exhibits 2 & 3.) Respondent never cashed the check.

4. Annual meetings usually began with Respondent reading a list of shareholders and the units of stock that each held. Generally, there would be a minor correction in ownership and the meeting would move on. At the January 1991 annual meeting, however, Respondent read a list of shareholders that was totally incorrect. Latchis was surprised and concerned by this since there appeared to be no reason why the list should suddenly be so out of kilter. Respondent said that he would look into this to find out what the problem was.

5. On February 14, 1991, Respondent forwarded a revised list of corporate ownership to Mr. Latchis for his review. (Exhibit 6.) The data was still quite wrong. Latchis telephoned Respondent and left a message that the information was still no where near correct.

6. On May 21, 1991, Respondent sent to Mr. Latchis a bill for $746.25 for legal services rendered between January 8, 1991 and February 14, 1991. (Exhibit 7.) The bill was similar to others which Respondent had sent in the past in that while Respondent listed a number of services performed, he did not list how much time was spent on each or even the total time spent on all of the tasks combined. He merely listed a total fee. Some, but not all of the tasks listed, pertained to efforts to correct the list of shareholders. The bill also included $151.25 in old charges for which Latchis had issued a check at the annual meeting.

7. Latchis testified that he was outraged by this bill, and we so find. As far as he knew, there was no need for this work except for Respondent's own benefit in correcting errors that he or his office had made in confusing the stock ownership.

8. Latchis communicated with Respondent's office by telephone. He spoke to an unidentified woman who worked there. Latchis told her that he wanted a breakdown of how much time was spent on which tasks and that he wanted to know why the work was performed.

9. Subsequently, Respondent reviewed the May 21, 1991 bill. He recognized that some of the charges were not justified and adjusted the bill from $746.25 to $453.75. He issued a bill dated July 29, 1991 (Exhibit 10) which again listed services rendered but without the requested breakdown of how much time was spent on each task.

10. In fact, Respondent had some of the requested information in his computerized billing system. Billing details including the specific time spent on each task, the attorney who performed it, and the hourly rate at which the services were billed were available to Respondent. (Exhibit 20.)

11. Respondent wrote a letter to Latchis the same day (Exhibit 9), stating that he was "enclosing a re-drafted and corrected bill which in essence has deleted a vast majority of my associates work." Respondent also requested payment of the $151.25 which he stated was due from the October 3, 1990 billing.

12. Respondent testified that he made this adjustment and review on his own initiative and without the request of Latchis. We do not find this testimony credible.

13. When Latchis received this bill, it only reinforced his suspicion that Respondent had been billing him for services which either were unnecessary or had not been performed at all. Latchis had not been looking for a discount, but for an explanation. Respondent had failed to provide him with one.

14. Had Respondent provided the information requested, which existed in respondent's computerized file (Exhibit 20), it would have given Latchis a means of reviewing the necessity of the work performed.

15. Latchis responded to Respondent's July 29, 1991 letter on September 1, 1991. (Exhibit 11.) Accompanying his response was a second check for $151.25. (Exhibit 12.) Latchis acknowledged that Respondent had been patient in waiting for payment of overdue balances in the past.

16. Latchis raised questions, however, about the current outstanding bill. He wrote, I am still unclear as to why you have billed
us for any work done to review the corporate records of either Latchis Corporation or D. Latchis and Sons. There have been no changes in the ownership of any stock in either corporation since 1986.

The only bill that I was expecting last (sic) year was from the cost of

preparing for, and holding the annual meeting for both Latchis Corporation and D. Latchis and Sons. As in the past years our annual meeting has lasted about one hour.

17. Respondent received the letter since he apparently cashed the enclosed check. He did not, however, reply to Latchis' concerns.

18. The following summer, Latchis decided to change corporate counsel. One of the reasons for this decision is that it had been a year since he had questioned the billing and nothing had been resolved.

19. Latchis telephoned Respondent and told him that he would be changing corporate attorneys. He told Respondent that he would like to pick up the corporate records. Respondent told Latchis that his records would be available to him when he paid his overdue bill. Latchis replied that he was disputing the bill and had not yet received answers to his questions.

20. After this conversation, Respondent sent Latchis a letter dated July 6, 1992. (Exhibit 14.) He wrote that "[t]he amount of work is spelled out in this statement itself." He expressed consternation that Latchis was then, after a full year, questioning the bill after it had already been adjusted. Respondent did not provide an accounting of the time and services provided to the corporations, other than the bills previously sent.

