

[10-Oct-2001]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In Re: Kjaere Andrews, Esq.
PRB File. No. 2001.014

HEARING PANEL DECISION NO. 25

A Petition of Misconduct was filed with the Office of the Professional Responsibility Board in the above referenced case on May 18, 2001. Respondent acknowledged receipt on May 18, 2001, but did not file an answer to the Petition of Misconduct. On June 13, 2001, Deputy Disciplinary Counsel filed a Motion to Deem Admitted the Charges and Allegations Set Forth in the Petition of Misconduct. Respondent did not respond to the Motion. On June 21, this hearing panel issued an Order granting the Motion to Deem Charges Admitted. The panel further requested submissions concerning sanctions to be filed with the Board within 30 days. On July 18, 2001, Deputy Disciplinary Counsel filed Recommended Conclusions of Law and Recommendation of Sanction. The Respondent did not file any submissions concerning sanctions. After notice to Respondent, a sanctions hearing was conducted by telephone on August 27, 2001. Deputy Disciplinary Counsel Beth DeBernardi attended by phone. Respondent did not participate in the hearing or otherwise respond to the notice of hearing.

Findings of Fact

The findings of fact are those that have been previously deemed admitted, as follows:

1. The Respondent Kjaere Andrews is an attorney licensed to practice law in the State of Vermont.
2. Respondent was admitted to practice before the Vermont Supreme Court on or about December 17, 1981.
3. In March or April of 2000, Complainant Corylenn Jenne consulted with Respondent about representation in a divorce.
4. On or about June 3, 2000, Complainant hired Respondent to represent her in a divorce.
5. At the time Respondent was hired by Complainant, the parties agreed to an hourly rate of \$50 per hour.
6. The fee agreement was not reduced to writing.
7. Complainant paid Respondent the sum of \$1,000.00 as a retainer.
8. At all times in question, Respondent did not have or maintain a client trust account.
9. Respondent deposited the retainer into her personal or regular business account.
10. Respondent did not complete the preparation of the complaint for divorce within the first few weeks of representation.
11. In mid-June of 2000, Respondent stated to Complainant that she might not be able to continue with the representation and that she was thinking of closing her law practice.
12. Complainant informed Respondent on or about June 22, 2000 that she would file her divorce pro se.
13. On or about June 22, 2000, Complainant asked Respondent for a final

statement or accounting and for a return of the unearned portion of the retainer.

14. Respondent did not have funds available to return the unused portion of the retainer because she had spent the retainer on her own personal or business expenses.

15. Respondent and Complainant have a mutual friend, Ms. Moore.

16. When Respondent found herself short of funds to return the retainer to Complainant, Respondent sought to borrow funds from Ms. Moore for this purpose.

17. Ms. Moore provided a loan to Respondent so that Respondent could return the retainer to Complainant.

18. The loan was in the amount of \$1,000.00.

19. Respondent used the funds borrowed from Ms. Moore for her own personal or business expenses rather than to repay the retainer to Complainant.

20. On or about July 12, 2000, Respondent sent a letter and final bill to Complainant wherein she informed Complainant that, due to the unexpected early termination of the representation, Respondent would retroactively charge an hourly rate of \$100 per hour, rather than the \$50 per hour agreed upon.

21. Respondent's letter also informed Complainant that, applying an hourly rate of \$100.00, Respondent owed Complainant a balance (refund) of \$150.70.

22. Respondent's letter informed Complainant that Respondent was not able to refund the balance of the retainer "today" because there was not enough money in Respondent's checking account to do so.

23. Respondent stated in her letter that she would come up with the money for the refund as soon as possible, but no later than two weeks from now when Ms. Moore returns.

24. On or about July 28, 2000, Respondent sent the sum of \$150.70 to Complainant by personal check.

25. On or about August 1, 2000, Complainant informed Respondent that she would accept the sum of \$150.70 as partial payment of the full amount due to her of \$575.35.

