112.PCB

[6-Dec-1996]

STATE OF VERMONT
PROFESSIONAL CONDUCT BOARD

IN RE: Sigismund Wysolmerski, Esq. - Respondent
PCB Docket No. 92.23 et al.

FINAL REPORT TO THE SUPREME COURT

DECISION NO. 112

This matter was heard, pursuant to Rule 8(D) of Administrative Order No. 9, before the full Professional Conduct Board on October 4, 1996. Present at the hearing was Respondent, his counsel, Peter Hall, Esq. and Bar Counsel Shelley A. Hill, Esq. Due consideration was given to the briefs filed by Bar Counsel and Respondent, their oral arguments, and the report from the Hearing Panel dated May 7, 1996. The Board hereby adopts as its own the Panel's Findings and Recommendation. A copy of the Panel's Report is attached hereto and made part of this Final Report.

We have concluded that a substantial period of suspension would serve the basic goals of the attorney disciplinary system. Therefore, we recommend that Respondent be suspended for three years.

Dated at Montpelier, Vermont this 6th day of December, 1996.

PROFESSIONAL CONDUCT BOARD

/s/
_____
Robert P. Keiner, Esq. Chair

/s/	RECUSED
Joseph F. Cahill, Jr., Esq.	Nancy Corsones, Esq.
/s/	/s/
Charles Cummings, Esq.	Paul S. Ferber, Esq.
/s/	
Michael Filipiak	Nancy Foster

/s/	
Rosalyn L. Hunneman	Donald Marsh
NOT PRESENT AT 8D	/s/
Karen Miller, Esq.	Robert F. O'Neill, Esq.
/s/	RECUSED
Alan S. Rome, Esq.	Mark L. Sperry, Esq.
NOT PRESENT AT 8D	NOT PRESENT AT 8D
Ruth Stokes	Jane Woodruff, Esq.

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STATE OF VERMONT
PROFESSIONAL CONDUCT BOARD

In re: PCB Piles No. 94.58, 92.23, 94.57, 94.55 and 94.56
Sigismund Wysolmerski, Esq.--Respondent

PROPOSED FINDINGS OF FACT

The above captioned matter came before the Hearing Panel on January 17, February 12, 13, 15, and 27, 1996. The Hearing Panel was chaired by Deborah S. Banse, Esq., and included Paul Ferber, Esq., and Ms. Nancy Foster. Present were Bar Counsel Shelley A. Hill, Esq., Respondent Sigismund Wysolmerski, Esq., and his attorney, Peter Hall, Esq.

The Hearing Panel heard evidence from Frank Romano, James Layden, Mark Butterfield, Esq., Frank Zetelski, Esq., Anne Buttimer, Esq., David Catero, Joanne Carney, Thomas Layden, Jebb Balch, Joan Loring Wing, Esq., Robert Reis, Esq., Jack Bowen, Mark Oettinger, Esq., Kelley Page, Robert Colomb, Respondent, and Dr. Albin Coglan.

Based upon all the credible, relevant evidence presented, the Hearing Panel makes the following findings of fact and conclusions of law.

1. Respondent was admitted to practice law in the State of Vermont in 1980 and is currently on active status. He was admitted to the Maryland bar in 1981.

PCB File No. 94.58

2. Kelly Page and Scott Christie rented an apartment from Two

Nickwackett Street Apartments (Landlord). A dispute arose, and Landlord filed a Complaint and Motion for Writ of Possession on December 2, 1988. Ms. Page retained the services of Respondent. Respondent told Ms. Page and Mr. Christie that based on their representations of what had occurred, they had a good case.

3. Hearing was held on a Motion to Pay Rents into Court on December 29, 1988, which the court granted.

4. Discovery proceeded and pre-trial issues were resolved. Ms. Page began paying her rent into court in early January 1989, paying in a total of $2,140.00. In or around June 1989 Ms. Page and Mr. Christie moved out of the apartment. Shortly after the move but before possession reverted to Landlord, unbeknownst to Ms. Page or Mr. Christie, Landlord entered the apartment and placed the personal property remaining in the apartment in storage with a local storage facility. Ms. Page informed Respondent of the landlord's action, and he responded to her that the claim would be part of her claim for damages.

5. On July 27,1989, Landlord's attorney conveyed a written offer to Respondent, which entailed Ms. Page and Mr. Christie receiving a payback of 20% of the rents they had paid into court to date of disbursement of funds.

Respondent forwarded this offer to his clients on August 2, 1989 to an address he knew or should have known was no longer current. Ms. Page never received the Landlord's offer of settlement. Ms. Page would have accepted the offer had she been made aware of it, as she was in serious need of money.

The trial on the merits of the complaint began on October 27, 1989, with time only for the plaintiff to present its case. It was Respondent's opinion that the plaintiff's case went well. The judge continued the trial to December 15, 1989, urging the parties to try to settle the case in the meantime. Ms. Page continued in her desire to present her case and believed that she would prevail on her counterclaim. Her belief was reinforced by Respondent's statements to her that her case was strong. Respondent's advice on the relative merits of her cause did not change over time.

6. Prior to December 15, 1989, both the parties' counsel informed the court that a settlement had been reached, and plaintiff's attorney forwarded to Respondent a stipulation for execution. The stipulation provided that plaintiff Landlord was to have judgment. Defendants Page and Christie were to take nothing on their counterclaim. Plaintiff represented that the stored property was in the condition it was at the time it was stored and that defendants could retrieve the property. Defendants were to be responsible for any storage costs past December 23, 1989.

7. Respondent had not informed Ms. Page of this proposal or agreement and did not forward this proposed settlement to her. Ms. Page did not agree to the settlement. We find Ms. Page's testimony in this regard to be credible. For example, she testified she would never have agreed to payment of storage costs since she remained of the opinion that the Landlord had wrongfully taken her property and because she had little or no money. This testimony is credible and consistent with her overall testimony that she

never agreed to the December 19, 1989 stipulation. Therefore, we find that Respondent lacked authority from his clients to agree to the stipulation.

8. On March 7, 1990 opposing counsel wrote to Respondent, inquiring about the defendants' inaction. On March 26, 1990 opposing counsel again wrote to Respondent asking for the stipulation to be executed by his clients and returned to him. The letter reminded Respondent "[a]s you know, this was the agreement...."

9. Also in March 1990 the court informed counsel that the case would be dismissed if there were no further action. Opposing counsel requested the court to put the case on the active docket. The court scheduled the continued trial for May 18, 1990, and Respondent informed Ms. Page. Because of short notice both counsel requested and received a continuance until July 1990.

10. In July 1990 Respondent wrote opposing counsel and informed him that his clients would not settle until their personal property was returned. On July 5,1990 opposing counsel informed Respondent that his clients could retrieve their personal property. Respondent passed that correspondence onto Ms. Page to an address he should have known was not current. Ms. Page never received the July 5, 1990 letter. Respondent did not follow up. In December 1990, Ms. Page received notice to pick up her personal property. She did so immediately, but it was damaged.

11. On December 4, 1990 opposing counsel wrote to Respondent urging him to finalize the settlement as they had earlier agreed. Respondent did not reply. We find that Respondent's continuing lack of response to the opposing attorney s entreaties to finalize the settlement buttresses Ms. Page's testimony that Respondent did not have authority to settle his clients' case and, moreover, that he knew he did not have such authority. Respondent's lack of response to the opposing attorney's inquiries compels the finding, by clear and convincing evidence, that he knew he could not obtain his clients' signatures on the stipulation. We find Respondent's testimony that the stipulation had been agreed to by his clients but nullified by the fact of damaged property is not credible, particularly in view of substantial credible evidence to the contrary.

12. On February 12, 1991 opposing counsel filed a Motion to Enforce Settlement, outlining the terms of the unsigned stipulation as related in paragraph 6, above. Respondent filed no response. The court granted the motion on March 7, 1991. Respondent filed a Motion to Reconsider, stating that he had not filed a response earlier, as he had relied on opposing counsel's request for a hearing. Respondent informed the court that the stipulation outlined by opposing counsel was correct but that a dispute over the condition of the defendants' personal property taken by the plaintiffs nullified the stipulation. The court ruled in favor of the plaintiff on March 28, 1991 and so notified the attorneys. The court paid out the rental money and security deposit to plaintiff Landlord on March 28, 1991.

13. Respondent did not inform Ms. Page of the dismissal of the complaint and her counterclaim or that her escrowed money had been paid over to the plaintiff.

14. From December 1989 to early 1993 Ms. Page telephoned Respondent on many occasions, asking when the continuation of the trial would be held.

Respondent informed her on every occasion that the case was pending and that the court was backed up or he desired a different judge.

15. In May 1993 Ms. Page checked with the court directly to ascertain the status of her case. Upon examining the court file, she discovered that her case had been dismissed in favor of the Landlord years before and that the rental money she had paid into court had been paid to her former Landlord without her knowledge or consent. Landlord received $2,140 in rent and $440 in security deposit, on its rental demand. Ms. Page took nothing on her counter-claim. Ms. Page did not receive any recompense for her damaged personal property. She lost valued items of sentimental value and a bed worth $500.