21. Although Respondent did not acknowledge in this letter that he had, in fact, been discharged as corporate counsel, he acknowledged the request for the return of the files by writing to Latchis, "Upon payment of the long

overdue statement I would be more than happy to give you your files."

22. Latchis did not respond to this letter because, as he testified and as we so find, he had already made three unsuccessful attempts for more details on the bill and felt that the situation needed time to "cool down."

23. Latchis had started a third corporation, Windbrew, in 1989. Attorney Raymond Perra had organized it for him. In the summer of 1992, Latchis asked Perra to become corporate counsel for Latchis Corporation and D. Latchis and Sons, Inc.

24. In the fall of 1992, Latchis began to put together an application for SBA financing. In December 1992 the corporate loan was coming to fruition and the need to obtain the corporate records became pressing. Latchis consulted with Attorney Perra as to this problem and then went to Respondent's office to obtain his corporate files. One of Respondent's secretaries told him to come back at a later date so that the files could be prepared and authorization given by Respondent to release the files.

25. On December 9, 1992, Latchis again went to Respondent's office and asked to pick up the corporate records. He was not given the files. He became angry and left.

26. Latchis spoke with Attorney Perra again. Attorney Perra wrote a letter to Respondent, dated December 9, 1992, which he faxed to him that day. (Exhibit 15.) The letter stated:

Spero Latchis asked you several months ago for the corporate records for the Latchis Corporation and, he tells me, you refused to turn them over to him because of a disputed bill. He stopped by your office this afternoon and repeated his request for all records and files of the Latchis Corporation and was told that they would be available to him sometime next week.

The Latchis Corporation is involved in a financing transaction under a S.B.A. Loan Authorization. The delay in making the corporate records available so that the corporation can comply with the requirements of the Loan Authorization is prejudicing its position. I cannot prepare the necessary corporate financing documents until I have examined the corporate records. These records must be made available to Spero immediately.

27. Respondent dictated an answer to Attorney Perra immediately. (Exhibit 16.) He said that he felt that the reason for the sudden need for the documents was "specious" and "contrived" in order to compel transfer of the files without paying the bill. He reiterated that the files would not be produced until he received payment.

28. For reasons not relevant to the production of the corporate files, the loan did not go through in December of 1992. By January, Latchis still needed the corporate books, particularly some stock certificates which were in Latchis' name. Latchis needed these as collateral for a loan which he expected would close on February 18 or 19, 1993.

29. Attorney Perra made a second attempt to obtain the files for Latchis. In January of 1993, he spoke with Respondent by telephone about them. The

records were not produced.

30. On February 5, 1993, Respondent wrote to Latchis, again demanding payment of the bill and directly accusing Mr. Latchis of contriving an immediate need for the files to escape payment. (Exhibit 17.)

31. Latchis conferred again with Attorney Perra. Because the need for the records was now great, Latchis decided he had no choice but to pay the bill. On February 15, Latchis telephoned Respondent's office and stated that he would pay the bill in full and needed to pick up the corporate stock certificates. These stock certificates were needed as collateral for the loan. Respondent's employee told Mr. Latchis that, as long as he paid the bill, he could pick up the documents.

32. Respondent's employee informed Respondent of Mr. Latchis request for the files. Respondent reviewed the files and instructed the employee as to the documents that could be released. Respondent was negligent in ensuring that all of the documents were ready to be released to Latchis.

33. On February 17, 1993, Latchis went to Respondent's office to pick up the records. He took with him a check for $509.15. (Exhibit 18.) He specified that he was particularly concerned about obtaining his stock certificates. The secretary gave him his file which Latchis began to review. The stock certificates were not there.

34. Latchis asked the employee about the missing stock certificates. She said that Respondent would be back in twenty minutes and would help him then.

Respondent sat and waited. He was confused and started to wonder if he was being tricked. He picked up all the records and left, refusing to tender payment, and telling the employee that the records were his property.

35. After reviewing all the records, Latchis decided to go back to Respondent's office to get the stock certificates. The closing on the loan was the next day and Latchis believed that he had to have the stock certificates or he would lose the loan. No more S.B.A. funds were available, and he would not get the loan if he had to re-apply.

36. Latchis arrived at Respondent's office late in the afternoon. He was as upset as he had ever been in his life. He was angry, profane, and loud. Respondent appeared in response to the commotion in his outer office and demanded that Latchis leave the premises immediately.

