NEW HAMPSHIRE ATTORNEY DISBARRED FOR ILL-CONCEIVED EFFORTS TO COLLECT ON FEES. RICHMOND'S CASE

OCTOBER 30, 2006

In what is becoming an increasingly familiar procedural scenario, the Supreme Court has rejected lesser sanctions recommended by the Attorney Discipline Office ("ADO") and entered a disbarment order against a respondent attorney. See Richmond's Case, ____ N.H. ____ (July 21, 2006).

Richmond's Case arose out of the Respondent's efforts to collect approximately $45,000 in overdue legal fees from his client. The Court adopted the referee's factual findings (based on stipulated facts and the submission of briefs); and the referee's rulings that Richmond had violated several rules while attempting to collect the outstanding billl.

There appears to have been no dispute that the client owed Richmond approximately $45,000 for legal services. The case therefore underscores the professional rules that limit the steps a lawyer can take to collect even undisputed, outstanding fees - - rules that apply during and after termination of representation. In Richmond's Case, the Court found clear and convincing evidence of violations of five rules: Rule 1.8(a); Rule 1.15(a)(1) and (c); Rule 1.16(d); and Rule 1.4. Writing for a unanimous court, Justice Galway discussed each of the Rule violations. He then explained the Court's rationale for imposing the sanction of disbarment.

Rule 1.8(a)

Starting in February 2001, Richmond provided legal services to Alvis, the client, and his client's various companies, under a retainer agreement that provided for payments "to escalate to $24,000 per month" within six (6) months. By May, a sizeable

Attorney Conduct & Liability Practice Group

Peter Beeson, Chair
603.695.8517
pbeeson@devinemillimet.com

Mitch Simon, Of Counsel
603.228.1541
msimon@devinemillimet.com

Andy Dunn
603.695.8503
adunn@devinemillimet.com

Bob Dewhirst
603.695.8646
rdewhirst@devinemillimet.com

DEVINEMILLIMET.COM

arrearage existed. At this point, the referee and Court found, Richmond pressured his client to sign a new fee agreement under which Alvis "accepted personal and corporate responsibility" for a delinquency of $46,107.43; agreed to pay monthly retainer amounts within five (5) days of the beginning of each month; granted Richmond "complete discretion" over securities held in the client's name or that of the client's various nominees; and allowed Richmond, until the debt was eliminated, to liquidate specified securities and apply the proceeds on a "two-thirds/one-third basis" to his law firm's debt and to other amounts that became due and payable to the firm.

Rule 1.8(a) prohibits an attorney from "acquiring a pecuniary interest adverse to a client" without first following a series of enumerated steps designed to protect the client. These include communication of the risks and consequences of the transaction to the client at the outset; providing the client a "reasonable opportunity" to consult with "independent counsel"; and ensuring that the transaction is "fair" to the client.

Richmond argued that the May 3, 2001 agreement was a "negotiated fee agreement" that complied with Rule 1.5 and therefore could not, as a matter of law, violate Rule 1.8(a). The Court held that while Rule 1.5 "did not prohibit the respondent from accepting property as a fee" (in this case Richmond's unlimited discretion to liquidate brokerage accounts), or to acquire pecuniary interests that may be adverse to the client's, such a fee agreement "(is) still required to comply with the procedural requirements of Rule 1.8(a) . . .."

In finding a violation of Rule 1.8(a), the Court emphasized the pressure under which the agreement was negotiated (it was drafted and executed the same day); the lack of evidence beyond Richmond's "surmise" of another lawyer's involvement for his client; the referee's finding that Richmond did not explain "the risks and consequences of signing the letter" to his client; and Richmond's acknowledgement, in deposition testimony, that he threatened cessation of representation on ongoing business negotiations if his client did not sign.

<u>Rule 1.15</u>

Following the drafting and execution of the May 3, 2001 fee agreement, the stipulated facts established that Alvis sent a letter terminating Richmond's legal services; requesting itemized bills for

Office Locations:

111 Amherst Street
Manchester, NH 03101
T 603.669.1000
F 603.669.8547

300 Brickstone Square
Andover, MA 01810
T 978.475.9100
F 978.470.0618

49 North Main Street
Concord, NH 03301
T 603.226.1000
F 603.226.1001

216 Lafayette Road
Suite 103
No. Hampton, NH 03862
T 603.964.4990
F 603.964.4997

prior services and delivery of files; <u>and instructing Richmond not to make transactions in or out of the client's various brokerage accounts</u>. Despite these instructions, Richmond sold his former client's stock and applied it to his bill.

