

IN RE: MARY CATHERINE CONNELL

NO. BD-2014-092

S.J.C. Order of Public Reprimand entered by Justice Spina on January 14, 2015.¹

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¹ The complete Order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
DOCKET NO. BD-2014-092

IN THE MATTER OF
AN ATTORNEY

MEMORANDUM OF DECISION

This matter came before me for hearing on the Information filed by the Board of Bar Overseers, which recommends that the respondent receive a private admonition. The facts found by the hearing committee and adopted by the board are not in dispute. They are summarized as follows.

The respondent's practice centers on real estate, probate law, and conveyancing. One of her clients is in the business of making private loans, primarily to business borrowers in need of financing for the purchase, rehabilitation, or refinancing of commercial real estate. At issue in this complaint are at least five loans that violated G. L. c. 271, § 49 (a), the Massachusetts criminal usury statute, because the terms of the loan charged interest rates, as defined by the statute, in excess of twenty per cent when, as the respondent knew, the client had not notified the Attorney General of his intent to engage in such transactions as required to avoid criminal liability.

The borrowers were all in need of rapid, alternative financing. Accordingly, the respondent's duties included drafting loan documentation, the terms of which were determined by the client. The nature of the work required tight deadlines. The respondent maintained

documentation of the loans in her office.

The respondent was generally aware of the requirements of G. L. c. 271, § 49 (a), and she knew a lender must notify the Attorney General, in advance, of his intent to make such a loan. Prior to at least two of the loans, the respondent urged the client to notify the Attorney General of the intended transactions. The client refused to give notice and was incredulous at the respondent's suggestion that the loans were usurious. The respondent did no further research on the point, either independently or at the behest of the client. However, prior to the final transaction at issue, the respondent reviewed G. L. c. 271, § 49.

The hearing committee characterized the respondent's behavior as willful blindness to the fact that the client's conduct was criminal and that she was assisting that conduct. The hearing committee found that the respondent had violated Mass. R. Prof. C. 1.2(a), (d), (e), 426 Mass. 1310; Mass. R. Prof. C. 1.16, 426 Mass. 1369 (1998); Mass. R. Prof. C. 2.1, 426 Mass. 1377 (1998); and Mass R. Prof. C. 8.4(h), 426 Mass. 1429 (1998). The Committee expressly stated that the respondent had not violated Mass. R. Prof. C. 8.4(b), prohibiting commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. The hearing committee recommended a private sanction. The Chair of the committee dissented, recommending a public sanction.

Both the respondent and bar counsel cross-appealed to the full Board. Bar counsel argued that a public sanction was more appropriate than the recommended private admonition. The Board rejected both appeals. The Board, in determining the appropriate sanction, concluded that the respondent had primarily violated Mass. R. Prof. C. 1.2(d), which prohibits an attorney from assisting a client in conduct the lawyer knows to be criminal. Finding that the respondent's behavior lacked any indicia of dishonesty, the Board rejected a suspension as an appropriate

sanction and instead considered imposing either a public reprimand or a private admonition.

In choosing between the remaining options, the Board examined three cases involving the usury statute that resulted in public reprimand to determine that private admonition was the appropriate remedy in the case before it. The Board described the germ of the respondent's misconduct to be her failure to act as an independent professional and to refuse her client's demands. The Board found no greater misconduct, such as dishonesty or assisting in predatory loans secured by the consumers' residential real estate. In making this distinction, the Board stated its belief that public discipline was unnecessary because the reporting of the case alone would deter similar conduct and assure the public understands that its protection is foremost. Accordingly, it recommended a private admonition.

Bar Counsel now appeals the Board's decision to impose a private admonition and argues that the more suitable punishment would be a public reprimand. Bar Counsel's position rests on the characterization of the conduct at issue in this case as a violation of rule 1.2(d) and the fact that no violation of rule 1.2(d) has previously resulted in a private admonition. Bar Counsel disagrees with the Board's characterization of the criminal usury statute as a "trap for the unwary," and Bar Counsel disagrees with the Board's distinctions of previous cases involving the criminal usury statute. Bar Counsel also points out that the Board failed to take into account several aggravating factors that necessarily call for a public reprimand.

A sanction imposed for professional misconduct must not be "markedly disparate" from sanctions imposed in comparable cases. Matter of Alter, 389 Mass. 153, 156 (1983). This standard does not require mathematical precision. The overriding consideration in bar discipline is "the effect upon, and perception of, the public and the bar." Matter of Finnerty, 418 Mass. 821, 829 (1994). At issue in this appeal is whether the purposes of punishment are best served

by warning the public that the bar is cognizant that behavior such as the respondent's was unacceptable by reporting the facts of a private admonishment or by warning the public that the respondent herself has been particularly unworthy of the public trust through a public reprimand.

