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[13-Sep-2004]

STATE OF VERMONT

PROFESSIONAL RESPONSIBILITY BOARD

In re: George E. Rice, Esq.

PRB File No. 2001.168

In re Decision No. 64.

By decision dated April 28, 2004, Respondent was suspended for a period of ninety days for violation of Rules 1.2(d), 8.4(c) and 4.4 of the Vermont Rules of Professional Conduct. Respondent took a timely appeal to the Vermont Supreme Court.

On August 27, 2004, Respondent and Disciplinary Counsel filed a Joint Motion to Amend Decision No. 64 by delaying the commencement of the suspension and publication of the decision until December 16, 2004. The Panel has since been informed that Respondent has withdrawn his request to delay publication.

With this change, the Joint Motion is GRANTED and Decision No. 64 is hereby amended to provide that Respondent's suspension shall commence on December 16, 2004.

Dated: 9/10/04

FILED: 9/13/04

HEARING PANEL NO. 1

/s/

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Barry E. Griffith, Esq. Chair

/s/

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Martha M. Smyrski, Esq.

/s/

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Stephen Anthony Carbine

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64 PRB

STATE OF VERMONT

PROFESSIONAL RESPONSIBILITY BOARD

In re: George E. Rice, Esq.

PRB File No. 2001.168

Decision No 64

Respondent is charged with assisting a client to hide assets from known creditors in violation of Rules 1.2(d), 8.4(c) and 4.4 of the Vermont Rules of Professional Conduct.

The matter was heard on November 6, 2003, before Hearing Panel No. 1, consisting of Barry Griffith Esq., Martha Smyrski, Esq. and Stephen Anthony Carbine. Respondent was present and appeared pro se. Beth DeBernardi appeared as Disciplinary Counsel. Based upon the evidence presented, and in consideration of the aggravating factors present, Respondent is suspended from the practice of law for a period of ninety days for violation of Rules 1.2(d), 8.4(c) and 4.4 of the Vermont Rules of Professional Conduct.

Facts

Respondent George E. Rice was admitted to the practice of law in Vermont in 1970 and is currently so licensed. For some years he represented Arthur Rice, Lisa Rice, and their corporation Rice Energy, Inc. (Rice Energy), a retail fuel dealer, in various legal matters. Arthur Rice and Lisa Rice are not relatives of George Rice. Until his death on December 7, 1999, Arthur Rice was the President of Rice Energy and handled the management of the corporation on a part time basis.

Complainant, Robert Foti, is the president of Foti Fuels, Inc. (Foti Fuels), a wholesale fuel dealer. Arthur Rice was employed by Foti Fuels as the general manager and comptroller, handling the day to day business of the corporation. Rice Energy would at times purchase wholesale fuel products from Foti Fuels on account, for resale to Rice Energy's retail customers. Arthur Rice would handle these transactions for both companies. In the spring of 1999, the State of Vermont began a tax audit of Foti Fuels, to determine whether Foti Fuels had paid all gasoline and diesel taxes due to the State. On December 5, 1999, the chief state auditor informed Robert Foti that Foti Fuels owed the State $650,000 in unpaid taxes. This information was a surprise to Robert Foti, who had entrusted the day to day operations of the business to Arthur Rice.

On December 7, 1999, Arthur Rice committed suicide, and Arthur Rice's widow, Lisa Rice, took over the management of Rice Energy. Robert Foti took

over the management of Foti Fuels. At that time Rice Energy owed Foti Fuels approximately $100,000 for fuel purchased on account.

Robert Foti met with George Rice shortly after Arthur Rice's' death. They discussed the status of the supply to Rice Energy and how both parties would proceed. Robert Foti also met with Lisa Rice and Norman Rice, Arthur Rice's brother. Robert Foti was concerned about the balance due from Rice Energy and requested a security agreement. Lisa Rice mentioned that there was the possibility of insurance proceeds being available to pay creditors, but that she did not know when payment would be made since questions had been raised due to Arthur Rice's suicide. Foti Fuels agreed to continue to supply Rice Energy on account. Robert Foti, however, was not comfortable relying on a representation as to the possibility of receiving life insurance proceeds as the basis for extending further credit to Rice Energy, and Lisa Rice was not comfortable entering into a security agreement with Foti Fuels. Accordingly, Foti Fuels stopped selling fuel to Rice Energy on credit at the end of the December of 1999. At that time the balance owed by Rice Energy to Foti Fuels was approximately $180,000. In December of 1999, when it appeared likely that Foti Fuels would assert a claim against Rice Energy, George Rice advised Lisa Rice to obtain another attorney specifically to defend any claims brought by Foti Fuels, since he had represented Foti Fuels some years earlier on an unrelated matter and wanted to avoid the appearance of a conflict of interest.(FN1) Respondent recommended that Lisa Rice hire Carl Lisman. She did so, and at some point she and Respondent met with Lisman to discuss the matter.