16. Ms. Page immediately went to see Respondent. She asked Respondent the status of her case, and he again told her it was pending and would be set for trial. She asked for her file. Respondent initially told Ms Page that he would send her a copy of the file. When she insisted that she wanted a copy immediately, Respondent copied the file himself. Ms. Page and her friend, Robert Colomb, both observed Respondent remove pages from the file and not copy them and not return them to the file. When they examined the file given to them by Respondent the judgment order in favor of the plaintiff was not there. Respondent testified that he was only removing duplicates of documents in the file. We do not find this testimony credible. The fact that the missing documents were those which contradicted what Respondent told Ms. Page about the status of the case throws serious doubt on Respondent's veracity on this issue. On June 14, 1993 Respondent wrote to Ms. Page for her to call and make an appointment to meet with him on a date certain. There was no further contact between Respondent and Ms. Page.

17. Respondent is in violation of DR 1-102(A)(4); DR 1-102(A)(5); DR 1-102(A)(7); DR 6-101(A)(3); DR 7-101(A)(2); and, DR 7-102(A)(5).

PCB File No. 92.23

18. Respondent represented Frank Romano, Jr. and his construction company, Romano Construction Company, Inc. Prior to forming Romano Construction, Mr. Romano had been a carpenter. Mr. Romano had no experience running a closely held construction company. He was young and inexperienced in the financial complexities of accurately pricing jobs and using the profit from a previous job to provide seed money for the next one. He was inexperienced and lacked understanding of the complex legal issues involved in mortgages and liens and their effect on the marketability of a piece of property. The company employed William Manchester.

The company withheld from Mr. Manchester's weekly pay medical insurance premiums that it was obligated to pay over to the health insurance carrier. The company did not do so and used the moneys withheld for the company's own obligations. Mr. Romano testified that the company stopped making payments when Mr. Manchester disappeared. At that point, the company was being shut down and employees were being laid off. Mr. Romano did not know that Mr. Manchester had become ill and required hospitalization. Shortly thereafter the insurance carrier denied Mr. Manchester's claims for coverage since the premiums had not been paid.

19. William Manchester retained the services of Frank Zetelski, Esq.

In February 1988 Mr. Zetelski filed a complaint and Motion for Writ of Attachment against Romano Construction Co., Frank Romano, Jr. and his wife, Dereth Romano, relating to the failure to make insurance premium payments on behalf of Mr. Manchester. Respondent accepted service on behalf of all the defendants on February 10, 1988

20. On February 24, 1988 Mr. Zetelski and Respondent conferred and agreed to stay action in the Romano action pending a mutual lawsuit against the insurance carrier. Respondent confirmed this conversation by letter to Mr. Zetelski dated February 26, 1988. Mr. Romano concurred with this course of action and paid to Respondent the filing fee for pursuing the lawsuit against the medical insurance company.

21. Mr. Zetelski filed an amended complaint in May 1988 adding a claim of negligence in Mr. Romano's office management in hopes of bringing in a second insurance carrier--the liability carrier. Mr. Zetelski had earlier informed Respondent of the planned amendment and the reason. As the result of conversations with Respondent, Mr. Zetelski was of the opinion that Respondent had turned the new claim over to the liability insurance company. Mr. Zetelsky did not believe that an action against the medical insurance company would be a fruitful avenue since he had learned in January or February of 1988 that Mr. Romano had not taken up their offer to reinstate the medical coverage if he paid up the premiums.

22. Respondent did not answer the first nor the amended complaints.

23. No insurance company was joined in the suit. Respondent did not inform Mr. Zetelski of the name of the insurance carrier.

24. On November 7, 1988, without the authority from or knowledge of the Romanos, Respondent stipulated to a Writ of Attachment on "any and all real property owned by Romano Construction Company, Inc. and/or Frank J. Romano, Jr. and/or Dereth Romano located in the Towns of Castleton and Pittsford..." in the amount of $6,052.50. Mr. Romano and the other defendants did not know about the attachment and did not authorize Respondent to stipulate to the attachment of their properties. This writ was recorded in the appropriate land records. Respondent failed to inform his clients about the attachment after the fact. On March 3, 1989 Mr. Zetelski filed for default judgment against the defendants, which was granted on May 15, 1989. Respondent was informed in advance of Mr. Zetelski's plan for default judgment. Respondent made an affirmative decision not to oppose the default judgment without consulting Mr. Romano. Respondent did not make any reasonable effort to contact his clients to ascertain their position on the default judgment. His clients did not know about the motion for default judgment in advance and did not authorize Respondent to accede to it. Respondent did not protect the best interests of his clients in regard to the default judgment. Respondent failed to inform his clients of the default judgment order after it was issued. The matter was continued for a damages hearing.

25. Throughout these proceedings, Respondent deceived Mr. Zetelski and the court by representing that he had authority to agree to the stipulations, the Writ of Attachment, and the default judgment. On July 14,1989 Respondent confirmed by letter a conversation with Mr. Zetelski informing him that he had advised the Romano defendants to confess judgment in the amount of Mr. Manchester's hospital bills and interest. He informed him also that "we are commencing a bad faith failure to pay

claims suit against...[the] medical insurance carrier." Respondent invited Mr. Zetelski to join in and cooperate with the suit.

26. Hearing on damages was ultimately held on October 11, 1989. Hearing was avoided when Mr. Manchester and Respondent, on behalf of Romano Construction Company, Frank Romano, Jr., and Dereth Romano, stipulated to damages in the amount of $16,460.50 and to a judgment lien. Mr. Romano and the other defendants did not know of the stipulation and did not authorize Respondent to stipulate to judgment against them or to stipulate to damages against them in any amount. A judgment order based on the stipulation was issued on May 23, 1990. Respondent failed to inform his clients of the damages order after it was issued.

When Mr. Romano learned of the default judgment order and the damages order against him, he sought legal assistance to sort it out. His new attorney, in attempting to have the underlying suit reopened, requested and received from Respondent an affidavit stating that he had had no specific authority to settle the lawsuit in the amount of $16,460.50 or in any amount. At the panel hearing, Respondent testified that Mr. Romano had authorized him to "deal with" the general context of the Manchester lawsuit early on in the representation, and on this basis, and because Mr. Romano did not appear at the October 11, 1989 hearing, Respondent believed he had general authority to make the best deal he could with Mr. Manchester. Respondent further testified that he believed that that statement gave him general authority to agree to settlement of the lawsuit, although he did not have a specific dollar amount authority from his client, so that his affidavit is accurate. Respondent also testified at hearing that the statement "make the best deal you can" gave him the authority to settle at a specific amount, whatever that amount ended up to be, so that apparently he did have full authority to settle from his client. Respondent also testified, in regard to the attachment, that he believed he 'had specific authority in a general way to stipulate.' We do not find Respondent's testimony to be credible. Moreover, as in PCB File No. 94.58, Respondent never did give his approval as to form of the Final Order sent to him by Mr. Manchester's attorney, Mr. Zetelski. Mr. Zetelski sent the proposed order to him in November 1989, for approval and filing with the court. Finally, in March 1990, Mr. Zetelski had his associate file it directly with the court, with a copy to Respondent. We find that Respondent's lack of response to the finalization of the order is an indication that he knew he did not have authority to accede to judgment and to stipulate to damages. Mr. Romano, his wife and the company lost the opportunity to present their case to a finder of fact and were, therefore, potentially in jured. Respondent paid, by way of his malpractice deductible. $3.000 recompense to Mr. Romano.

27. Respondent ultimately decided it would be fruitless to file a lawsuit against the medical insurance company, and no such lawsuit was filed. He did not seek authorization from Mr. Romano or the other defendants for this change in direction. Respondent applied the filing fee for the insurance lawsuit given to him by Mr. Romano to past due attorney's fees due to him by Mr. Romano. He did not seek approval from Mr. Romano for the new application of this money given to him for filing fees. Respondent had not placed the filing fee in a federally insured trust account maintained in a financial institution in the State of Vermont. 28. On September 1, 1989, after the issuance and recording of the Writ of Attachment on all of the Romanos' property but before the judgment order, Respondent appeared at a closing on behalf of Mr. Romano. Mr. Romano had

been involved in approximately 5 other closings, some with Respondent's representation. At the past closings which Respondent had participated in on behalf of the Romanos, Respondent had advised Frank Romano of the outstanding liens which needed to be paid off. Mr. Romano's experience at the other closings had been that, if there were active liens or mortgages on the property, they were either paid off at closing or an amount was held in escrow for payoff after the closing.

Property subject to the Manchester attachment was being conveyed to a Mr. and Mrs. Peterson. Vermont Mortgage Group provided financing to the Petersons, with the mortgage requirement that the property be unencumbered. Mark Butterfield, Esq. represented the Petersons. Mr. Romano's company had been having financial difficulties, and he and Respondent had each been working to pay off the company's creditors, who were generally suppliers of construction materials. Although Mr. Romano knew that he had creditors, because of his inexperience, he did not understand that these creditors had attached liens and/or mortgages to the property about to be conveyed. He was relying on Respondent to advise him of his legal obligations, as Respondent had done at prior closings.

