

WOLTERBEEK'S CASE: COURT REJECTS LAWYER'S NEGOTIATED DISPOSITION WITH THE ATTORNEY DISCIPLINE OFFICE AND IMPOSES DISBARMENT

DECEMBER 5, 2005

Wolterbeek's Case, No. LD-2005-002 (10/31/2005) is the second case in as many months in which the New Hampshire Supreme Court has turned aside a sanction of suspension recommended by the Professional Conduct Committee and disbarred a practicing lawyer. Coffey's Case, 152 N.H. _____ (2005), 880 A.2d 403 (2005), which resulted in the same ultimate sanction, is the subject of an earlier Advisory issued by the Attorney Conduct & Liability Practice Group. If you do not have the prior Advisory, you can click this link <http://www.dmb.com/news-and-events/newsletter.asp?id=121>.

While the sanctions were the same, however, there is also a significant difference between these two cases. In Coffey's Case, sanctions were imposed following a contested hearing. Wolterbeek's Case, by contrast, reached the Court based on stipulated findings of rule violations and a negotiated sanction of a two-year suspension. Before the case reached the Supreme Court, the suspension sanction had been negotiated with the Attorney Discipline Office ("ADO") and approved by a hearing panel and by the full Professional Conduct Committee.

Wolterbeek's Case involved serious violations of the professional conduct rules. The Respondent's stipulation included his acknowledgement of knowing failure to disclose material facts in his client's bankruptcy petition; deceptive conduct toward his client in acquiring an undisclosed ownership interest in the client's grocery store prior to the bankruptcy petition; and continued representation in the face of an undisclosed conflict of interest with the intent to benefit at the client's expense.

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The gravity of the misconduct is reflected in the following summary of the Court's detailed analysis of aggravating and mitigating factors:

(Respondent's dishonest and selfish motive) is the most serious aggravating factor in this case. Over the course of his representation of Schneider, and as recently as 2003, the respondent engaged in a course of misconduct motivated by his self-interest. His willingness to deceive his client and the bankruptcy court for his own financial gain resulted in misconduct injurious to his client, the bankruptcy court and the legal profession.

The Respondent also had a record of prior disciplinary actions - - typically an aggravating factor in determining the sanction.

Despite the facts of the individual case, however, Wolterbeek's Case is a stark reminder of the limited protection sometimes provided by negotiated settlements with the ADO - - at least in aggravated cases. The Court makes no finding of flawed reasoning, unsustainable exercise of discretion, or other defect during the various levels of review of the stipulated sanction at the ADO. Nor, of course, is such a finding required. The Court has always retained ultimate authority to impose sanctions and to consider each case on its own facts and circumstances - - looking to the ABA Standards for Imposing Lawyer Sanctions (1992) for guidance.

While the Wolterbeek Court "accorded considerable weight to the fact that this disposition was negotiated by the respondent and the ADO", and acknowledged the value of negotiated settlements in reducing burdens on the attorney discipline system, the Court's ruling nevertheless underscores the significant difference between attorney discipline matters on the one hand; and other forms of regulatory, civil and criminal enforcement (in which the judiciary typically defers to negotiated resolutions presented by the parties) on the other.

New Hampshire's Supreme Court clearly retains ultimate authority to set appropriate sanctions for violations of the Rules of Professional Conduct. The Court will not defer to the judgment of

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the ADO, and will look closely to the *ABA Standards for Imposing Lawyer Sanctions* (1992) for guidance. One likely result of this ruling will be a greater reluctance by attorneys to stipulate to findings of serious misconduct in a negotiated disposition with the Attorney Discipline Office.

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.