George Rice continued to represent Lisa Rice, the Estate of Arthur Rice, and Rice Energy in other matters not directly involving Foti Fuels, and Carl Lisman began to represent Lisa Rice, the estate of Arthur Rice, and Rice Energy in matters directly involving claims of Foti Fuels. Lisa Rice's engagement of Carl Lisman was prior to December 29, 1999, the date of a letter she wrote to him for advice on how to handle her business dealings with Foti Fuels. At that time she was still expecting life insurance proceeds but had not received them.

In late December of 1999 George Rice met with an officer of the Howard Bank. Respondent was aware that Rice Energy had applied for a line of credit with the bank. The bank officer told him that the loan application had been denied and that the best thing to do would be to shut the business down. One of Rice Energy's obligations was a demand note held by Howard Bank secured by a piece of equipment.

On or about January 12, 2000, National Life Insurance Company issued a check for the life insurance proceeds payable to Rice Energy, Inc. in the amount of $354,676.68. Lisa Rice had thought that the check would be payable to her rather than to the corporation. She called George Rice and asked him what to do with the money until she found out whether or not the beneficiary was the corporation. She asked how to keep it safe for her and her children. Lisa Rice testified that she relied on Respondent to handle the details of how to protect the money.

On or about January 14, 2000, Lisa Rice and George Rice went to the Northfield Savings Bank with the life insurance check. With Lisa Rice's consent, George Rice opened a new checking account in the name George E. Rice, Trustee, and deposited all of the life insurance proceeds into this account. There never was any written trust agreement, and the documents establishing the account did not identify the beneficiary of the trust. The taxpayer ID number on the account was initially the taxpayer ID number for George Rice's law practice.

Respondent's understanding of how the money was to be used was reflected in his letter to Lisa Rice dated January 14, 2000. Funds were to be first used to reimburse Norman Rice, Jr., and John Larose, Lisa Rice's father, for advances to the corporation and to pay potential wholesale distributor's of heating fuel and to cover tax liabilities. There is no indication of any understanding that Foti Fuels was to receive any of the funds.

Thereafter, George Rice made the funds available to Lisa Rice and Norman Rice on request. Funds were sent via checks written on the account in the amounts requested. No checks were written to the entity Rice Energy except for a final check for $3,658.68 closing out the account ten months later.

On Thursday, January 27, 2000, Foti Fuels filed a Complaint and a

Motion for Attachment against Rice Energy, Lisa Rice, and the Estate of Arthur Rice, in an attempt to collect the debt owed to Foti Fuels for fuel purchased on account by Rice Energy. Copies of these documents were sent to attorney George Rice on the same date.

On Tuesday, February 1, 2000, George Rice changed the title on the Northfield Savings Bank account to George E. Rice. The designation of trustee was dropped, and the taxpayer ID number on the account was changed to Respondent's personal social security number. Neither this account nor the previous account was established under the IOLTA rules.

Respondent testified that the purpose of establishing the account in his name, first as trustee, and thereafter as apparent owner, was to shelter the life insurance proceeds from the Howard Bank, so that Rice Energy could use the funds to purchase fuel for resale to its customers and thus remain in business during the heating season. George Rice did not acknowledge that holding the life insurance proceeds in his name was for the additional purpose of preventing attachment by Foti Fuels; however, the Panel finds that George Rice knew of the obligation of Rice Energy to Foti Fuels prior to the establishment of the bank account, and that he learned of the Motion for Writ of Attachment filed by Foti Fuels just four days before he changed the account from George Rice, Trustee, to George Rice. The timing of events and Respondent's knowledge of the Foti Fuels' Motion for Attachment leads the Panel to find that sheltering the funds from Foti Fuels was an additional motivation for the establishment of the Northfield

Savings Bank accounts.

On February 28, 2000, the court granted Foti Fuels' Motion for an Attachment in the amount of $170,000, until such time as the court could hold a full hearing on the motion. At that hearing, the court directed Rice Energy to transfer $170,000 of the life insurance proceeds to an escrow account in the joint names of the attorneys for the parties. Robert Foti testified that he first learned of the existence of funds at the Northfield Savings Bank on the date of the attachment hearing. In his prior discussions with George Rice the fact that there was money available to pay creditors was never mentioned.

On the date of the court order, the amount of the life insurance proceeds in George Rice's account at Northfield Savings Bank was $128,676.68, down from the original total of $354,676.68 six weeks before.