29. At the closing, there was a discussion about the various liens and mortgages, including the Manchester lien, among Respondent, Mr. Butterfield and James Layden, the representative of the financial institution. Mr Romano recalls only that he heard that releases would be prepared. Respondent told Mr. Butterfield that he would insure that the liens, including the Writ of Attachment, would be paid off from the proceeds of the sale. In turn, Mr. Butterfield, on whom the financial institution relied for clear title, informed Mr. Layden that Respondent would take care of the liens. Vermont Mortgage Group had issued one check made out to Frank Romano personally rather than to Respondent in trust for Mr. Romano. No escrow agreement was written regarding payment of the liens. Based on the representations of Respondent, Mr. Butterfield believed that the liens would be paid and discharged. Because the closing was interrupted pending arrival of the Peterson's closing funds, the check made out to Mr. Romano was given either to Mr. Butterfield or Mr. Wysolmerski. However, it was eventually entrusted to Respondent, who turned it over to Mr. Romano without informing Mr. Romano that he had to pay the Manchester lien from the proceeds of the check. The check given to Mr. Romano was in the amount of $16,954.38.

30. On September 5, 1989 Mr. Butterfield wrote to Respondent confirming their understanding from the closing that Respondent would obtain and send to him the discharges of the liens, including the William Manchester lien from the Writ of Attachment.

31. Believing the amount he received from the closing to be his, Mr. Romano did not use any of the $16,954.38 to pay off the liens. In fact, these funds were significantly insufficient to cover the total face amount of all the liens on the property.

32. When Mr. Butterfield received information that the liens had not been paid off, he both wrote and called Respondent on many occasions throughout the winter of 1989-90 to find out about the liens. Respondent continually told him that the liens would be paid. Respondent testified he had hoped to get Mr. Manchester to agree to an exchange of collateral on his lien, but was unsuccessful. Finally, Mr. Butterfield went to Respondent's office. At that time, Respondent told him that there was no

money left to pay the liens. At no time did Respondent assert that the Manchester lien was invalid and unenforceable.

33. Mr. Manchester, through an attorney, filed a foreclosure proceeding against the Peterson property to collect on his lien. The proceeding was dismissed as the court ruled that the original lien was not valid as it had not particularly described the property being attached. Mr. Manchester has filed a lawsuit against the attorneys involved in the case of Manchester v. Romano, et al. Mr. Butterfield spent approximately 40-50 hours on behalf of the Petersons in attempting to resolve the lien issue. He did not bill the Petersons for that time, which equated to approximately $4,000-5,000 of his billable time. This time would not have been required had the liens been paid off as Respondent had assured they would be. Respondent's malpractice carrier paid $2,000.00 recompense to the Petersons.

34. Respondent is in violation of DR 1-102(A)(4); DR 1-102(A)(5); DR 1-102(A)(7); DR 6-101(A)(3); DR 7-101(A)(1); DR 7-101(A)(2) and DR 9-102(A).

PCB File No. 94.57

35. Jack Bowen purchased a gravel crusher, by written contract, from Filskov Brothers, Inc. in January 1982. Filskov repossessed the crusher. Mr. Bowen, through his attorney, J. Fred Carbine, filed a lawsuit on June 22, 1983 against Filskov based on the disputed crusher and other apparently informal business arrangements between the parties, including Filskov's alleged sale of a tractor or dump truck belonging to Mr.Bowen that had been located on Filskov property. Filskov retained Mark Oettinger, Esq. and filed a counterclaim. Respondent entered his appearance as substitute counsel on behalf of Mr. Bowen on November 14, 1984.

36. Hearing on a discovery motion was set for January 22, 1985.

37. On January 22, 1985, Respondent and Attorney Oettinger met at court without the presence of their clients. On behalf of Filskov, Mr. Oettinger offered a dismissal of all claims if Mr. Bowen would transfer title of the truck to Filskov. On behalf of Mr. Bowen, Respondent accepted this offer, but represented that the title was lost and he would have to obtain a new one to effect the agreement. Mr. Bowen did not authorize Respondent to settle his claim and was not made aware that Respondent had committed him to do so once the contingency of the title transfer had been met. 38. Telephone hearing was held on March 12, 1985 during which both counsel agreed that Mr. Bowen's complaint be dismissed and Filskov receive judgment on its counterclaim. On behalf of Mr. Bowen, Respondent agreed that, unless Mr. Bowen transferred title to the vehicle on or before May 29, 1985, a hearing would be set on damages due to Filskov. Mr. Bowen did not authorize Respondent to make such an agreement and was not made aware that he had done so. The court issued an order based on this agreement on March 27, 1985.

39. Respondent informed Mr. Oettinger in August 1985 that title to the vehicle would be forthcoming in the near future. Respondent did not produce the title to the vehicle. Respondent never asked Mr. Bowen for the title, nor did he ask Mr. Bowen to obtain a replacement title from the Department of Motor Vehicles. Nor did Respondent attempt to obtain a replacement title on behalf of his client. Mr. Bowen did not actually have

title to the vehicle, because another person had a lien on it and had possession of the title document.

40. Hearing on damages was scheduled for June 26, 1986. Although Respondent told Mr. Bowen there was to be a hearing in the case on that day, he did not tell Mr. Bowen the true purpose of the hearing. Respondent and Mr. Bowen met the morning of June 26,1986, the day of the hearing. Respondent asked Mr. Bowen if he would settle the case by turning title over to Filskov. Mr. Bowen replied that he would not. Toward the end of this meeting Respondent told Mr. Bowen he need not accompany him to court since the hearing was to be held in chambers. Mr. Bowen did not, therefore, attend the hearing.

41. In advance of the June 26, 1986 hearing, pursuant to discussion with Respondent, Mr. Oettinger had prepared a Stipulation and Order and brought it to the hearing. The Order provided that Filskov was awarded $20,000 plus interest of $6.58 per day beginning the date of execution of the order. Respondent approved the Stipulation and Order as to form, and the Court signed the order on June 26,1986. As in PCB File 92.23, Respondent testified that he believed he had general authority to settle Mr. Bowen's case, by virtue of an alleged statement to him by Mr. Bowen for him to make the best deal he could. Respondent concedes that he did not have specific authority to settle Mr. Bowen's action for any specific amount, including the one to which he stipulated. We do not find Respondent's assertion credible, and find that Mr. Bowen had not authorized, in general or specific terms, Respondent to stipulate to the settlement of his case nor to any damage order and was not made aware of the existence of the same. In stipulating to the judgment and to the damages, Respondent misrepresented to the court and to opposing counsel that he had authority to bind his client. After June 26, 1986 Respondent told Mr. Bowen that they would await a court date, which could take as long as a year. Mr. Bowen lost his opportunity to have his cause of action heard by a finder of fact and, therefore, was potentially injured. His invoices indicated that Filskov owed him $2,000$4,000, although Filskov s invoices likely showed an offset amount. Mr. Bowen estimates that the tractor/truck was worth approximately $16,000 when it was sold by Filskov and that he had invested about $10,000 in the crusher when Filskov sold that piece.

42. On July 11, 1986 Mr. Oettinger served Post-Judgment Interrogatories in Aid of Enforcement on Respondent. Mr. Oettinger filed Motions to Compel Answers to Interrogatories in Aid of Enforcement on March, 18, 1987; April 3, 1987; May 14, 1987; July 28, 1987; September 14, 1987. All motions were granted. Respondent did not forward any of these documents to Mr. Bowen. Respondent has asserted that he did forward these documents to Mr. Bowen and that the fault lay with Mr. Bowen for failure to respond. We do not find Respondent's testimony on this point credible, particularly since Respondent personally offered to pay Mr. Oettinger's legal fees for the preparation of the documents in connection with those motions to compel.

43. Respondent filed a Motion to Withdraw on December 21, 1987. The motion stated, untruthfully, that Mr. Bowen had no objection to the motion and that he wished to retain other counsel. Mr. Bowen did not know of Respondent's Motion to Withdraw, had not discussed it with Respondent and had no plans to retain another attorney. In exchange for Respondent's agreement to pay attorney's fees for Mr. Oettinger's attempts to obtain

Answers to his Post-Judgment Interrogatories, Mr. Oettinger agreed not to oppose the Motion to Withdraw. The court granted the Motion to Withdraw on January 12, 1988. Mr. Bowen learned of the withdrawal of his attorney on January 13, 1988 by certified letter from the court. At that time, he believed his lawsuit against Filskov was still pending, a belief based on the misrepresentations made to him by Respondent.

44. Mr. Bowen finally retained another attorney later in 1988, Frederick Harlow. Mr. Bowen first learned of the judgment and damage award against him in a meeting with Mr. Harlow.

45. Respondent is in violation of DR 1-102(A)(4); DR 1-102(A)(5); DR 1-102(A)(7); DR 6-101(A)(3); DR 7-101(A)(2); and, DR 7-102(A)(5).