36. Latchis displayed to Respondent a check for $509.15 for payment of Respondent's bill and put it on the secretary's desk. Latchis said he would leave when he received the corporate files he needed. Respondent refused to turn over the files. He said he would meet with Attorney Perra the next morning at 8 am to deliver the records.

37. At this point, Latchis lost control of his behavior. He did not believe that he could contact Attorney Perra at this late date to arrange for an 8 am meeting. He demanded that the records be produced then and there and refused to leave without the files.

38. Respondent felt that he could not reason with Latchis and told an

employee to call the police.

39. The police arrived and told Latchis he would have to leave or be arrested. Latchis refused to leave without the records, and Respondent refused to give them to him. The police arrested Latchis, and charged him with unlawful trespass.

40. The next morning, Respondent gave all of the files to Attorney Perra. He also cashed the check which Latchis had left on the secretary's desk the previous afternoon.

41. Respondent has never provided the information requested by Latchis, i.e., the number of hours spent on the work billed on May 21, 1991, and the reason the work was performed.

CONCLUSIONS OF LAW

We find that Respondent violated DR 2-110(A)(2) which provides, in pertinent part,

In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including...delivering to the client all papers and property to which the client is entitled....

One of the reasons that Latchis discharged Respondent was because of his failure to provide an explanation for his claimed legal services. (Findings

at Par. 17.) This was information which Respondent was obligated to provide, consistent with his responsibilities as Latchis' agent and fiduciary. It was also a duty imposed upon Respondent by DR 9-102(B)(3). It was a duty which Respondent failed to fulfill.

Because Respondent made no attempt to fulfill this duty and because Respondent knew of the request for an explanation, we find that Respondent consciously ignored this request. His failure to provide the requested information was not the result of negligence; it was willful conduct. Thus, at the time Latchis decided to discharge Respondent, Respondent had already failed to deal with his client in good faith. He had taken no reasonable steps to provide his client with either the amount of time spent on each claimed task or the reason why the claimed legal services were necessary.

Once Respondent was discharged by his client (Findings at Par. 18), Respondent was required to comply with DR 2-110(A)(2) by taking reasonable steps to avoid foreseeable prejudice to the rights of his client. The first reasonable step he could have taken would have been to return the client's books and records which he held in trust for Latchis. Instead, Respondent demanded full payment of the questioned fee and refused to release the file.

Respondent attempts to justify his refusal to deliver his client's files by stating that these were not "papers and property to which the client [was] entitled." DR 2-110(A)(2). He claims that because there was an outstanding claim for legal fees due, he could properly assert the attorney retaining lien, an equitable remedy at common law.

While there is some dispute as to when an attorney lien can ethically be asserted, there is no dispute that it is an equitable remedy of self-help, subject to the "clean hands doctrine." By the time Respondent was discharged by Latchis, Respondent had ignored three requests for billing details which he was ethically obligated to provide. Therefore, he was not acting with "clean hands" and not entitled to assert the equitable remedy of a retaining lien. In re Bucknam, 160 Vt. 355, 364 (1993)(retaining lien improperly asserted when lawyer negligently failed to justify claim for reimbursement of expenses disputed by the clients and engaged in other inappropriate dealings with her clients). See Academy of California Optometrists, Inc. v. Superior Court, 51 Cal. App. 3d 999, 1006, 124 Cal. Rptr. 668, 672 (Ct. App. 1975)(lien is void where subject matter of lien is of no economic value and lien is used solely to extort disputed fees from client); Lucky-Goldstar International, Inc. v. International Manufacturing Sales Co., Inc., 636 F. Supp. 1059, 1064 (N.D. Ill. 1986)(in accordance with ABA Informal Opinion No. 1461(1980), retaining lien cannot be ethically asserted where there is a question as to the reasonableness of the fee or there is no clear agreement to pay the amount claimed to be owing).

Respondent raises several arguments in the two memoranda of law which he filed with us: Respondent's Post Hearing Memorandum of Law Concerning Transfer of the File, dated February 17, 1995, and Respondent's Reply to Bar Counsel's Memorandum in Support of Violation of DR 2-110(A)(2), dated March 8, 1995. We consider each of these arguments below.

First, Respondent argued that the events could be characterized "as an attorney's transfer of a file within a 24 hour period from the client's

demand for the file." Respondent's Post-Hearing Memorandum of Law, p. 4. This characterization ignores the facts that the client asked for the files on at least five occasions over a seven month period: first, in the summer of 1992, prior to July 6, 1992 (Par. 18); second, in early December 1992 (Par. 23); third, through counsel on December 9, 1992 (Par. 25); fourth, through counsel in January of 1993 (Par. 28); fifth, by telephone on February 15 and in person on February 17, 1993 (Par. 30). The request was finally honored on February 18, 1993.