Rule 1.15, entitled "Safeguarding (Client) Property," requires the use of client trust accounts or similar means to segregate and safeguard client property; "prompt delivery" of client property when the client is entitled to same; and preservation of any property that is disputed until the competing claims of lawyer and client are resolved. Richmond argued that the May 3, 2001 fee agreement was irrevocable, and gave him the right to liquidate the accounts as necessary to satisfy the outstanding arrearages despite his client's subsequent contrary instructions. He based his argument on the language of Rule 1.15(b), which creates an exception to the "prompt delivery" obligation for prior agreements with the client:

> Except as stated in this rule or otherwise permitted by law or <u>by agreement with the client</u>, a lawyer shall promptly deliver to the client any funds or other property that the client is entitled to receive. (Emphasis supplied.)

The Court rejected Richmond's argument, in part, because the May 3, 2001 fee agreement was unenforceable under Rule 1.8. In addition, Rule 1.15(c) requires that disputed property be segregated and maintained while the conflicting claims of lawyer and client are resolved. While the existence of the debt itself was not disputed, "the manner of payment was in dispute." The Court accordingly upheld the referee's ruling that "faced with this dispute, the respondent was not ethically permitted to exercise self-help to ensure that his fees were paid." In short, Rule 1.15 requires that the status quo be maintained when a dispute arises with respect to property in which the client and attorney both have interests.

Rules 1.4(a) and 16(d)

Finally, based on Richmond's delay in returning the client's files and accounts despite three separate requests from Alvis and successor counsel, the Court upheld the referee's ruling that the respondent failed to "promptly comply with reasonable requests for information," Rule 1.4(a); "failed to surrender promptly" the papers of the client upon termination of representation as required by Rule

1.16(d); and failed to "take steps to the extent reasonably practicable to protect a client's interest" - - again required by Rule 1.16(d).

The Disbarment Sanction

The Richmond case reached the Supreme Court on the Attorney Discipline Office's petition to suspend the attorney's license for two, concurrent one-year periods. The referee recommended disbarment.

In reviewing the sanction decision de novo, the Court held that suspension was appropriate for the violations of Rules 1.16 and 1.4 - - since Richmond had not "converted" a client's files - - but only delayed their transfer. See ABA Standards for Imposing Lawyer Sanctions (1992) ("Standards") at § 4.12 (suspension is generally warranted when "a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client"). "Potential injury" was found in the Richmond fact pattern because records of one company were withheld despite the company's active involvement in ongoing business transactions.

The sanction was elevated to disbarment when the Rule 1.8(a) violation was considered. Citing Wolterbeek's Case, 152 N.H. 710, 714 (2005)[1], the Court discussed a key factor in assessing sanctions in conflict of interest cases:

> The crucial distinction between suspension and disbarment is whether the conflict of interest is between the lawyer and the client and whether the lawyer acts with the intention to benefit himself.

Based on findings that Richmond pressured his client into the May 3rd fee agreement, and then accessed brokerage accounts resulting in "considerable financial injury to Alvis," the Court found that disbarment was warranted. See Standards at § 4.11 ("courts generally disbar lawyers who intentionally exploit the lawyer-client relationship by acquiring an ownership, possessory, security or other pecuniary interest adverse to a client without the client's understanding or consent").

---

[1] Wolterbeek's Case is summarized in Devine Millimet's Advisory No. 6 on the Law of Lawyering in New Hampshire. This Advisory is available at *http://www.dmb.com/news-and-events/newsletters.asp?month=12.*

CONCLUSION

The demanding requirements imposed by Rule 1.8 (on business transactions with a client) are difficult to meet even when the challenged transaction is negotiated and executed when relations are excellent. When, as here, the agreement is drafted to address payment problems in a disintegrating relationship, retrospective scrutiny of the "fairness" and informed consent requirements of this rule will be virtually impossible to satisfy. The one exception to this general rule may be situations in which the client has been represented by counsel in re-negotiating the fee agreement.

The Advisories on the Law of Lawyering in New Hampshire issued by the Attorney Conduct & Liability Practice Group are intended to provide general overviews of professional responsibility law in a variety of areas encountered by lawyers. Because the law in this field is constantly changing, and because the Advisories are generic, they should not be relied upon as guidance or advice on how to handle specific situations. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at AC&LPG@devinemillimet.com.