26. To date, Respondent has not returned any other sums to Complainant.

27. Respondent has provided various reasons for why she doubled the hourly rate charged to Complainant.

28. One reason provided was Respondent's contention that Complainant was told that the \$50/hour rate was only available for representation lasting more than six months.

29. Respondent also contended that Complainant was told that the rate was subject to change based on Complainant's financial circumstances.

30. Respondent also contended that the doubling of the hourly rate was appropriate because Respondent's own financial circumstances were less favorable than Complainant's.

31. Complainant was never told at any time during the representation that the hourly rate would change for any of these reasons (or for any other reasons).

32. Respondent's failure to return the balance of Complainant's retainer exacerbated Complainant's already difficult financial circumstances and also prevented Complainant from filing her divorce pro se because she did not have sufficient funds to pay the court filing fee.

Conclusions of Law

The charges, which have been deemed admitted and which the Hearing Panel concludes are supported by clear and convincing evidence, are that the Respondent violated Rules 1.5(b), 1.15(a), 1.15A, and 1.16(d) of the Vermont Rules of Professional Responsibility.

Rule 1.5(b)

Rule 1.5(b) of the Vermont Rules of Professional Conduct provides as follows:

"When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation."

The facts deemed admitted clearly and convincingly establish that the Respondent failed to communicate the \$100 per hour rate of the fee to her client before or within a reasonable time after commencing the representation. At the commencement of the representation, the Respondent told Complainant that she would charge her \$50 per hour for all work done. Nothing was said to suggest that this rate would or could change under differing circumstances. Less than six weeks later, in sending a final bill, Respondent retroactively doubled her hourly rate with no prior notice to her client and without giving the client any opportunity to agree or disagree with this substantial change in the agreed upon terms of representation. The Panel concludes, as a matter of law, that the Respondent violated Rule 1.5(b) of the Vermont Rules of Professional Conduct.

Rule 1.15(a)

Rule 1.15(a) of the Vermont Rules of Professional Conduct provides as follows:

"A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in accordance with Rules 1.15A, B and C"

The facts deemed admitted clearly and convincingly establish that the Respondent did not hold Complainant's retainer separate from Respondent's own property, nor did she hold the funds in accordance with the rules governing client trust accounts. In fact, Respondent treated the funds as her own property, spending them on personal expenses before the fee was even earned. The Panel concludes, as a matter of law, that the Respondent violated Rule 1.15(a) of the Vermont Rules of Professional Conduct.

Rule 1.15A

Rule 1.15(a) of the Vermont Rules of Professional Conduct provides as follows:

"A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in accordance with Rules 1.15A, B and C"

The facts deemed admitted clearly and convincingly establish that the Respondent did not hold Complainant's retainer separate from Respondent's own property, nor did she hold the funds in accordance with the rules governing client trust accounts. In fact, Respondent treated the funds as

her own property, spending them on personal expenses before the fee was even earned. The Panel concludes, as a matter of law, that the Respondent violated Rule 1.15(a) of the Vermont Rules of Professional Conduct.

Rule 1.15A

Rule 1.15A of the Vermont Rules of Professional Conduct requires every attorney in private practice or who otherwise receives client funds to maintain a trust accounting system which includes the specific features set forth in Rule 1.15A. Respondent has admitted that she did not use any trust account system, and the facts that have been deemed admitted clearly and convincingly establish that the Respondent failed to maintain the required trust account. The Panel concludes, as a matter of law, that the Respondent violated Rule 1.15A of the Vermont Rules of Professional Conduct.