PCB File No. 94.55

46. David Catero operates a dry cleaning business, Washbuckler's, owned by Ortac, Inc., of which he is the president. Respondent had represented Ortac since the planning stages of the business in 1985. Around 1988 Mr. Catero and Respondent agreed that his legal services would be paid for by Mr. Catero providing Respondent with free dry cleaning services.

47. Ortac hired Birch Hill Construction to build a new building for the business. In late 1987 a disagreement arose between Mr. Catero and Birch Hill as to workmanship provided and work still to be performed and amounts due from Mr. Catero for the construction. Birch Hill filed a collections lawsuit against Ortac on March 14, 1988. Respondent accepted service. A Writ of Attachment on Ortac property was issued on March 16, 1988, pursuant to stipulation by Respondent. Respondent did not discuss the proposed writ of attachment with Mr. Catero in advance, and Mr. Catero did not authorize the stipulation. Mr. Catero learned about the attachment in 1993, upon reviewing his file, after Respondent's discharge.

48. After settlement discussions, in December of 1987, an agreement was reached, with the active participation of Mr. Catero, for Mr. Catero to escrow $23,231.34 and for Birch Hill to complete items on a punch list, to be prepared by Mr. Catero. The $23,231.34 did not specifically relate to any particular punch list items, since the punch list was not in existence at the time the amount was agreed to. For reasons unknown, that agreement was disregarded.

Settlement negotiations continued into 1988. In February 1988, Respondent and Birch Hill's attorney, Thomas Layden, agreed to accept $15,000 from Ortac, with no further work to be performed by Birch Hill. This agreement was disregarded, also. In March 1988, Respondent and Birch Hill's attorney agreed that Mr. Catero would escrow $15,000 and Birch Hill would complete the work in a punch list to be prepared by Respondent. Although the punch list was not in existence at the time the $15,000 amount was agreed to, the attorneys had discussed the items in dispute and Birch Hill's attorney had a general idea of the items that would be included. Respondent did not prepare the punch list.

49. On May 9, 1988, Birch Hill's attorney wrote to Respondent inquiring of the whereabouts of the punch list. On May 10,1988, Mr. Catero agreed to a 14-item punch list. Respondent did not forward this punch list to Birch Hill's attorney. On May 24, 1988 Birch Hill's attorney again wrote to Respondent asking about the punch list. On June 3, 1988

Respondent forwarded to Mr. Layden the Agreement and Release and the 14-item punch list. Mr. Layden was surprised at the punch list since it was much more expansive than had been discussed with Respondent. On July 15, 1988 Mr. Layden forwarded to Respondent a revised 4-item punch list, with the request that the parties finalize the project as soon as possible. On September 19, 1988 Mr. Catero gave to Respondent $15,000 to hold in escrow, with the understanding that it would be paid-out to Birch Hill as the items on the punch list were completed. Respondent was to consult with Mr. Catero before any amounts held in escrow were disbursed.

50. On October 7, 1988 Respondent paid out of the escrowed funds $12,000 to Thomas Layden on behalf of Birch Hill. Respondent relied on Mr. Layden's representations that the items on the punch list permitting the release of these funds had been completed by Birch Hill. Respondent did not consult with Mr. Catero before releasing this money. Respondent made another such payment, in the amount of $1,000, on the representations of Mr. Layden on October 18, 1988. Respondent did not consult with Mr. Catero before releasing this money. Respondent paid out these moneys before forwarding to Mr. Layden the executed four-item punch list, the final piece of the contract.

51. On December 12, 1988 Respondent sent to Mr. Layden "a copy of Exhibit A as we discussed," the four-item punch list. Although a signature purporting to be Mr. Catero's is on this four-item punch list, the signature is a forgery. The forged signature was not made by Respondent. Mr. Catero had never seen this four-item punch list and did not authorize its being used in any way in the settlement of the dispute with Birch Hill.

52. From the time Mr. Catero had placed his money in escrow, he pointed out to Respondent on a regular basis, when Respondent came into the establishment, the failures of the construction or remedial items that Mr. Catero believed were on the punch list, so Respondent knew that his client was dissatisfied with the effort to address the punch list items. There was testimony that some of the 14 items on the punch list were covered by a warranty of workmanship that Attorney Layden testified was not released in the settlement, and Ortac still had rights to pursue. However, we find that Respondent should have, but failed to, discuss this with Mr. Catero before releasing the escrow

53. On February 14, 1989 Mr. Layden wrote to Respondent informing him that his client had told him that it had completed all of the work on the punch list and requested the final payment of $2,000. Mr. Layden sent a reminder letter to Respondent on February 28,1989. Despite Respondent's knowledge that his client was not satisfied, on March 10, 1989 Respondent sent to Mr. Layden the final $2.000 he held in escrow. He did not consult with his client before releasing this money.

54. On October 6, 1989 Mr. Layden signed and sent to Respondent a Stipulation for Dismissal. Respondent did not send a copy of this dismissal or otherwise advise Mr. Catero that the case was dismissed. October 10, 1989 Respondent wrote to Mr. Layden complaining that Birch Hill had not yet appeared at Mr. Catero' establishment to complete the punch list items. Nonetheless, Respondent signed the Stipulation on October 27, 1989 and forwarded it to the court. The case of Birch Hill Construction, Inc. v. Ortac Corp. was dismissed with prejudice. Respondent did not consult with Mr. Catero before executing this stipulation and had

no authority to agree to the dismissal of the lawsuit.

55. The conclusion that Respondent acted without authority of his client when he agreed to the four-item punch list to resolve the construction contract dispute between his client and Birch Hill is established by clear and convincing evidence. Mr. Catero, by virtue of his signature, on May 10, 1988, on a 14-item punch list was reasonably under the belief that that was the operative document. Given Mr. Layden' surprise and reaction when he received the 14-item punch list, we find that he and Respondent had orally agreed to a four-item punch list, to which Respondent was not authorized to agree, and that they had agreed Respondent would prepare. Respondent engaged in substantial delay in forwarding the four item punch list, further supporting Mr.Catero's testimony that Respondent knew his client had not agreed to a reduced punch list and would not execute such a document. Respondent's six months delay in forwarding the contract documents, Mr. Catero's never having seen or agreed to the four-item punch list prior to its having been sent to Mr. Layden, Respondent's knowledge that his client was not satisfied with Birch Hill's response to the punch list, Respondent's paying out Mr. Catero's money without authority from his client and before the contract was fully completed, that he agreed to dismissal of the lawsuit without authority and that Respondent hid the pay-out and dismissal from his client for five years compels, by clear and convincing evidence. The conclusion that Respondent acted without authority of his client when he agreed to the four-item punch list to resolve the construction contract dispute between his client and Birch Hill.

56. At some point in 1989 Respondent told Mr. Catero that the settlement with the contractors was not working and that the case would have to go to court. Throughout the next four years, Mr. Catero periodically asked Respondent when his case would come to trial. On each occasion Respondent led Mr. Catero to believe the case remained pending. Respondent lied to Mr. Catero from 1989 through May 1993. Respondent continued to receive free or, later, "at cost" dry cleaning services through the spring of 1993. Mr. Catero estimates that he provided approximately $5,000 in cleaning services to Respondent over the six-year period. Respondent did not report the barter as income on his tax returns. Respondent never provided to Mr. Catero an itemized account of legal services provided. From October 1988 through May 1993 Respondent did no other legal work for Mr. Catero, Ortac or Washbuckler's.

57. In the spring of 1993 Mr. Catero met with his accountant to prepare his business tax returns. He informed her that Respondent held $15,000 of the corporation's money in escrow. He asked her to contact Respondent to ascertain any interest that might have accrued and be taxable. In May 1993 Joanne Carney, CPA, called Respondent, who informed her that $12,000 was left in escrow and that it was not in an interest-bearing account because it was illegal in Vermont for escrow accounts to earn interest. Respondent lied to Ms. Carney. Ms. Carney knew the information about interest was not correct, and she so informed Mr. Catero. Mr. Catero told her that he was under the impression that there was $15,000 in the escrow account. Ms. Carney then called Respondent back, and Respondent then told her that the escrow did have $15,000 in it, and that he had been mistaken about the $12,000 earlier. Respondent lied to Ms. Carney, because, at the time he made these statements, all escrow funds had been disbursed to Mr. Layden.

58. In May 1993, after the conversation with Ms. Carney, Mr. Catero went to the courthouse to review his case file personally. It was then that he learned that his case had been dismissed with prejudice in October 1989.

59. Mr. Catero made an appointment with Respondent shortly thereafter. Mr. Catero again asked when his case would be coming for trial. Respondent lied again, replying that it was scheduled for trial in August 1993. Mr. Catero then confronted Respondent with the dismissal order. Respondent admitted that he did not consult with his client before allowing the case of Birch Hill Construction, Inc. v. Ortac Corp. to be dismissed with prejudice, by stipulating thereto. He admitted lying to Mr. Catero about the status of the case and perpetuating this lie for the next three and a half years.