On February 29, 2000, the sum of $125,018 was transferred from George Rice's Northfield Savings Bank account and was deposited into an escrow account, as directed by the court. This transfer left a balance of $3,658.68 in the account.(FN2)

On April 14, 2000, the court held the full attachment hearing and awarded Foti Fuels an increased attachment in the amount of $190,000. The amount held in escrow was not increased, and thus Foti Fuels' attachment was collateralized only to the extent of $125,000, putting Foti Fuels at

risk of not being able to collect in full any judgment or settlement it would eventually achieve.

George Rice continued to hold the sum of $3,658.68 in the Northfield Savings Bank until November 16, 2000, when he drew a check payable to Rice Energy which zeroed out the account. Respondent held his clients money in this account from January 14, 2000 until November 16, 2000, a period of ten months.

Foti Fuels' claim against Rice Energy was settled on January 5, 2001, for the sum of $180,000. Foti Fuels received payment in full from the escrow account established by the court plus a separate payment from Rice Energy for the balance.

George Rice's conduct in establishing an account in his own name to hide client funds could have caused serious harm to Foti Fuels, had Foti Fuels not received a court order that the insurance proceeds be placed into escrow. Moreover, the Court ordered the transfer of $170,000 into escrow, not $125,018.

Disciplinary Counsel stipulated that there was no damage to Foti Fuels. Robert Foti, however, testified that he was injured to the extent that he had to pay attorney's fees to collect the debt from Rice Energy, and had to borrow money until payment was received.

Respondent's conduct could also have caused serious harm to his own client, Rice Energy. When the account was re-titled on February 1, 2000, the trustee designation was dropped, and the funds were titled outright to George Rice. His personal ownership was confirmed by the use of his own social security number on the account. Had George Rice died or become incapacitated while holding client money in his own name, his client Rice Energy might not have been able to retrieve its money or might have had to incur substantial expense litigating the matter with George Rice's estate or guardian.

The Northfield Savings Bank account agreement contained a provision whereby one opening a trustee account could designate a payee on the death of the holder of the account. This form was left blank on both account agreement forms signed by Respondent, though he could have prevented the potential for damage to Rice Energy on his death by completing the form. The fact that serious harm was avoided was not due to any remedial action taken by George Rice, but rather was due to the timely motion of Foti Fuels for an attachment, the timely ruling of the Superior Court that the remaining insurance proceeds be placed in escrow, and the willingness and ability of Rice Energy to settle the matter and pay the balance of the settlement in January 2001.

There are several aggravating factors present. Respondent does not acknowledge the wrongful nature of his conduct; he was admonished twice by the Professional Conduct Board, once in the 1970's and once in the 1980's,

and has substantial experience in the practice of law. The one mitigating factor present is the remoteness of the prior discipline.

Conclusions of Law

Respondent's intentional efforts to shield his client's assets from known creditors illustrates the fact that the requirement for zealous representation of one's client is not limitless. A lawyer has obligations to the public and to the integrity of the legal system which cannot be neglected even though to do so might be to the benefit of one particular client.

Such conduct is in general covered by Rule 8.4(c) which provides that "[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation," and more specifically by Rule 1.2(d) which provides that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct the lawyer knows is criminal or fraudulent . . ."

Respondent's conduct presents us with a case of first impression in Vermont, but similar conduct has been found to be a violation in a number of other jurisdictions and the Vermont Bar Association's Committee on Professional Ethics has issued an advisory opinion in a similar matter.

Case Law From Other Jurisdictions

A New Jersey case, In re DePhamphilis, 153 A.2d 680 (1959), involved facts very similar to the present case. DePhamphilis's clients were in financial difficulty and sought his advice. He advised them to transfer real estate to a third party, in this case an uncle, and to then file for bankruptcy. The client's did so and the New Jersey committee found that there was no legitimate debt to the uncle and that the transfer "was a pure sham undertaken for the purpose of concealing assets and defrauding or hindering creditors if such became necessary." Id. at 684. The committee further found that the transfers were made "with actual intent to hinder, delay or defraud present or future creditors, and so were fraudulent as to such creditors at the time of delivery." Id. at 686.

In DePhamphilis there was conflicting evidence as to whether the transfers were without consideration and whether the scheme originated with the attorney or with the clients. We have no such conflicting evidence here. The facts are uncontroverted that the purpose of the transfer was to conceal funds from creditors and that the method of doing so was devised by Respondent. The New Jersey court stated: "Any such conduct is unquestionably unethical and unprofessional despite the fact it may be thought to serve the client and no one may be actually injured. It is dishonorable, enables violation of the law and brings the profession into disrepute." Id at 687.