Five cases are relevant to a determination of this appeal. In Matter of Levine, 11 Mass. Att'y. Disc. R. 162 (1995), the attorney prepared revisions to documents of a usurious loan but failed to prepare the proper UCC forms to perfect the security interest covering assets pledged by a corporation of which the borrower was a principal. The attorney's client was the borrower. The attorney was unaware of the applicability of G. L. c. 271, § 49. The attorney did not advise the lender to consult lender's counsel before signing the revised loan documents. Subsequently, the borrower defaulted on the loan, and the lender was unable to recover against the unsecured assets pledged by the corporation. The attorney received a public reprimand for inadequate preparation as to the applicability of the usury statute, and for not advising the lender to consult with lender's counsel before signing the revised loan documents.

In Matter of Abbene, 23 Mass. Att'y Disc. R. 2, 2 (2007), the attorney acted as the representative of both his client and the borrower in a transaction that contained a usurious interest rate. The attorney personally guaranteed the loan to his client. The borrower defaulted. The attorney failed to fulfill his guaranty. The attorney received a public reprimand for violating rules concerning conflict of interest, and for assisting a client in making a loan that the attorney knew or should have known violated the usury statute..

In Matter of Charmoy, 9 Mass. Att'y Disc. R. 62 (1993), the attorney drafted two loan agreements, one of which was disguised as a stock sale. The interest rates of both loans were usurious. He also maintained possession of the loan documents, in violation of G. L. c. 271, § 49 (b). The attorney stipulated, among others, to a violation of Canon One, DR-1-102(A)(4), as

appearing in 382 Mass. 769 (1983), prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation.¹ He received a public censure.

In Matter of Long, 24 Mass. Att'y Disc. R. 435 (2008), the attorney violated rules concerning conflict of interest, and he prepared loan documents that were usurious. However, the attorney was unaware of G. L. c. 271, § 49 (a). In determining the appropriate sanction, the Board concluded that the attorney's ignorance of G. L. c. 271, § 49 (a), did not demonstrate the level of culpability necessary to impose a sanction for criminal conduct that "adversely reflects on the lawyer's . . . fitness as a lawyer," or "conduct involving dishonesty, fraud, deceit, or misrepresentation," under Mass. R. Prof. C. 8.4(b), (c). Id. at 441. The attorney did receive a two-month suspension from the practice of law, which sanction was suspended for one year on specified conditions, for failing to ethically manage a conflict of interest, and for other ethical violations.

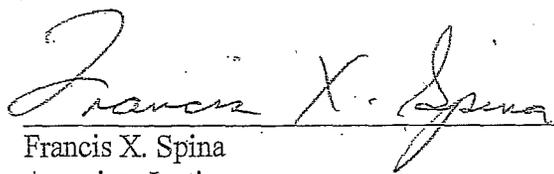
In AD-94-65, 10 Mass. Att'y Disc. R. 445 (1994), the attorney was approached by two parties he did not know and hastily prepared documentation for a loan that violated the criminal usury statute. The attorney received a private admonition. The Board distinguished the Charmoy case, noting that the attorney had not personally maintained possession of the loan documents. The Board characterized the attorney's retention of the usurious loan documents in Charmoy as a personal violation of the law. See G. L. c. 271, § 49 (b).

In each of the foregoing cases, where the sanction involved a public reprimand, there was other misconduct in addition to the violation of the usury statute. In AD-94-65, the only one of the above cases involving a private reprimand, the Board noted that there was no violation of G. L. c. 271, § 49 (b). That is, the attorney did not maintain possession of the files.

¹ The successor rule is Mass. R. Prof. C. 8.4(c), 426 Mass. 1429 (1998).

The Board found that the essence of the respondent's misconduct was not the result of true ignorance nor willing and zealous participation in the lending scheme. Rather, it was "her failure to take a strong stand as an independent professional in response to a stubborn and opinionated client." However, the respondent did not fall into a "trap for the unwary." She *knowingly* assisted her client in the commission of a felony. As such, she was an accessory before the fact and potentially liable as a principal to the crime. See G. L. c. 274, § 2. See Rule 1.2, comment 7, and Rule 4.1, comment 3. Moreover, the maintenance of the loan documentation by the respondent was a separate crime under G. L. c. 271, § 49 (b), and serves as an aggravating factor. Compare Charmoy, supra. Contrast AD-94-65, supra.

Although the respondent did not have a conflict of interest in the transaction, as in Abbene, and she did not harm the financial interest of a third party through her own failure to exercise professional diligence, as in Levine, I am persuaded by Bar Counsel's argument that no violation of rule 1.2(d) has previously resulted in a private admonition. The public is best served by reminding attorneys that they must resist strong-willed clients who insist on pursuing a course of conduct that clearly violates the criminal law, even if the client does not believe his conduct may be criminal, and that they should not assist the client in such a pursuit. For the foregoing reasons, the appropriate sanction is a public reprimand.


Francis X. Spina
Associate Justice

ENTERED: January 14, 2015