65 PRB

[05-May-2004]

STATE OF VERMONT

PROFESSIONAL RESPONSIBILITY BOARD

Decision No: 65

In re: Mark Furlan, Esq.

PRB File Nos. 2003.048 & 2003.051

Respondent is a contract public defender who is charged with two instances of neglect of his clients' cases in violation of Rule 1.3 and with one instance of failure to keep his client informed and one instance of failure to explain a matter to his client, in violation of Rules 1.4(a) and 1.4 (b) of the Vermont Rules of Professional Conduct.

The matter was heard on January 26, 2004, before Hearing Panel No. 8, consisting of Eileen Blackwood Esq., Chair, Peter Bluhm, Esq. and Samuel Hand. Disciplinary Counsel Michael Kennedy was present, as was Respondent who was represented by A. Jeffrey Taylor, Esq.

Based upon the evidence and exhibits, the Hearing Panel publicly reprimands Respondent and places him on probation for a period of one year for violation of Rules 1.3, 1.4(a) and 1.4(b) of the Vermont Rules of Professional Conduct.

Facts

Respondent was admitted to the Vermont bar in 1993. Since July 1994 a substantial part of his practice has been criminal defense, some as private counsel, but the bulk of his criminal practice has been as a public defender. He has worked under contract with the state as the conflict defender in Orange County, handling cases in which the public defender had a conflict. He later worked in Washington County and most recently in Rutland County, also as a contract conflict defender.

In late 2001, Respondent discussed with the Defender General signing a contract to perform the duties of Prisoner's Rights Conflict Defender for the entire state. This new position was intended to provide representation to prisoners whenever the Prisoner's Rights Office of the Defender General (Prisoner's Rights Office) had a conflict. Previously these matters had been handled by ad hoc assignments to members of the bar by the court where the matter was pending. Both Respondent and the Defender General expected this new position to require only part time work that would augment Respondent's other contract defense work and his private practice. Prior

to the beginning of the contract, Respondent discussed the caseload with the Defender General. The Defender General had reviewed the statistics from the previous year and did not expect the caseload to be overwhelming. Respondent began service under the new contract in January 2002. At this time the courts had a backlog of conflict cases because they had been unable to find members of the bar to handle them. Respondent and the Defender General were unaware of the size of this backlog.

After Respondent began performing the contract, courts began to assign these old cases to Respondent along with the expected current cases. In the first six months of 2002, Respondent was assigned 59 cases under the contract. This was twenty to thirty more cases than the Defender General had anticipated and thirty to forty more cases than Respondent had anticipated, and he was overwhelmed by the number. He found himself in court nearly every day. By May of 2002, he felt that it was humanly impossible to handle the onslaught of cases. At that time Respondent was "triaging" cases, paying the most attention to those that had the greatest potential for infringing the liberty of the plaintiff.

Respondent did not ask for relief from the extra caseload, nor did he seek assistance from the Defender General's office. Respondent had been working with the Defender General's office for some years by this time, and, based upon prior practice, he did not believe that such assistance would be available. Respondent wanted to appear to the Defender General as capable of handling the caseload. He now acknowledges that he should have

asked for help. In June of 2002, Respondent renegotiated the contract and received substantially more money because of the larger number of cases, but he did not say at the time that the caseload was excessive.

In May of 2002, Respondent received 15 new cases, two of which involve the complainants in the matters before this Panel.

File No. 2003.048 - Charles Crannell

Charles Crannell is incarcerated at the Newport Correctional Facility, serving a life sentence without possibility of parole for a conviction of first degree murder. While in prison, Mr. Crannell took a course in computer assisted drafting. He is also a Certified Inmate Legal Assistant. The teacher of his drafting class had suggested to Mr. Crannell that practicing on the computer would benefit him. The computers set aside for the general prison population were only available to Mr. Crannell on a limited basis.