In another similar case, Coppock v. State Bar of California, 749 P.2d

13317 (1988), a client with a number of judgment creditors asked the attorney's assistance hiding funds and avoiding attachments. The attorney set up a separate trust account in his name, and for a period of two years, provided the client with deposit slips and signed checks for his use. While the attorney reviewed the account statements in the early months, he eventually permitted the client to operate the account without supervision. Coppock admitted that the account was established for the purpose of avoiding his client's creditors but argued that it was not fraudulent because he believed that the funds to be placed in the account would be exempt from attachment. The court found that even if the funds were so exempt, the act of concealing the funds "amounts to an intent to deceive." Id at 1325. It is the act of concealment for purposes of deception that leads to the violation. Coppock, argued that his concealment of funds was legally justified. The court dismissed this argument stating that "[a]n attorney is not permitted to engage in deceptive acts even when he believes his action is legally justified. Id. at 1325.

The issue was also addressed in a Missouri case in which the attorney placed a lien on his client's property in excess of the amounts owed him by the client in order to hinder the client's creditors. The court held that "as a matter of law, it is unlawful and unprofessional conduct for a lawyer to participate in any transaction which he knows to be fraudulent, or to knowingly assist or advise in any transfer of property made for the purpose of hindering, delaying or defrauding creditors." In re Farris, 105 S.W. 2d 921 (1937).

In an Oregon case in which the attorney transferred property from husbands to wives in the context of a divorce with the intent of removing property form the reach of the husbands' creditors, the Court discussed the nature of the conduct and whether it violated the rules of ethics. In re Hockett, 734 P.2d 877 (19987). The court found that the conduct was not fraudulent in the tort sense but that it violated DR 7-102(A)(4) which provided that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation and DR 7102(A)(7) which prohibits a lawyer from counseling or assisting a client in conduct that the lawyer knows to be illegal or fraudulent. These provisions are similar to the present rules which Respondent is charged with violating.

Ethics Opinions

The Vermont Bar Association's Committee of Professional Ethics issued an opinion on DR 7-102(A)(7), the predecessor to the present Rule 1.2(d). The committee was asked whether an attorney ethically could record a mortgage on the property of a client for the purpose of frustrating the client's creditors. The committee's opinion was that such conduct "would constitute an attempt to defraud," and is a violation of the Rule. Similar opinions have been issued in Connecticut, Informal Opinion No. 19-22, Dec. 5, 1991, San Diego County Bar Association, Ethics Opinion No. 1993-1, Standing Committee on Legal Ethics of the Virginia State Bar, Opinion 1518, May 11, 1993.

Respondent's conduct also violates Rule 4.4 which provides that "[i]n representing a client a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of third persons." In his zeal to protect his client from creditors, Respondent forgot his obligations to third parties, in this case the creditors of Rice.

Sanctions

The appropriate sanction in any matter is determined based upon a number of factors. Those factors include: the facts and circumstances of the violation, and any facts that may be considered in aggravation or mitigation of the offense, including the attorney's disciplinary history and state of mind.

In reaching our decision in this matter we have considered both the ABA Standards for Imposing Lawyer Sanctions and case law from other jurisdictions. It is well established that it is appropriate to refer to the ABA Standards for Imposing Lawyer Sanctions for guidance in determining the appropriate sanction in a disciplinary case, In re Warren, 167 Vt. 259, 261 (1997); In re Berk, 157 Vt. 524,532 (1991) (citing in re Rosenfeld, 157 Vt. 537,546-47 (1991)).

The ABA Standards are first used to establish a provisional discipline and this result is examined and adjusted based upon the existence of aggravating and mitigating circumstances.

There are several provisions of the ABA Standards for Imposing Lawyer Sanctions which bear on Respondent's conduct, though none is directly on point.

Standard 5.1 deals with "failure to maintain personal integrity." It deals first with criminal conduct and then refers to "cases with conduct involving dishonesty, fraud, deceit, or misrepresentation." Disbarment and suspension are generally reserved for criminal cases and reprimand for non-criminal conduct. The example cited in the commentary to the section dealing with reprimand discusses a case of plagiarism unrelated to the practice of law which evidenced a disregard of the attorney's obligation to maintain personal integrity. The fact that the conduct in the present case related directly to Respondent's practice of law makes the violation more serious since it goes to the heart of the attorney's relationship with and responsibility to maintaining the integrity of the legal system. Standard 4.12 which deals with an attorney's mishandling of client's property, provides that "[s]uspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client." Disbarment under this provision is generally reserved for cases involving misappropriation or conversion of client funds and reprimand is generally reserved for cases of negligence in

dealing with a client's property. Since Respondent's conduct was neither criminal nor negligent, it falls within the suspension category. While there is no evidence that Respondent intended to convert any of the funds entrusted to him, he did place them in his own name, under his own social security number. The client at that point had no access to the funds other than through Respondent. In addition, since Respondent did not place the funds in a client's trust account or establish an actual trust for the client, the funds were available to Respondent's creditors and to his personal representative had he died or become incapacitated. Though none of these events occurred, and all of the money was used for the benefit of the client, there was the potential for harm to his client.