Second, Respondent argues that, "Even if Attorney McCarty's conduct can be described as asserting the retaining lien, the reasonable bill which was outstanding at the time, coupled with the client's agreement to the amount and/or failure to object, made assertion of the retaining lien appropriate." Respondent's Post Hearing Memorandum of Law, p. 5.

This argument ignores the facts that the client challenged the reasonableness of the bill and requested an accounting of actual time spent on no less than three different occasions over at least one year: first, between May 21 and July 29, 1991 (par. 7); second, by letter of September 1, 1991 (Par. 14-15); third, sometime in the summer of 1992, before July 6, 1992 (Par. 18). The requests for the information were abandoned when Respondent failed to comply. Par. 21. To this date, Respondent has yet to provide the requested information. Respondent's claim that "all fees were reasonable, and the client agreed to the reasonableness of the fees..." Respondent's Post Hearing Memorandum, p. 3, is contrary to our findings of fact.

Third, Respondent suggests that it was the client's responsibility to

demonstrate the unreasonableness of his lawyer's bills. Respondent's Post Hearing Memorandum, p. 3. We do not accept such an interpretation of the attorney's fiduciary obligations to his client. Even if we were to accept such an argument, the client here could not meet that burden because Respondent has never provided an explanation as to how much time was spent on each claimed task and why that task was necessary.

Fourth, Respondent argues in favor of the continuing availability of the retaining lien, observing that it is "very often the attorney's sole means of ensuring payment of his fee." Post Hearing Memorandum, p. 2. It is not necessary for us to decide here the continuing viability of the retaining lien in the modern practice of law. However, we find Respondent's characterization inaccurate. To the contrary, the attorney is in a comparatively better position than other creditors to ensure payment of his fees. Not only does he have the legal right to seek and enforce a judicial judgment against a debtor, he has the training and knowledge to obtain such relief himself. Moreover, an attorney with a fee dispute can submit the dispute to arbitration by a panel of his peers through the Vermont Bar Association's Fee Arbitration Committee.

Fifth, Respondent argues that, "The credible evidence at the hearing indicated that the client's alleged need for the file to obtain financing was a mere ploy to obtain the client's file from Attorney McCarty without paying his fee." Respondent's Reply Memorandum, p. 1. We found no credible evidence that Latchis' claim of a need for the files to assist his loan application was a "mere ploy." The only evidence offered was Respondent's own suspicion which was not supported by any reasonable factual basis.

Sixth, Respondent argues that because In re Bucknam, 160 Vt. 355 (1993), had not yet been decided, he had no notice that his conduct was improper. There is no evidence that Respondent researched the propriety of his conduct before refusing to release the file. Had Respondent conducted any research on the issue, he would have been aware of all of the authorities, eventually cited by the Vermont Supreme Court in Bucknam, Id. at 364-365, which clearly delineated the limits of the attorney lien.

RECOMMENDED SANCTION

In determining what type of sanction to recommend, we consider the duty violated, Respondent's state of mind, any actual or potential injury to the client, and any aggravating or mitigating factors.

The duty violated was the duty of fair dealing owed to the client. The duty to the client is paramount.

While we have no hesitation in finding that Respondent wilfully failed to provide an accounting to his client, that is not the misconduct with which Bar Counsel charged him here. We must determine his state of mind in violating DR 2-110(A)(2).

While we believe that Respondent did not intend to hurt his client by withholding the client's property, the evidence does establish that Respondent acted knowingly, i.e., with "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective

or purpose to accomplish a particular result." Standards for Imposing Lawyer Sanctions, p. 7 (1991).

Respondent acted without regard to the substantial risk that by withholding the files in light of a claimed need for them while the client had a legitimate fee dispute, he would prejudice his client. He did not exercise the same standard of care that a reasonable lawyer would have exercised in the same situation. We, therefore, conclude that Respondent acted negligently. Id.

The injury to his client was one of extreme exasperation, inconvenience, loss of time, emotional distress, and humiliation. Respondent had to enlist, and presumably pay for, the services of another attorney to assist him in retrieving the files. Had Latchis not finally capitulated to the demands for payment of the disputed fee, the actual damages in the lost financing opportunity would have been enormous. We find that there was actual injury and the potential for significant injury.

