134.PCB

[2-Apr-1999]

STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

IN RE: PCB Docket No. 95.23

DECISION NO. 134

Respondent is a lawyer of considerable experience who ran afoul of the ethics rules by the way in which he borrowed money from a client who was also a family member. This case arose out of events which occurred seven years ago. It is submitted to us by stipulated facts.

Facts

Over a period of several years, Respondent provided occasional legal services to an elderly aunt when she was still capable of making decisions for herself. Eventually the aunt needed someone to act for her as her attorney-in-fact. Respondent declined this responsibility because he felt that it might conflict with his responsibilities as her attorney-at-law. Eventually, the aunt designated her brother, Respondent's uncle, to care for her interests by a power of attorney. Some six years after the uncle became attorney-in-fact, Respondent wrote him a letter asking to borrow money from the aunt. Respondent was in difficult financial straits at the time due to Respondent's poor health.

The uncle was a sophisticated businessman. He reviewed the aunt's financial situation and determined to cash in the aunt's certificates of deposit in order to make the loan to Respondent. Respondent agreed to match the interest then being paid on the CDs and to pay the penalties for cashing them in prior to their maturity dates.

The first loan was for $30,000. The second loan, received three months later, was for $7,500. A third loan for $12,000 was negotiated, but the funds were never disbursed to Respondent. In each case, Respondent executed a demand note. The loans were not secured by any collateral.

The parties stipulated, and we so find, that these loans constituted business transactions with a client. At the time he negotiated and received each of these loans, Respondent was his aunt's legal counsel. The uncle expected Respondent to exercise his professional judgment for the protection of the aunt's interests. The uncle believed that Respondent would be able to repay the loans. Respondent did not explain to the uncle that in making a loan from the aunt to Respondent, Respondent had personal interests which conflicted with his professional interests. Respondent states that he recalls advising the uncle to consult with independent counsel before extending the loans, although the uncle states that he did not receive that advice. Whatever Respondent may have said, it was obviously not adequate for the uncle to understand the importance of receiving independent advice before loaning the aunt's money to her lawyer. Shortly after the third loan was negotiated, the uncle made a demand for

payment. Respondent could not repay the money. Respondent later agreed to a repayment schedule, although more than half of the loan is still outstanding. The uncle filed a complaint with the Board, which complaint led to the present disciplinary action. The disciplinary action has been delayed because Respondent suffers from a life threatening disability.

Conclusions of Law and Sanctions

Disciplinary Rule 5-104(A) provides:

> A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgement therein for the protection of the client, unless the client has consented after full disclosure.

While this case may be somewhat muddied by the fact that the loan was between family members, the fact that one family member was legal counsel for the other makes DR 5-104(A) applicable. The loan between client and lawyer may have been permissible if lawyer had made a full disclosure of the conflicting interests, but that did not occur here. Respondent, therefore, violated DR 5-104(A).

There are a series of cases out of New York, referenced by the parties here in their stipulation, where courts there have held that accepting loans from clients without advising them to obtain independent counsel, without memorializing the loan, and without providing security, constitutes conduct which adversely reflects on the lawyer's fitness to practice law in violation of DR 1-102(A)(7). See, e.g., In re Hardy, 172 A.D.2d 866, 568 N.Y.S.2d 463 (3rd Dept. 1991)(accepting a loan from a client constitutes conduct adversely reflecting on fitness to practice law where lawyer accepts loans from clients which are not memorialized or only sketchily memorialized with terms favorable to the lawyer and where lawyer did not advise clients of the benefit of independent legal advice); In the Matter of Chariff, 221 A.D.2d 719, 633 N.Y.S.2d 618 (3rd Dept. 1995)(lawyer violated DR 1-102(A)(7) by accepting loan from client that was not documented or secured and where lawyer failed to advise client of need to consult with independent counsel); accord In the Matter of MacKinnon, 223 A.D. 2d 807, 637 N.Y.S.2d 321 (App. Div., 3rd Dept. 1996).

Given that the loan here was documented by a demand note and given the absence of any information in the record regarding what representations Respondent may or may not have made about his ability to repay the loan or the purposes to which the loan proceeds would be applied, we are not inclined to conclude that these facts - without more - constitute conduct adversely reflecting on Respondent's fitness to practice law.