60. Respondent is in violation of DR 1-102(A)(3); DR 1-102(A)(4); DR 1-102(A)(5); DR 1-102(A)(7); DR 6-101(A)(3): DR 7-101(A)(1); DR 7-101(A)(2): and. DR 7-102(A)(5).

PCB File No. 94.56

61. Jebb Balch was injured in 1985. He was a lineman trainee for Central Vermont Public Service Corporation. In the course of line work at Stratton Mountain he climbed an electrical pole that fell down upon him, severely injuring him. The pole had been planted by Bemis Construction Corporation. A ditch adjacent to the pole had recently been backfilled by R. Cyr & Sons, Inc.

62. Mr. Balch contacted Respondent for representation. Respondent did extensive pre-filing investigation and determined that Cyr was the defendant to pursue. Cyr then filed cross claims against CVPS and Bemis for indemnification for damage liability. The construction contract between CVPS and Bemis provided for partial, but not complete, contractual indemnification in favor of CVPS. The parties were represented as follows:

1. Jebb Balch by Respondent;
2. CVPS by John Zawistoski and Joan Loring Wing;
3. Cyr by Robert Reis;
4. Bemis by Peter Joslyn

63. CVPS was self-insured for workmen's compensation and for medical coverage for its employees.

64. Negotiations ensued. They were complicated by workmen's compensation and indemnification issues. CVPS and Bemis both challenged their status as potential indemnors. They won at the trial level, and Cyr appealed. The cross claims against CVPS and Bemis were severed. The Balch case proceeded.

65. During one negotiation session shortly before trial was to begin Respondent summarized the various demands:

A. Demand from Mr. Balch to CVPS:

1) CVPS had filed a lien on any recovery by Mr. Balch for past workmen's compensation it had paid to Mr. Balch. Mr. Balch was demanding a release of this lien;

2) Mr. Balch wanted him and his family continued to be covered under CVPS' medical plan. Mr. Balch also wanted future medical costs associated with his accident to be paid by CVPS. There was a onetime deductible for this medical coverage of $25,000 that Mr. Balch was demanding that CVPS pay;

3) Mr. Balch was demanding that CVPS place him on long-term disability, at which time,

4) Mr. Balch would release CVPS from further workmen's compensation benefit payment obligation;

B. Demand from Mr. Balch to Cyr:

1) $250,000 case;

2) $300,000 structure;

C. Demand from Cyr to CVPS:

1) Payment to Cyr of $50,000 to release them from any indemnification;

D. Demand from Cyr to Bemis:

1) Payment of $100,000 to Cyr to release them from any indemnification.

66. Trial was scheduled to begin on Monday, October 21, 1991. On the Saturday before trial a deposition of one witness was held in the office of Respondent. Attending were Respondent, Mr. Reis and Ms. Wing. Negotiations proceeded. Counsel reviewed their respective positions with each other. Ms. Wing's position had been, and continued to be, that CVPS would not settle its issues with Mr. Balch unless Cyr released CVPS from any indemnification. CVPS was not willing to pay any amount to Cyr for the release (as of this date, the legal challenge to indemnification by Bemis and CVPS remained pending in the Supreme Court). Ms. Wing reasserted that position and left the office. When she left, three issues remained unresolved between CVPS and Mr. Balch: 1) CVPS had offered to forego its lien on past payments for workmen's comp for Mr. Balch, 2) CVPS was still unwilling to fund the $25,000 long-term disability deductible for which Mr. Balch was responsible, and 3) CVPS continued to be unwilling to bear the costs for Mr. Balch s future medical costs associated with the accident. At no time did any of the attorneys exchange words to the effect that a deal or agreement had been reached between or among any of the parties. Respondent and Mr. Reis continued to discuss money settlement issues after Ms. Wing left.

67. Respondent testified that he had had a conversation with Attorney Reis the afternoon of Friday, October 18, 1991, in which they both agreed that Attorney Wing was not requiring releases as part of the deal anymore. Such testimony is directly contrary to that of both Ms. Wing and Mr. Reis. Mr. Reis testified that he had not obtained an agreement from CVPS, and Ms. Wing testified in no uncertain terms that she never told or implied to Mr. Reis that CVPS no longer wanted a release from Cyr. Respondent testified that he had known, prior to this alleged change in position, that the position of CVPS had been that they wanted a release from Cyr but were not

willing to pay for it. Transcript, February 13, 1996 at 16. Nonetheless, even though he had known that CVPS position had been that there would be no deal with Mr. Balch without a complete wrap up with all parties, including a release from Cyr, he did not think it sufficiently significant a change in position regarding the Cyr release to discuss the alleged report of Mr. Reis with Ms. Wing. Ms. Wing never conveyed or implied to anyone that CVPS had changed its position regarding the release from Cyr. There was no meeting of the minds between Respondent and Ms. Wing on October 19,1991 to settle the issues between CVPS and Jebb Balch. Respondent testified that the two issues--the$25,000 deductible and the long-term medical coverage relating to Mr. Balch's accident--remaining between Mr. Balch and CVPS prior to October 19, 1991 were settled that day. A representative from CVPS came to Respondent's office on October 19, 1991 and explained to Respondent the provisions of the new medical plan. Ms. Wing was present at the table for that explanation. As a result of that explanation, Respondent testified that he concluded that the two issues became non-issues because they were covered under the new plan. However, Respondent conceded that he did not address these specific issues with Ms. Wing to confirm they now had a mutual understanding.

Mr. Reis testified that as of the time he left on October 19, 1991, he had heard nothing to indicate that Respondent and Ms. Wing had come to an understanding regarding the issues between Mr. Balch and CVPS. Ms. Wing testified that as of the time she left on October 19,1991, there were still three issues unresolved with Mr. Balch and one major issue unresolved with Cyr. Therefore, contrary to Respondent's testimony, we find that all of the issues with CVPS had not been resolved as of October 19, 1991.

68. Ms. Wing was scheduled to attend the trial to monitor it on behalf of Cyr; a fact known to both Respondent and Mr. Reis.

69. On October 21, 1991 Respondent and Mr. Reis arrived at the courthouse early to continue negotiations. Respondent told Mr. Reis that he had spoken to Ms. Wing over the weekend and settled the Balch/CVPS aspect of the case. Respondent and Mr. Reis then settled on a payment by Cyr to Mr. Balch. Mr. Reis was still intending to pursue Cyr's indemnification claims against CVPS and Bemis.

70. Ms. Wing had not agreed with Respondent to settle Mr. Balch's demands against CVPS since Cyr had not agreed to release CVPS from its indemnification claim and because there remained three unresolved issues between Mr. Balch and CVPS.

71. Ms. Wing was detained in leaving her office on October 21, 1991 to travel to Manchester for the trial, causing her to be late. Respondent and Mr. Reis informed the court on the record that the case had been settled. Mr. Reis stated that Cyr would be pursuing its indemnification claim against CVPS. The court accepted the settlement and dismissed the Balch case.

72. On October 29,1991 the parties received the decision from the Supreme Court affirming the lower court's decision dismissing CVPS and Bemis from the case. Nonetheless, CVPS still had significant financial interest in the Balch case because of its obligations under workmen's compensation and continuing medical coverage for Mr. Balch and his family.

73. Subsequent to October 21, 1991 several lawsuits on behalf of Mr.

Balch were discussed between him and Respondent. One was Balch v. CVPS to enforce the "settlement agreement" with CVPS. Another was a lawsuit against Cyr on behalf of Mr. Balch's children. In or around November 1991 Respondent and Mr. Balch decided that such a complaint should be filed, and Mr. Balch instructed Respondent to do so. Over the course of the next year Mr. Balch inquired of Respondent on several occasions as to the status of the lawsuit. Each time Respondent replied that the complaint had been filed and was pending.

74. In April 1993 Mr. Balch called the courthouse and inquired of the status of the lawsuit on behalf of his children. The lawsuit had not been filed.

75. Mr. Balch then called Respondent and inquired again of the status of the lawsuit. Respondent replied that the case was pending and awaiting court time. Respondent had told Mr. Balch that he was going to depose Attorney Reis as part of discovery in the case. Mr. Balch asked if Mr. Reis' deposition had been taken. Respondent responded that he had done so.

76. Later that day Mr. Balch went to Respondent's office. Mr. Balch demanded to see copies of the complaint in this case and the transcript of the deposition of Mr. Reis. Respondent replied that it would take awhile to retrieve the file, and that he was too busy to get it that day, but he would send it to Mr. Balch as soon as possible. When Mr. Balch became agitated, Respondent pretended to call the Court Reporter in front of Mr. Balch, and pretended to speak to the Court Reporter, and request that a copy of the transcript be sent to Mr. Balch. Mr. Balch asked again about the status of the lawsuit. Respondent again replied that it was pending. Mr. Balch then confronted Respondent with his discovery at the courthouse. Respondent conceded he had not filed the complaint, or taken the deposition of Mr. Reis. Respondent lied to his client. Respondent's only explanation for his conduct that day was that it was his birthday, and the day he intended to propose to his current wife, and he wanted to get Mr. Balch out of the office as quickly as he could.

