

SUPREME COURT OF WISCONSIN
OFFICE OF LAWYER REGULATION

Public Reprimand With Consent

17-OLR-4

Thomas Aul
Attorney at Law

At all times relevant to this matter, Attorney Thomas E. Aul practiced law in Delafield, Wisconsin. Aul and his wife are the owners of a real estate investment company. The real estate company owns two commercial buildings in Delafield, each containing restaurant space. In November 2008, both buildings were vacant.

In late December 2008, a woman interested in space for a family restaurant business contacted Aul in order to see one of the commercial properties. In January 2009, the woman and her son met Aul at the property. The property did not suit their needs, and Aul suggested they view his other commercial building, which the family found satisfactory.

On January 13, 2009, Aul and his wife had dinner at the home of the woman and her husband. At that time, Aul delivered a letter of intent for lease. In the course of the dinner, the possibility of the woman and her husband purchasing the second commercial building was discussed. Aul offered the property to the woman and her husband for \$1.4 million, the value at which the property had been recently appraised. When the woman and her husband told Aul they did not have sufficient capital for a down payment and operating capital to start and run the restaurant, Aul told them that he would be willing to sell the property on land contract which would result in a net monthly payment similar to rent. Aul required a down payment to ensure

that they were serious about the purchase. The parties ultimately agreed to a down payment of \$75,000.

At the January 13, 2009 dinner meeting, the woman and her husband told Aul that they did not have sufficient asset liquidity at that time to make a \$75,000 down payment. In response, Aul suggested that they cash out a whole life insurance policy for the down payment and replace it with a term life policy. Aul further advised the woman and her husband to structure the acquisition so that a limited liability company would own the real estate, a corporation would operate the restaurant, and both entities would be owned by a revocable living trust for estate planning purposes. Aul agreed to assist the woman and her husband in structuring the ownership of the second commercial property and creating the entity that would operate the restaurant. An attorney-client relationship was established in the course of the January 13, 2009 dinner meeting.

On or about January 17, 2009, Aul prepared a commercial offer to purchase identifying the couple as the buyers. The offer stated a purchase price of \$1.4 million, of which \$300,000 was allocated towards the purchase of the furniture, fixtures, and equipment. The terms called for the woman and her husband to pay earnest money of \$5,000. The woman and her husband executed the offer to purchase on January 17, 2009, and on January 18, 2009, they issued a \$5,000 draft payable to Aul's real estate company as earnest money for the transaction.

On January 20, 2009, the husband executed a life insurance application for a term life policy with the face amount of \$500,000. The term life policy was meant to replace a \$250,000 whole life policy from a different insurance company. Aul signed the application as agent for the insurance company selling the term life policy, and received a commission of \$1,100 for the sale of the policy. By steering the husband to a company for which Aul was an agent, Aul engaged in a conflict of interest. By signing the application as agent for the company, and

receiving a commission for the sale, Aul engaged in a business transaction between attorney and client. No conflict waiver was in place at the time of the life insurance application.

Using documents prepared by Aul, on January 26, 2009, the woman and her husband executed incorporator and subscribers' consent resolutions, Articles of Incorporation were approved, bylaws were adopted, a subscription agreement was approved, directors were elected, stock certificates were approved, and the annual meeting date for the corporation was scheduled.

Under the heading, "Annual Meeting" the resolutions provided the following:

The annual meeting date specified in the bylaws presented to the meeting as drafted by counsel to the corporation, Thomas E. Aul, Attorney at Law, and setting forth the date of the annual meeting as the second Friday in January of each year, commencing 2010, is hereby approved, confirmed, and adopted.

On January 26, 2009, Aul sent the Articles of Incorporation for the woman and her husband's company to the Wisconsin Department of Financial Institutions, which registered the company on January 29, 2009.

The closing for the commercial property took place at Aul's law office on March 2, 2009. During the closing, Aul gave the woman and her husband a land contract closing statement which included \$2,950 in legal fees, and three invoices detailing legal work. Aul charged the woman and her husband for preparing a revocable living trust, pour over wills, powers of attorney and other documentation in connection with their personal estate planning. Aul also charged for incorporation of the woman and husband's company, including the drafting and filing of the Articles of Incorporation, bylaws, and opening minutes. Finally, Aul charged for professional services rendered in connection with the incorporation of a second company owned by the woman and her husband, including the drafting and filing of Articles of Incorporation, Operating Agreement, and Resolutions. Aul's billings were not preceded by a written fee

agreement. The woman and her husband also executed a quit claim deed on behalf of the second company, transferring the property back to Aul's real estate investment company in the event the woman and husband's second company defaulted on payments pursuant to the land contract or security agreement between the parties. By signing the quit claim deed, the woman and her husband waived the right of redemption in the event a default arose. Aul did not record the land contract.

On March 2, 2009, the woman and her husband also signed a "waiver of conflict of interest." There is disagreement between the parties as to whether Aul provided the woman and her husband with the waiver one month prior to closing, or at the closing itself, but there is no dispute that the waiver was not signed until the March 2, 2009 closing. The document memorialized the prior transactions and the services provided by Aul. The document did not make clear whether the couple signed only in their individual capacities or also on behalf of the limited liability company that would own the real estate and the corporation (each created with Aul's assistance) that would operate the restaurant.

Just nine months later, on November 17, 2009, the woman and her husband decided to cease operation of the restaurant due to lack of business.

On or about February 18, 2010, Aul's counsel gave notice to the woman and her husband that one of their companies was in default as it related to the payment of principal and interest for the commercial property. The default stemmed from the failure to pay the principal and interest payment in December 2009 and the failure to pay the real estate tax levy as of December 31, 2009.

The woman and her husband filed a civil lawsuit against Aul on March 2, 2012. Disposition of the couple's OLR grievance was placed on hold pending the conclusion of the lawsuit, which was resolved by stipulation in June 2016.

By failing to communicate in writing to the woman and her husband the scope of his representation and the basis or rate of his fee and expenses, Aul violated SCR 20:1.5(b)(1), which states, "The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate as in the past. If it is reasonably foreseeable that the total cost of representation to the client, including attorney's fees, will be \$1000 or less, the communication may be oral or in writing."

By acting as agent for a life insurance company in obtaining an application for life insurance from the husband and in obtaining a commission for the sale, Aul violated SCR 20:1.8(a), which states:

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
 - (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner than can be reasonably understood by the client;
 - (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
 - (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