In determining the appropriate sanction, there is conflicting guidance. We recall our decision in Decision No. 76 (PCB Docket 92.29, Sept.9, 1994)(lawyers privately admonished for engaging in business venture with client where critical business agreements not reduced to writing and where there was no disclosure of conflicting interests). We also note that the applicable standard from the ABA Standards for Imposing Lawyer Sanctions suggests that a public reprimand, not a private admonition, is the appropriate sanction. Standard 4.33 provides, in pertinent part:

> Reprimand is generally appropriate when a lawyer is negligent in

determining whether the representation of a client may be materially affected by the lawyer's own interests...and causes injury or potential injury to a client.

We decline to go beyond a private admonition - because of a number of mitigating factors. These include the absence of a prior disciplinary record in a career that has spanned a considerable period of time, Respondent's personal problems, his full and free disclosure to the disciplinary board and his co-operative attitude toward disciplinary counsel, the remoteness of the conduct, and, most significantly, Respondent's physical disability. We find there is no likelihood that this conduct would be repeated or that there is any danger to the public.

Dated at Montpelier this 2nd day of April, 1999.

PROFESSIONAL CONDUCT BOARD

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

/s/	/s/
Steven A. Adler, Esq.	John Barbour
/s/	
Charles Cummings, Esq.	Paul S. Ferber, Esq.
/s/	
Michael Filipiak	Nancy Foster
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Barry E. Griffith, Esq.	Robert F. O'Neill, Esq.
/s/	
Alan S. Rome, Esq.	Mark L. Sperry, Esq.
Ruth Stokes	Joan Wing, Esq.
/s/	
Jane Woodruff, Esq.	Toby Young

Dissenting

DISSENT

Although I agree with the majority that Respondent's conduct violated DR 5-104(A), I disagree with the majority on two grounds. First, I think that the Respondent's conduct in this case, taking advantage not just of a client but of two family members, in failing to provide any security for loans of almost $50,000 also violates DR 1-102(A)(7). Second, I think that the majority's decision of a private reprimand is seriously inadequate for Respondent's conduct in this case.

Violation of DR 1-102(A)(7).

If there is a single critical characteristic necessary for the practice of law, it is trustworthiness. The client must be able to have total confidence that the lawyer will act solely in the client's best interests. Respondent in this case committed three distinct violations of self-dealing. In three different transactions, he borrowed $30,000, then $7,500, and a third time for $12,000 (although the latter funds were not ultimately disbursed). In none of those situations did Respondent make any effort to tell his client that he was not representing the client's interest but rather was representing his own interests. In none of these transactions did he advise his client to consult with independent counsel, an absolute requirement of DR 5-104(A). In none of these transactions did he provide any security for any of the loans. This latter facts is crucial under the caselaw finding a violation of DR 1-102(A)(7). See e.g., In the Matter of Chariff, 221 A.D.2d 719 , 633 N.Y.S.2d 618 (1995).

Sanction

The majority decision performs an interesting indirection maneuver in finding a private admonition the appropriate sanction. It begins with Reprimand and then refer to thinly supported mitigating factors and virtually makes the violation disappear.

The proper starting is Standard 4.32 rather than 4.33. Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client. The undisputed facts show that Respondent knew of the conflict and failed to disclose the possible effects. This was a knowing and wilful violation of the conflict of interest rule for selfish purposes, Respondent's own financial well-being. As to the injury, the loans have been unsecured and at least half of the amounts loaned are still outstanding. At a minimum, there was potentially a complete loss of the entire amounts of the multiple loans. At this point at least half of that injury remains possible.

I find it surprising that the majority considers the Respondent's personal problems as mitigating. Rather it was his decision to take care of his personal problems with his client's money which is the heart of the case. Furthermore, the majority ignores the aggravating factor of Respondent's selfish motivation which underlies the violation.

Whatever weight one may give to the remaining mitigating factors, a

sanction less than a public reprimand is a serious failure of the disciplinary system to tell the Bar that honesty to clients is an absolute obligation which we consider of the highest priority. For these reasons, I cannot join in the majority opinion.

/s/

Paul S. Ferber

/s/

Ruth Stokes

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