Respondent is in violation of DR 1-102(A)(4); DR 1-102(A)(5); DR 1-102(A)(7); DR 6-101(A)(3); DR 7101(A)(1); DR 7-101(A)(2); and, DR 7-102(A)(5).

SANCTION

77. Respondent was admitted to the practice of law in Vermont in the fall of 1980 and in Maryland in 1981.

78. In the early 1980's, Respondent became associated with the law firm of Abatiel and Abatiel. By 1984-85 he was handling an active caseload of 75-90 files, with 60% of them litigation matters. During this time period, he also became active in the Young Lawyer's Section of the Vermont Bar Association and the Young Lawyer's Section of the American Bar Association. He was elected to the Rutland School Board and became active in community affairs, including participating in the community band. He met his first wife in 1984 and married in 1986.

79. James Abatiel, the senior partner in the firm, became ill with leukemia in 1985 and passed away in 1988. Respondent's obligations in the office became more demanding because of James Abatiel s illness and absence and because his son, Tony Abatiel, reduced his workload to be with his ill

father. Serious problems surfaced with Respondent's wife in 1987-88 and their marriage became dysfunctional, much to Respondent s regret.

80. Throughout his life, Respondent had had a very close relationship with his uncle, Ben, a Catholic priest. Respondent had relied heavily on his uncle as a confidant and adviser. As problems increased at work and in his marriage, Respondent sought the comforting advice of his uncle. In the fall of 1988, however, Ben informed Respondent of certain allegations of serious impropriety being made against Ben by female parishioners. Respondent could no longer confide his own problems in his uncle and, instead, became his uncle s confidant and family legal adviser. Respondent testified that, since he and his uncle had changed roles, he no longer had anyone with whom to confide his own feelings and difficulties. However, Respondent confided in Joan Wing on a regular basis about the difficulties with his first wife, with little or no prompting from Ms Wing.

81. Respondent had many stresses in his life from 1988 until 1992, when he met his current wife.

82. In 1989 Respondent accompanied nine friends, including Respondent's girlfriend and David Catero, on a 10-day trip to the British Virgin Islands, where Respondent had arranged the leasing of a boat on which they resided for the duration of the trip. Respondent and Mr. Catero regularly dined out together from the time period 1988-1993.

83. From 1988 through 1990 Respondent was very active in community affairs. He was an elected member of the Rutland City Board of Alderman as well as the chair, vice-chair or member of many committees and subcommittees of the city. In 1988 he attended 31 of the 34 aldermen meetings, in 1989 he attended 30 out of the 36 meetings and in 1990 he attended every one of the 32 meetings. He actively participated in the aldermen activities.

84. From 1985-1988 Respondent was the only active lawyer in the firm, handling an open caseload of as high as 230 cases, with 50-60% being litigation files. Litigation files require a great deal of energy, concentration and organization. Except for these five cases, the results were good for Respondent's clients. Respondent did not suggest to current clients, in 1988-1990, that they might consider retaining other counsel. Respondent continued to take on new clients from 1988-1990.

85. Respondent concedes that he continued to lie to clients even after 1990.

86. Respondent offered the expert testimony of Dr. Alban Coghlan, a psychiatrist of Rutland, Vermont, who offered an opinion, to a reasonable degree of medical certainty, based upon the pleadings in this case, and three conversations with Respondent in January, 1996, that Respondent suffered from a major depressive episode from 19861989. Dr. Coghlan testified that Respondent would have suffered from a depressed mood, have had difficulty concentrating and memory problems, have been confused and disorganized, had lack of interest in hobbies, have been sad, anxious, irritable, despondent, and have difficulty eating and sleeping.

87. Respondent first contacted Dr. Coghlan on January 22, 1996, after the beginning of the hearings in this disciplinary matter. He based his diagnosis of depression on Respondent's current reporting to him of his

feelings and activities 8-10 years earlier, one letter Respondent obtained from his secretary as to his state 8-10 years earlier, Dr. Coghlan's observations of Respondent's current appearance and manner of delivery of the information, and the pleadings and documents in this disciplinary proceeding. Dr. Coghlan never reviewed Respondent's medical records. Dr. Coghlan made no effort to talk with people who knew Respondent in 1986-89 to ascertain how Respondent behaved at that time, although he admitted that such information would have been useful and relevant. Dr. Coghlan admitted that the validity of the methodology used is very much in dispute among mental health professionals, and that he had never testified to the existence of depression using these parameters before. Dr. Coghlan also testified that, with reference to Respondent's conduct giving rise to the charges, he does not know whether they were acts of a careless lawyer or the function of depression.

88. According to his own expert, Respondent has a capacity to lie, and that capacity can increase or decrease depending on stress, but it doesn't go away. Nonetheless, Dr. Coghlan relied heavily on the veracity of what Respondent told him about his condition from 1986-1988 or 1988-1990 in making his diagnosis, to reasonable medical certainty, of depression.

89. We do not find, by clear and convincing evidence, that Respondent was depressed at any time that he represented the clients in these five cases. Moreover, even if were to find that Respondent was depressed during any of the time period in question, we would be unable to find, by clear and convincing evidence, that his depression was the causative factor of his misconduct in these cases. But even if we were to find that Respondent was depressed during any of the time period in question and that his depression was the causative factor of his misconduct in these cases, we find that the misconduct Respondent engaged in was sufficiently serious to warrant refusing mitigation in this case, in lien with the recent decisions Attorney Grievance Commission v. Kenney, 664 A.2d 854 (1995), and Florida v. Clement, No. 82,097 (Fla. Nov. 2, 1995).

CONCLUSIONS OF LAW
PCB FILE NO. 94.58

93. Respondent engaged in a pattern of deceit, with both the opposing attorney and his clients. Respondent did not have the authority from his client, Ms. Page, to settle her lawsuit along the lines that Respondent represented to opposing counsel he had. Furthermore, Respondent lied by telling her, over a period of years after the case was dismissed, that her case was still pending. When Ms. Page requested a copy of her file, Respondent removed from it his copy of the dismissal notice from the court of March 28, 1991, awarding the rental payments to the landlord. Respondent's conduct in this respect violated DR 1-102(A)(4) and DR 7-102(A)(5)

94. Furthermore, Respondent's conduct deprived Ms. Page of the opportunity to present her case to a finder of fact, as she expected, and was entitled, to do. Respondent's conduct in this respect violated DR 1-102(A)(5).

95. Respondent failed to ensure offers of settlement were received by his clients, failed to forward to the opposing attorney finalized documents memorializing their "agreements," failed to keep in contact with

his clients and failed to notify his clients of the status of their case. Respondent's failure to give Ms. Page proper notice of a settlement offer which would have given her over $1,000 from the amount she had paid into court resulted in her sustaining a financial loss. Respondent's conduct in this respect violated DR 6-101(A)(3).

96. Respondent bound his clients to a settlement agreement without their authority. This settlement was not in the best interests of, at least, Ms. Page, nor is it a resolution that she had authorized or desired. Respondent knew his clients' desire was to present their case in court, based on what they believed and what Respondent had told them was a strong case. Respondent knew he was acting without authority and knew he was proceeding in a manner not supported by his clients, but proceeded nonetheless. Respondent's conduct violated DR 7-101(A)(1). Bar counsel also charged a violation of DR 7-101(A)(2) violation. We do not find that such a violation was established by clear and convincing evidence.

97. Based on all of the above, Respondent violated DR 1-102(A)(7).

PCB FILE NO. 92.23

98. Respondent engaged in a pattern of deceit, with his client, two opposing counsel, Mr. Zetelski and Mr. Butterfield, by, among other things, misrepresenting that he would ensure that the proceeds from the sale of property by Respondent's client would be used to pay off specified liens to ensure that the buyers received clear title and that the buyers' mortgagee would have the first lien on the property. Respondent is in violation of DR 1102(A)(4).

99. Respondent acted without his clients' authority in stipulating to attachment of his client's real property, to judgment against Respondent's clients, and to damages against Respondent's clients. Respondent's actions denied his clients' the opportunity either to present their case to a finder of fact or to engage in meaningful settlement negotiations. Respondent's conduct in this regard violated DR 1-102(A)(5).

100. By failing to protect the interests of his clients and failing to advise them as to their obligations after the September 1 closing, Respondent neglected his responsibilities to his client. Respondent's conduct in this regard violated DR 6-101(A)(3).

101. Respondent knew he did not have authority to bind his clients at the various stages of the lawsuit and did not consult with his clients before binding them to unauthorized agreements or inform them of such agreements after the fact. Respondent's conduct in this regard violated DR 7-101(A)(1) and DR 7-101(A)(2).

102. Mr. Romano paid to Respondent a filing fee for a lawsuit against the insurance company that Respondent did not place in a proper trust account. Respondent's conduct in this regard violated DR 9-102(A).