Rule 1.16(d)

Rule 1.16(d) provides as follows:

"Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned." (emphasis added)

The facts deemed admitted clearly and convincingly establish that Respondent did not fully refund the advance payment of fee that had not been earned upon the termination of representation. The hourly rate agreed to by Respondent and Complainant was \$50 per hour. Respondent performed 8.493 hours of work for Complainant, and accordingly the refund due amounted to \$575.35 (ignoring for the moment the disputed 0.58 hours Respondent charged for preparing a bill and answering a telephone call from her client asking for the bill). Respondent did not refund that amount. Instead, Respondent calculated her fee at the arbitrarily imposed rate of \$100 per hour, and refunded only \$150.70 to Ms. Jenne. Accordingly, Respondent failed to refund a substantial portion of the retainer to Ms. Jenne in violation of Rule 1.16(d).

Sanctions

The ABA Standards for Imposing Lawyer Sanctions ("ABA Standards") suggest that the sanctioning body consider four factors in determining the appropriate sanction, as follows: (1) the duty violated; (2) the respondent's mental state; (3) the actual or potential injury; and (4) any mitigating and/or aggravating factors. ABA Sanctions, § 3.0 (1991 Edition); see also *In Re Warren*, 167 Vt. 259, 261 (1997).

The Office of Disciplinary Counsel has recommended a suspension of at least six months in length. Applying the four factors to the Respondent's case leads the Hearing Panel to conclude that a six month suspension is the minimum appropriate sanction under these circumstances.

The Duty Violated

Respondent has violated her duty of loyalty to her client, in that she

failed to preserve the property of her client by expending client funds for personal use. The ABA Standards note note that the obligations owed to clients are the most important of all the ethical duties owed by lawyers. ABA Standards, § II, page 5.

Respondent has also violated the duties that she owes as a legal professional, in that she did not communicate or deal properly with the fee agreement and did not handle appropriately her obligations with regard to termination of the representation and return of her client's retainer. See ABA Standards, § II, pages 5-6 and §III.7.0.

In this case, where the primary duty violated was the duty owed to a client, a more serious sanction is indicated. The fact that Respondent's conduct also violated her duty as a professional compounds the gravity of the offense.

Respondent's Mental State

The most culpable mental state is when the lawyer acts intentionally. In the case at hand, Respondent acted at least knowingly, and quite likely intentionally, when she failed to maintain any client trust account system and when she deposited and then spent her client's retainer without earning it. Moreover, by unilaterally and retroactively doubling her hourly rate, thereby substantially reducing the amount of her client's refund, Respondent must be found to have acted intentionally.

Extent of the Injury

The potential for serious injury to clients arising out of Respondent's commingling of funds and her failure to maintain a trust account was enormous. In addition, there was actual injury to Complainant, who has still not received the balance of her retainer and who was unable to file her divorce complaint due to her lack of funds for the court filing fee. The amount due, about six hundred dollars, was a significant amount of money to Complainant at a time when she had just left her husband and couldn't afford a place to live. Given the specific facts of this case, including Complainant's financial vulnerability, the actual harm must also be considered serious, thus supporting the recommendation of a suspension as the appropriate sanction.

Appropriate Sanctions

In cases involving the failure to preserve a client's property, suspension is appropriate when a lawyer "knows or should know that he (sic) is dealing improperly with client property and causes injury or potential injury to a client." ABA Standards, § 4.12. According to the comment to § 4.12, "[s]uspension should be reserved for lawyers who engage in misconduct that does not amount to misappropriation or conversion. The most common cases involve lawyers who commingle client funds with their own, or fail to remit client funds promptly." Id. This is precisely the misconduct in which Respondent was involved. It is clear that Respondent commingled funds and failed to remit client funds promptly, as well as failed to maintain a trust account, and failed to prospectively inform her client of a change in the terms of billing. At a minimum, a six month suspension is necessary to protect the public, as no lesser sanction will require Respondent to demonstrate that she has acquired the fitness to act as a professional that she clearly lacks at present.

Aggravating and Mitigating Factors

Under the ABA Standards, after determining which sanction is appropriate, the sanctioning body should then consider any aggravating or mitigating factors to see whether the proposed sanction should be adjusted up or down. In the case in hand, there are several aggravating factors.