In November of 2001, Mr. Crannell asked Corrections officials for permission to have a computer that he could keep in his cell. The request was denied, and on November 25, 2001, Mr. Crannell filed a grievance alleging that other inmates were allowed to have computers, and that he had a legitimate need for one. Mr. Crannell's grievance was dismissed in December of 2001. In February of 2002, Mr. Crannell filed a Complaint for Review of Governmental Action in the Orleans Superior Court alleging that

the Department had never responded to his grievance and that the Department had unreasonably denied his request for a computer.

The Orleans Superior Court appointed an attorney from the Prisoner's Rights Office to represent Mr. Crannell. By letter dated February 27, 2002, the attorney for the Department of Corrections informed Mr. Crannell's attorney that, contrary to Mr. Crannell's assertions, the Department had responded to his administrative grievance and that the Department had no record of Mr. Crannell's complaining to the Commissioner that his grievance had not been answered.

On May 16, 2002, Mr. Crannell's attorney filed a letter stating that the Prisoner's Rights Office had an ethical conflict. Under the terms of Respondent's contract with the Defender General, he was obligated to handle such cases. On May 17, 2002, the Orleans Superior Court noted Respondent's appearance on behalf of Mr. Crannell and sent notice to Respondent that he had been assigned to represent Mr. Crannell.

On July 8, 2002, the court scheduled a status conference for July 18, 2002. Respondent failed to appear at the status conference, and the court dismissed Mr. Crannell's complaint. Respondent may not have received the Crannell file before the scheduled hearing date.

During the time he was assigned to represent Mr. Crannell, Respondent made no effort to contact his client by mail, phone or personal visit, nor

did he take any action on Mr. Crannell's case when he learned that the case had been dismissed. He did not notify his client of the dismissal, and he took no steps to rectify the situation. When asked why Mr. Crannell was not given an explanation of the dismissal, Respondent acknowledged that he made no effort to contact his client and had no good reason for his failure to do so.

Mr. Crannell wrote to Respondent between five and seven times, but Respondent did not reply. Contrary to Respondent's assumption, Mr. Crannell did not learn that the case had been dismissed until several months later when he wrote to the court and the court informed him of the dismissal. Mr. Crannell filed a request to re-open his case and a request to have Respondent removed. Before the court ruled on his requests, Mr. Crannell filed a complaint with the Professional Responsibility Program. Given the ethics complaint, Respondent joined in Mr. Crannell's request that he be removed. The court allowed Respondent to withdraw and granted Mr. Crannell's request to re-open.

In March of 2003, the court granted the Department of Corrections' Motion for Summary Judgment, concluding that the Department had not acted unlawfully in denying Mr. Crannell's request for a computer. The Supreme Court later affirmed. Mr. Crannell testified that he did not know that he had to file affidavits in response to the motion. Mr. Crannell testified that had he been properly represented, he would have filed affidavits, so the outcome might have been different. Respondent believed that Mr.

Crannell did not have a viable case because granting or withholding a computer was within the discretion of the Department of Corrections and that nothing he could have done would have changed the ultimate outcome.

PRB File No. 2003.051 - Leo Pratt

Leo Pratt is also incarcerated at the Newport Correctional Facility, serving a term of 5 to 20 years for conviction of several felonies. In late 2001, Mr. Pratt filed two lawsuits against the Department of Corrections. In one, Mr. Pratt alleged that the Department had improperly classified him and, as such, had unlawfully prevented his release on furlough or parole. In the other, Mr. Pratt alleged that the Department had improperly handled an institutional grievance. An attorney from the Prisoner's Rights Office entered an appearance on behalf of Mr. Pratt. The attorney for the Department moved to consolidate and to dismiss the suits filed by Mr. Pratt. The Prisoner's Rights Office attorney then moved to withdraw, and the court granted the motion. The court also ordered, consistent with his contract with the Defender General's Office, that Respondent be assigned to represent Mr. Pratt in connection with these two cases.