We find the following aggravating factors present:

1. Respondent has a previous history of discipline. He was given a private admonition in PCB File No. 86.34A on June 10, 1987, a public reprimand in PCB File No. 90.26 on September 9, 1994 and a private admonition in PCB File No. 91.46 on February 10, 1995.

2. Respondent's misconduct was not the result of a weighing of competing ethical conflicts. Respondent's misconduct resulted from a placing of his

own financial interests above the legitimate interests of his client. Therefore, we find that he acted with a selfish motive when he improperly refused to turn over Mr. Latchis' files.

3. Respondent refuses to acknowledge the wrongful nature of his conduct. His testimony before us evidences little or no concern for the consequences of his actions.

4. Respondent has substantial experience in the practice of law.

5. Although Mr. Latchis may be a sophisticated businessman, he was in a very vulnerable position.

We find no evidence of any mitigating factors.

The applicable provisions of the ABA Standards for Imposing Lawyer Sanctions appear at Section 4.0, "Violations of Duties Owed to Clients."

Section 4.12 provides, in pertinent part, that absent aggravating or mitigating factors, "[s]uspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client."

Section 4.13 provides, in pertinent part, that absent aggravating or mitigating factors, "[r]eprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client."

We believe that Standard 4.13 is applicable. However, in light of the number of aggravating factors and the total absence of any mitigating factors, we believe that a period of suspension is appropriate. We are particularly concerned that Respondent fails to appreciate the gravity of the ethical problem created when a lawyer insists upon subordinating the legitimate rights of his client to the lawyer's own financial interests. If Respondent had demonstrated in his testimony before us that he at least recognized the ethical issue and weighed the competing interests before engaging in his course of conduct, we might be willing to recommend a public reprimand. Instead, Respondent appeared to have no insight into his client's legitimate concerns.

Bar Counsel has recommended a period of suspension of one month. We note that shortest period of suspension which the Vermont Supreme Court has imposed is two months. See, e.g., In re Doherty, Sup. Ct. Docket No. 94-379 (October 7, 1994). While we believe that a two month period of suspension is more appropriate than one, we are willing to support Bar Counsel's recommendation. However, we continue to be concerned by Respondent's failure to provide Latchis with the information he needed to determine the legitimacy of the bill which he eventually paid in order to obtain his files.
Therefore, we recommend that a period of probation be imposed during which Respondent must provide the requested information to Latchis. If Latchis continues to dispute the validity of the charges, Respondent must submit the matter to mediation through the VBA Fee Arbitration Committee. Failure to comply with these requirements within six months of the final disciplinary order should result in an immediate suspension from practice until the

requirements are met.

Dated at Montpelier, Vermont this 7th day of April, 1995.

HEARING PANEL

/s/

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Jane Woodruff, Esq., Chair

/s/

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Joseph Cahill, Esq.

/s/

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Nancy Foster

APPENDIX TO DECISION 90

ENTRY ORDER

VERMONT SUPREME COURT DOCKET NO. 95-276

JUNE TERM, 1995

In re William M. McCarty, Jr., Esq. } Original Jurisdiction

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} FROM

} Professional Conduct Board

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} DOCKET NO. 93.25

In the above-entitled cause, the Clerk will enter:

Pursuant to the recommendation of the Professional Conduct Board filed June 5, 1995, and approval thereof, it is hereby ordered that William M. McCarty, Jr., Esq., be publicly reprimanded and placed on probation for six months for the reasons set forth in the Board's final report attached hereto for publication as part of the order of this Court. A.O. 9, Rule 8E.

The probationary period shall begin on September 1, 1995 and end on February 29, 1996.

BY THE COURT:

/s/

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Frederic W. Allen, Chief Justice

/s/

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Ernest W. Gibson III, Associate Justice

/s/

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James L. Morse, Associate Justice

/s/

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Denise R. Johnson, Associate Justice

[ ] Publish

[x] Do Not Publish

ENTRY ORDER

VERMONT SUPREME COURT DOCKET NO. 95-276

JUNE TERM, 1995

In re William M. McCarty, Jr., Esq. } Original Jurisdiction

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} Professional Conduct Board

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The probationary period shall begin on September 1, 1995 and end on February 29, 1996.

BY THE COURT:

/s/

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Frederic W. Allen, Chief Justice

/s/

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Ernest W. Gibson III, Associate Justice

/s/

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James L. Morse, Associate Justice

/s/

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Denise R. Johnson, Associate Justice

[x] Publish

[ ] Do Not Publish