103. For all of the above reasons, Respondent is in violation of DR 1-102(A)(7)

PCB FILE NO. 94.57

104. Respondent engaged in a pattern of deceit with his client and opposing counsel, Mr. Oettinger. Respondent did not have the authority from his client to settle her lawsuit along the lines that Respondent represented to opposing counsel he had, or to stipulate to damages as he did. Furthermore, Respondent lied by telling his client, after the case was dismissed that the case was still pending and a trial was forthcoming. Respondent misrepresented to the court that he was authorized to stipulate to judgment and damages against his client. Respondent's conduct in this respect violated DR 1-102(A)(4). Further, Respondent lied to his client when he told him that the hearing on June 26, 1986 was scheduled to be in chambers and misrepresented to the court when he stated in his Motion to Withdraw that his client did not object to the withdrawal, when in fact he had not consulted with his client about his withdrawal. Respondent is in violation of Dr 7-102(A)(5).

105. By reason of Respondent's conduct, his client was deprived of the opportunity to present his case to a finder of fact or to engage in meaningful settlement negotiations, as he expected, and was entitled, to do. Respondent's conduct in this respect violated DR 1-102(A)(5).

106. Respondent neglected his responsibilities to his client by failing to further his client's position, failing to obtain information from his client necessary to respond to legitimate discovery requests and failing to keep in meaningful contact with his client. Respondent's conduct in this respect violated DR 6-101(A)(3).

107. Respondent knew he had no authority to bind his client to the agreement he did. He knew that Mr. Bowen did not want to settle his case, based on Mr. Bowen's belief, supported by Respondent's advice, that his case was strong. His client's financial loss as a result of this conduct is in the range of $30,000, consisting of the value of the truck ($16,000), expenses paid by his client to refurbish the crusher ($10,000), and amounts owed by the defendant for services and parts ($2,000 to $4,000). Respondent's conduct in this respect violated DR 7-101(A)(1) and DR 7-101(A)(2).

108. For all of the above reasons, Respondent is in violation of DR 1-102(A)(7).

PCB FILE NO. 94.55

109. Respondent did not report to the tax authorities the bartered income received for many years, in the form of dry cleaning services. Respondent's conduct in this respect violated DR 1-102(A)(3). Furthermore? Respondent failed to provide his client with a statement of services rendered and continued to receive dry cleaning services either at no charge or at a cost discounted from the normal retail charge after the Birch Hill case was dismissed and after which Respondent did no further legal work for his client. Respondent's conduct in this respect violated DR 1-102(A)(7).

110. Respondent engaged in a pattern of deceit, including lying to Mr. Catero from 1988 through the spring of 1993, in withholding from his client the fact that the Birch Hill case had been dismissed, and in stating to his client that the matter had not been resolved and that the he still had the client's funds in escrow. Respondent's conduct in this respect violated DR 1-102(A)(4).

111. Respondent acted without his clients' authority in, among other things, releasing funds from escrow and stipulating to dismissal of the lawsuit. Respondent's actions denied his client the opportunity to present his case to a finder of fact and to negotiate for the full punch list that he desired. Respondent's conduct in this respect violated DR 1-102(A)(5). Furthermore, Respondent knew he was binding his client to a position contrary to his client's desires. Respondent's conduct in this respect also violated DR 7-101(A)(1) and DR 7-101(A)(2)

112. Respondent neglected his responsibilities to his client by, among other things, failing to represent his client's interests in the negotiation. Respondent's conduct in this respect violated DR 6-101(A)(3).

113. Respondent engaged in a series of lies with his client for many years, in violation of DR 7-102(A)(5).

114. For all of the above reasons, Respondent is in violation of DR 1-102(A)(7).

PCB FILE NO. 94.56

115. Respondent misrepresented to Mr. Reis and to the court that he and Ms. Wing had settled the CVPS/Balch portion of the lawsuit and lied to his client repeatedly over the course of several years about, among other things, the status of the lawsuit which was to have been filed by Respondent on behalf of the children. Respondent's conduct in this respect violated both DR 1-102(A)(4) and DR 7-102(A)(5).

116. Respondent's misrepresentations to the court directly resulted in the filing of additional lawsuits and in delays in Mr. Balch's efforts on behalf of his children. Respondent's conduct in this respect violated DR 1-102(A)(5).

117. Respondent knew he had not achieved full agreement with CVPS by the time of trial on October 21, 1991 yet failed to proceed to trial. Furthermore, Respondent failed to file the lawsuit on behalf of the Balch children and to keep his clients advised of the true status of representation. Respondent's conduct in this respect violated DR 6-101(A)(3),DR 7-101(A)(1) and DR 7-101(A)(2).

118. For all the above reasons, Respondent is in violation of DR 1-102(A)(7).

RECOMMENDED SANCTION

In determining the appropriate sanction to recommend, the Panel has considered the duty violated, Respondent's state of mind, any actual or potential injury to the client, and any aggravating or mitigating factors, and the ABA Standards for Imposing Lawyer Sanctions.

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.

Respondent's conduct falls into four general categories:

violation of duties owed to clients, violation of duties owed to the public, violation of duties owed to the legal profession, and violation of duties owed to the legal system. The ABA Standards for Imposing Lawyer Sanctions generally set up levels of culpability to distinguish between the levels of sanctions. The sections which appear to be relevant in determining the appropriate sanction to be imposed in this case are the following:

> 4.41(b) Violation of Duty owed to Clients: Disbarment is generally appropriate when: a lawyer knowingly fails to per form services for a client and causes serious or potentially serious injury to a client.
>
> 4.62 Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.
>
> 5.11(b) Violation of Duty Owed to the Public: Disbarment is generally appropriate when: a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.
>
> 6.11 Violation of Duty Owed to the Legal System: Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submit a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant adverse effect on the legal proceeding.
>
> 7.2 Violation of Duty Owed to the Legal Profession: Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system.

The Panel considered each of these sections in its analysis.

Violation of Duties Owed to Clients

Respondent violated two duties: lack of diligence (Standard 4.4) and lack of candor (Standard 4.6). Standard 4.41 provides that disbarment is generally appropriate when "a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client' (4.4 l(b)) or "a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client" (4.41(c)). A suspension is appropriate if the same conduct identified under 4.41 resulted in injury or potential injury short of "serious."

In considering Respondent's misconduct relating to his lack of candor (Standard 4.6), we note that such conduct would support disbarment only if the lawyer knowingly deceived the client with intent to benefit the lawyer

or another. Since we find that Respondent did not act with the intent to benefit himself or someone else, disbarment would be inappropriate for Respondent's violations under this standard. However, since we find that Respondent knowingly deceived his clients and caused them injury and potential injury, suspension is appropriate for Respondent's violations under this standard.

Violation of Duties Owed to the Public

As the Standards provide, a lawyer's duty to maintain the standards of personal integrity on which the community relies is the "most fundamental duty which a lawyer owes the public." Standard 5.11(b) provides that disbarment is appropriate where a lawyer engages in intentional conduct involving 'dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice law." As our findings of fact demonstrate, Respondent's conduct clearly fits within this Standard and suggests that disbarment is appropriate.

Violation of Duties Owed to the Legal System

Respondent made several false statements to different courts in different matters on which the courts relied in taking action, including dismissing cases Respondent filed for his clients. For such action, under DR 6.11, disbarment is the appropriate sanction where the acts of deceit "cause serious or potentially serious injury to a party, or cause a significant or potentially significant adverse effect on the legal proceeding." As the facts demonstrate, Respondent's acts deprived several clients of having their day in court. That is both serious injury to the client and a significantly serious adverse effect on the legal proceeding, precluding a decision on the merits. Therefore, Respondent's conduct would support a recommendation of disbarment.

Violation of Duties Owed to the Legal Profession

It has been established, by clear and convincing evidence, that Respondent knowingly engaged in a pattern of dishonesty, deceit and misrepresentations to the court and to his clients. Respondent acted without authority, failed in his obligations of diligence and loyalty on numerous occasions and lied to clients, courts, and other counsel. We do not find that Respondent engaged in this conduct for financial or personal gain. However, we find that the conduct that is the subject of 94.58 caused serious injury to the client and the conduct that is the subject of 92.23 and 94.56 caused serious potential injury to the client. We further find that, in 94.55, 94.56 and 94.57, Respondent, with the intent to deceive the court, made false statements, and caused serious or potentially serious injury to a party, or caused a significant adverse effect on the legal proceeding.

In determining what sanction to recommend, the Standards set forth a series of aggravating and mitigating circumstances which should be considered in reaching a final recommendation.

AGGRAVATING CIRCUMSTANCES

There are five factors listed in the ABA Standards supported by the

record which may be considered in aggravation of the sanction to be recommended in this case:

1. Substantial experience in the practice of law. Respondent has been a member of the Vermont bar since 1980.

2. Pattern of misconduct. Respondent's conduct involves a clear pattern of the same kind of misconduct over a period of about six years, involving a series of clients.