First, the Respondent had a dishonest or selfish motive when she retroactively doubled her hourly rate for work done on behalf of Complainant, so that the amount of the refund due would be reduced from \$575.35 to \$150.70. A dishonest or selfish motive is an aggravating factor, as set forth in the ABA Standards, § 9.22(b).

Second, Respondent has never acknowledged the wrongfulness of her conduct, either to Complainant or to the Office of Disciplinary Counsel. Such failure to acknowledge the wrongful nature of one's conduct is an aggravating factor as set forth in the ABA Standards, § 9.22(g).

Third, the vulnerability of the Complainant is also an aggravating factor. During the time at issue, Complainant had recently left her husband, had no place to live except with friends, and had to borrow a substantial portion of the \$1,000 retainer in order to commence her divorce. In fact, due to Respondent's failure to return the retainer, Complainant was unable even to file her divorce pro se. The vulnerability of the victim is also an aggravating factor, as set forth in the ABA Sanctions, § 9.22(h).

Fourth, Respondent was first admitted to the practice of law in Vermont on or about December 17, 1981 and thus has had almost nineteen years experience in the practice of law at the time in question; accordingly her "substantial experience in the practice of law" must be considered an aggravating factor as well. ABA Standards, § 9.22(i).

Finally, Respondent has still made no effort to return the balance of the retainer to Complainant, despite the complaint to the Professional Responsibility Program and despite the passage of almost a year since she misappropriated Complainant's retainer. Indifference to making restitution is also an aggravating factor set forth in the ABA Standards at § 9.22(j).

Although Respondent has not come forward to present any mitigating factors, the following are possible mitigating factors: First, Respondent has no prior disciplinary sanctions on her record. Second, Respondent apparently alluded to some personal difficulties she was experiencing at the time in question. In particular, she apparently stated to Complainant that she was upset in June about the suicide of one of her other clients, and she apparently had some financial problems at that time. However, because Respondent failed to provide her version of these events, the Hearing Panel does not have direct information concerning these possible difficulties and declines to speculate as to their relevance.

A balancing of the aggravating factors and the mitigating factors leaves the aggravating factors in preponderance and does not lessen the appropriateness of imposing a significant suspension.

Conclusion

The facts of this case demonstrated a complete lack of professionalism on the part of Respondent Kjaere Andrews. Respondent violated Rule 1.5(b) by charging an hourly rate twice as high as the rate communicated to the client. She violated Rule 1.15(a) by commingling Complainant's funds with Respondent's own funds. She violated Rule 1.15A by failing to have a trust account. She violated Rule 1.16(d) by failing to refund in full the advance payment of fee that had not been earned at the time the representation was terminated. Finally, she added insult to injury by blaming Ms. Jenne for terminating the representation "early" when it was Respondent's own actions that led to the termination of Respondent's services.

This course of conduct on the part of Respondent Kjaere Andrews, for which she has not taken responsibility, supports Disciplinary Counsel's suggestion of at least a six month suspension. The Hearing Panel recommends suspension of the Respondent's license to practice law for six months and one day, and directs that Respondent reimburse Complainant the full amount due to Complainant based upon the agreed upon rate of \$50.00 per hour.

Panel member James Gallagher concurs with the Sanctions, but dissents from the conclusion that Rule 1.5(b) of the Vermont Rules of Professional Conduct was violated under the facts of this case. Notwithstanding Respondent's later claim that she was entitled to \$100 an hour, Respondent had communicated to Complainant that Respondent would charge \$50 an hour. Mr. Gallagher believes this communication satisfied Rule 1.5(b) by contractually limiting Respondent to this agreed upon rate.

PROFESSIONAL RESPONSIBILITY BOARD - HEARING PANEL NO. 6

Dated this 28th day of September, 2001.

FILED OCTOBER 1, 2001

/s/

Judith A. Salamandra Corso,
Chair

/s/

George Coppenrath

/s/

James C. Gallagher, Esq.