Thus, the provisional sanction under the ABA Standards for Imposing Lawyer Sanctions would be either suspension under Standard 4.1 or reprimand under 5.13.

We now turn to aggravating and mitigating factors. The most troubling to the Panel is the fact that Respondent does not acknowledge anything wrongful about his conduct. ABA Standards § 9.2(g). He in fact sees his actions as positive. By shielding Rice Energy's assets from its creditors he enabled it to remain in business during the heating season, and Lisa Rice was then able to sell a going business at a profit. Respondent believes that had he not taken the steps he did to conceal the funds from creditors, Lisa Rice would have lost the business due to inability to purchase fuel for resale to her customers. The Panel does not deny that

assisting a client to obtain a good price on the sale of her business is exactly what clients can and should expect from their attorneys. The attorney must, however, accomplish this in such a way that the Rules of Professional Conduct are not violated. This is the challenge for the attorney and one which Respondent failed to meet.

Other aggravating factors include the fact that Respondent has been disciplined in the past, ABA Standards § 9.22(a), and has substantial experience in the practice of law, ABA Standards § 9.22(i). In mitigation, the prior offenses are remote in time. ABA Standards § 9.23(m). If we look at the provisional sanction under the ABA Standards, it lies between suspension and reprimand. The existence of aggravating factors, and especially Respondent's lack of understanding of the wrongful nature of his conduct, lead the Panel to believe that suspension is the appropriate sanction in this matter.

This decision is supported by the sanction imposed in several of the cases which we cited earlier in our conclusions of law, as well as other cases.

The facts of the Coppock case, 749 P.2d 1317 (1988), are very similar to the present case. Like Respondent, the attorney held funds in his own account which were at the client's disposal in order to avoid judgment creditors. Coppock was suspended for a period of two years, with all but 90 days stayed. He was also placed on probation and ordered to pay

restitution. In this case there were a number of mitigating factors present, most importantly, a lack of prior discipline and remorse.

In the case of In re DePhamphilis, 153 A.2d 680 (1959), where the attorney assisted in a transfer to an uncle to avoid creditors, the court imposed public reprimand, noting that it was a case of first impression in New Jersey. In a later New Jersey case, In re Breen, 552 A.2d 105 (1989), the attorney was disbarred for a number of instances of misconduct including placing mortgages on property to defraud judgment creditors.

In a more recent South Carolina case, two attorneys who were partners assisted a criminal client to avoid creditors by transferring property to a corporation owned by the attorneys. The Court suspended one attorney indefinitely and reprimanded the other whom they found to be less culpable. Florida imposed a ninety one day suspension on a lawyer who accepted transfers of property from a friend in order to assist the friend in avoiding creditors. Florida Bar v. Scott, 566 So. 2d 765 (1990). Similar transactions in Oregon resulted in a sixty days suspension in one case, In re Hockett, 734 P. 2d 877 (1986), and a six month suspension in another, In re Benson, 854 P. 2d 466 (1993).

We believe that our decision to impose a ninety day suspension is in accord with both the ABA Standards for Imposing Lawyer Sanctions and these cases.

Conclusion

Respondent, George E. Rice is hereby SUSPENDED from the practice of law for a period of ninety days commencing 45 days from the date of this decision.

Respondent shall promptly and fully comply with the provisions of Rule 23 of A.O.9 which set forth the responsibilities of suspended attorneys, including the obligation to notify clients and opposing attorneys, duties with respect to clients' property and representation, and affidavits to be filed with the Professional Responsibility Board.

Dated: _____, 2004.

FILED MAY 3, 2004

HEARING PANEL NO. 1

/s/

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Barry E. Griffith, Esq. Chair

/s/

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Martha M. Smyrski, Esq.

/s/

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Stephen Anthony Carbine

Footnotes

FN1. Respondent is not charged with any conflict of interest and the Panel makes no findings with respect to any such conflict.

FN2. There was no evidence presented as to why the entire balance in the account was not transferred to the escrow account ordered by the court.