3. Multiple offenses. This proceeding involves five unrelated instances of the same kind of misconduct.

4. A prior disciplinary record.

5. Vulnerable victims. In most cases, the victims were unsophisticated and relied heavily on Respondent's expertise and advice. In one case, the victim relied on Respondent because of a perceived friendship.

MITIGATING FACTORS

The factors listed in the ABA Standards supported by the record which may be considered in mitigation of the sanction to be recommended are as follows:

1. Cooperation. Respondent has cooperated with this disciplinary proceeding.

2. Expression of remorse. Respondent expressed remorse for his misconduct.

3. Personal problems. Respondent had personal problems during part of the time period involved in this proceeding.

4. Respondent's prior discipline was remote in time.

5. Motive. Respondent did not have a selfish motive.

RECOMMENDATION

Bar Counsel has argued, we think correctly, that the record would support disbarment. However, she observes that the absence of complaints relating to Respondent's conduct over the last few years might support a slightly less severe sanction, a three year suspension. Counsel for Respondent suggests that a public reprimand would be appropriate but requests that if the Panel believes that a more severe sanction is proper, that it not exceed a six month suspension.

The primary purpose of attorney discipline is the protection of the public. Although Respondent's active misconduct as it relates to these files ended in 1990, Respondent's misrepresentations regarding the misconduct continued until May of 1993. Furthermore, the Panel has found that Respondent's testimony during these proceedings was, at times, disingenuous at best. The Panel is also troubled by testimony of Dr. Coghlan, Respondent's expert, who testified that Respondent's capacity

for lying, especially when he is under stress, continues; it "doesn't go away.

The Panel did not give significant weight to Dr. Coghlan's forensic diagnosis of Respondent's mental condition because of the remoteness in time between the condition and the diagnosis, the lack of personal contact between the doctor and any independent observers, and the admittedly highly disputed nature of the method used in formulating his opinion. While we have given little weight to the expert's conclusion, we have considered the unfortunate occurrences in Respondent's life during some of the time in which Respondent's misconduct occurred as a mitigating factor.

However, in the cases of serious misconduct, the Panel embraces the trend toward refusing to mitigate sanctions where an attorney contends that his or her serious misconduct resulted from a mental disability and/or has engaged in substantial rehabilitation, because of the paramount need to safeguard the public. See, e.g. Attorney Grievance Commission v. Kenney, 664 A.2d 854 (1995);Florida v. Clement, No. 82,097 (Flat Nov 2, 1995).

A second significant goal of attorney discipline is to maintain the integrity of the legal profession, both within the profession and in the eyes of the public. A lawyer's honesty as an officer of the court, and loyalty and honesty to his or her client, is central to maintaining the integrity of the attorney - client relationship, the profession, and the legal system. Respondent's pattern of false statements to the court and to his clients creates a serious adverse effect on the profession in the eyes of the public as well as within the profession. The failure to impose a sanction appropriate to the misconduct would have a negative impact in both communities.

We believe that the record would support a recommendation of disbarment under ABA standards 4.41(b), 5.11(b), and 6.11. However, considering the mitigating factors, we believe that a substantial suspension would serve the basic goals of attorney discipline. Therefore, the Panel recommends that the Board, in its final report on this matter to the Supreme Court, recommend that Respondent be suspended for three years.

Dated this 7th day of May, 1996.

/s/
Deborah S. Banse, Panel Chair

/s/
Paul Ferber, Esq.

/s/
Nancy Foster

/usr3/dal/9223.op

In re Wysolmerski (96-597) [Filed 25-Jul-1997]

ENTRY ORDER

SUPREME COURT DOCKET NO. 96-597

JUNE TERM, 1997

In re Sigismund Wysolmerski, Esq.	}	APPEALED FROM:
	}	
	}	
	}	Professional Conduct Board
	}	
	}	
	}	DOCKET NOS. 92.23, 94.55, 94.56, 94.57 and 94.58

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

Respondent Sigismund Wysolmerski challenges the Professional Conduct Board's recommendation that he be suspended from legal practice for three years. He argues that this recommendation is unduly harsh and does not take several mitigating factors into account. We agree with the Board's recommendation and accordingly, impose the three-year suspension.

Respondent does not dispute the conduct that led to these disciplinary proceedings. The Board found that between 1985 and 1993 respondent violated numerous provisions of the Code of Professional Responsibility while serving five clients. Among these violations, respondent acted without clients' approval and bound them to unauthorized settlements. See DR 7-101(A)(1), 1-102(A)(5) (lawyer shall not intentionally fail to seek clients' lawful objectives through reasonably available means; lawyer shall not engage in conduct prejudicial to administration of justice). He misrepresented to other attorneys his authority to bind clients, and lied to clients about the status of their cases. See DR 1-102(A)(4) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). He knowingly made false statements to other attorneys and to courts. See DR 7-102(A)(5) (lawyer shall not knowingly make false statements of fact while representing client). He failed to keep in contact with clients and inform them of their legal obligations, failed to file a promised lawsuit, and failed to forward settlement offers and court papers. See DR 6-101(A)(3) (lawyer shall not neglect entrusted legal matters). Respondent otherwise did not fulfill his professional contracts with clients, as required by DR 7-101(A)(2), and engaged in conduct adversely reflecting on his fitness to practice law in violation of DR 1-102(A)(7).

Respondent concedes that suspension is appropriate, but maintains that the three-year suspension recommended by the Board is too severe given the mitigating circumstances of his case. He argues that the Board, in making its recommendation, did not give sufficient weight to mitigating factors, particularly the serious personal problems that beset respondent. One partner in respondent's law firm died of cancer in 1988. Another took time

off and left respondent with much of the office's work. Meanwhile respondent's marriage ended in a painful divorce, and a close relative was accused of serious improprieties. Because he was helping his relative cope with these accusations, respondent could no longer approach him to discuss his own problems and so lost his only confidant.

We do not agree with respondent that the recommended three-year suspension is too severe. The Board recognized and considered the personal problems that beset respondent; it also noted such aggravating factors as the vulnerability of respondent's victims and the extent of his misconduct over six years in five unrelated instances. His neglect and active misconduct not only harmed several clients, but denied them their day in court. He was repeatedly dishonest with clients, other attorneys, and courts. Such behavior generally merits disbarment. ABA/BNA Lawyers' Manual on Professional Conduct, ABA Standards for Imposing Lawyer Sanctions, Standards 4.41(b), 5.11(b), 6.11; see In re Berk, 157 Vt. 524, 532, 602 A.2d 946,

950 (1991) (ABA standards helpful in gauging sanctions); see also In re Sullivan, 530 A.2d 1115, 1118 (Del. 1987) (fraudulent misrepresentations to court and neglect of legal matters each separately warrant disbarment). Respondent avoids disbarment only because of the mitigating factors in his case. Cf. In re Willcher, 404 A.2d 185, 189 (D.C. 1979) (five-year suspension, rather than disbarment, as severe depression likely caused misconduct).

Respondent also argues that the Board inappropriately rejected expert testimony that he had suffered from clinical depression from 1986 until 1989. We agree with the Board that this testimony was relatively weak. The psychiatrist offering the diagnosis did not treat respondent during the time in question and based his diagnosis on three conversations with respondent years later, after these disciplinary proceedings began. In addition, the diagnosis of clinical depression would not account for all instances of respondent's professional misconduct; while he may have suffered from depression from 1986 until 1989, his pattern of misconduct began in 1985 and continued well into 1993. In any event, the diagnosis of clinical depression would not alter our conclusion that respondent should be suspended for three years: we do not impose sanctions as punishment. See Berk, 157 Vt. at 532, 602 A.2d at 950. Whether we explain respondent's extreme errors in judgment in terms of clinical depression or profound personal distress, we must still adhere to our goals of protecting the public from misconduct and maintaining confidence in our legal institutions. See Sullivan, 530 A.2d at 1119 (attorney disbarred to protect public and preserve integrity of profession; mental condition not mitigating).

Respondent maintains that a one-to two-year suspension would protect the public from his misconduct and encourage other attorneys to seek help when personal distress threatens their fitness to practice law. This may be so, and respondent may have every intent to avoid future misconduct, but this is not enough. Given respondent's grave misconduct, a briefer suspension would not restore public confidence in the legal profession or in the integrity of our legal institutions. Cf. In re Harrington, 134 Vt. 549, 552-53, 367 A.2d 161, 163 (1976) (Court gives Board recommendations great weight but bears sole responsibility for discipline of legal

profession; one purpose of sanctions is to promote public confidence in legal institutions).

In light of respondent's multiple, serious violations of the disciplinary rules, we impose the three-year suspension recommended by the Board. As requested at oral argument, the suspension will begin forty-five days from the date of this order.

Respondent Sigismund Wysolmerski is hereby suspended from the practice of law for a period of three years, beginning forty-five days from the date of this order.

BY THE COURT:

_____
Jeffrey L. Amestoy, Chief Justice

_____
Ernest W. Gibson III, Associate Justice

_____
John A. Dooley, Associate Justice

_____
James L. Morse, Associate Justice

_____
Denise R. Johnson, Associate Justice