Respondent received notice that he had been assigned to represent Mr. Pratt in both cases. On July 8, 2002, the Court scheduled a hearing for July 18, 2002, on the Department of Corrections' motions to dismiss. Respondent's office received copies of the notices of the hearing, but he

failed to appear. Respondent may not have received the Pratt file before the scheduled hearing date.

The court granted the defendant's motion to dismiss and the next day sent Respondent a copy of the order dismissing Mr. Pratt's suits. Upon learning that the cases had been dismissed, Respondent did not contact the court or otherwise take any action on behalf of Mr. Pratt, nor did he inform Mr. Pratt that he had failed to attend the hearing and that his cases had been dismissed.

It is Respondent's opinion that even if he had been present and had actively represented Mr. Pratt, Mr. Pratt would not have prevailed. Mr. Pratt learned that the cases had been dismissed when he received a copy of the dismissal order from the court. He filed a motion asking the court to reconsider its decision, citing Respondent's failure to appear as grounds for reconsideration of the dismissal. In September of 2002, the court denied Mr. Pratt's motion to reconsider.

Upon being appointed to represent Mr. Pratt, Respondent never wrote to or called him. Prior to July 8, 2002, Mr. Pratt sent several letters to Respondent asking for information relating to the cases in which Respondent had been appointed. Respondent did not respond to Mr. Pratt's letters, nor did he respond to the Department's motions to dismiss Mr. Pratt's cases. Between the date he was appointed and the date the cases were dismissed, Respondent never spoke with Mr. Pratt, contacted him in any way, or

provided legal services to Mr. Pratt.

Office Practices

In the cases involving both Mr. Crannell and Mr. Pratt, Respondent failed to appear at hearings scheduled for the same day. Respondent acknowledges that his office may have received copies of the notices of hearing. Respondent testified, however, and we find, that he did not actually know of the hearings. They were never entered by office staff into Respondent's desk calendar or any other time-keeping system in his office. Respondent acknowledges that it was his responsibility to structure his office in such a way that such notices received his attention.

Respondent's caseload and office management practices at this time contributed to his problems. He knew of the existence of the cases, but he knew very little about their substance. Because of the volume of his caseload at the time, it was his practice to review letters that came in and place them in the file. He would then deal with the case when it was scheduled in court. He also acknowledges that he should have informed his clients that he had missed their hearings and that their cases had been dismissed.

Respondent has made no attempt to excuse his behavior. He knew that it was his responsibility to show up in court when he was supposed to. He

testified that he was very sorry for what had happened. He believes that his appearance at the hearings would not have changed the outcomes of the cases, but he acknowledges that had he communicated with his clients and gone to court, they would have felt fully represented. Respondent recognizes that had he acted differently, the clients would have felt that someone cared about their cases and that they had been treated fairly. He recognizes the value of treating clients fairly, even when their legal claims apparently are not sound. Respondent believes that his prisoner work is important, and he intends to continue to work in this area for the foreseeable future.

In early 2002, shortly after Respondent realized the extent of his obligations under the contract, he advertised for an associate attorney at his law firm. He did not interview right away, but in September of 2002 he hired someone who was admitted to the bar in November. This relationship did not last long, and he then hired another attorney. He now has two associates and an office assistant, and they all meet monthly. He also routinely communicates with clients as soon as he receives an assignment.

Conclusions of Law

It is undisputed that Respondent took no action with respect to either the Crannell case or the Pratt case. We must conclude that Respondent has violated the Vermont Rules of Professional Conduct.

With respect to both clients, Respondent is charged with a violation of Rule 1.3 which requires an attorney to act with reasonable diligence in representing his clients. An attorney who takes no action of behalf of a client can never be said to have acted with due diligence. Even if Respondent could not have altered the outcome, that does not excuse the behavior. We agree with Respondent that there is a value to clients to being treated fairly and given due process whether or not there is any likelihood of prevailing.

With respect to Mr. Crannell, Respondent is charged with failing to explain a matter in order to permit the client to make an informed decision, in violation of Rule 1.4(b). With respect to Mr. Pratt, Respondent is charged with violation of Rule 1.4(a) which requires attorneys to keep their clients reasonably informed about the status of their cases and to comply with reasonable requests for information. In both instances, Respondent made no attempt to communicate with his clients upon being assigned to represent them, he did not answer their letters, he gave them no legal advice, he did not attend their court hearings, and he failed to inform them when their cases had been dismissed.

The essence of attorney representation, and the thrust of these two rules, is the fact that communicating with clients, giving them advice, and keeping them informed of the status of their cases is central to representation. The obligation of the attorney to initiate and maintain communication is especially important when the client is incarcerated,

since the client has limited opportunities for initiating contact with the attorney. The client is usually unable to telephone the attorney or to visit in the attorney's office. Thus, it is critical that the attorney be diligent and thorough in establishing and maintaining contact with these clients. Respondent's total failure to do so is a violation of the Rules 1.4 (a) and 1.4(b).

Sanctions

In Vermont it is appropriate to refer to the ABA Standards for Imposing Lawyer Sanctions in determining the sanction in a particular case. In re Warren, 167 Vt. 259, 261 (1997); In re Berk, 157 Vt. 524,532 (1991) (citing in re Rosenfeld, 157 Vt. 537,546-47 (1991)). We have done so and have also considered existing Vermont case law.

The ABA Standards for Imposing Lawyer Sanctions are based upon a two-step process and the analysis of four factors. First to be considered are the duty violated, the lawyer's mental state, and the potential or actual injury caused by the lawyer's misconduct. A presumptive sanction based upon these three factors may then be modified based upon aggravating or mitigating factors. ABA Standards §3.0.

Duty Violated

Respondent owed a duty to both Mr. Crannell and Mr. Pratt to act with

diligence and to keep them informed about the status of their cases. Respondent's total failure to act on behalf of his clients is a violation of that duty.

Respondent's Mental State

The Panel finds that in both cases Respondent's mental state was that of negligence, prior to his receipt of the court decisions dismissing his clients' cases. While we believe that the notices of hearing were delivered to Respondent's office, there is no evidence that he was actually aware of the hearings. We find no reason to believe that he was aware of the hearings and decided not to attend.

After receiving notices of the court's actions, in both cases Respondent's mental state was clearly a knowing violation of the Rules, and it is this fact that is most troubling to the Panel. One would normally expect an attorney to immediately call the court, opposing counsel, or both and make efforts to rectify the situation. Had he done so, it is likely that Respondent would not find himself before this panel charged with violations of the Rules of Professional Conduct. It is no excuse that he believed that the cases had no merit or that, at least in Mr. Crannell's case, he believed that the client had been present at the hearing.

Injury

Respondent's conduct caused actual injury. While the ultimate outcome for both clients might not have been different, they were entitled to representation, and they were entitled to have their cases presented to the court. Respondent himself admits that a failure to provide due process is injurious to the client without respect to the outcome of the case. In addition, had these clients known that Respondent was not providing representation, each could have acted on his own behalf or sought alternate legal assistance from the court. The effect of just such neglect was noted in In re Andres, PRB Decision No. 41, at 7.

> A failure or a refusal to act on a client's behalf has a twofold effect on the client. Not only is the client's case compromised by the lawyer's inaction, but the client, while obviously not precluded from acting on his own behalf, is not inclined to do so and thus is usually prevented from acting promptly to preserve his or her own rights.

Similarly, if they had known that their cases had been dismissed because of Respondent's failure to act, Mr. Crannell and Mr. Pratt could have pursued their appeal right on their own. Thinking that they were being represented, and limited in their ability to contact Respondent, these two clients, expecting that Respondent was acting on their behalf, did nothing.

Presumptive Sanction

The ABA Standards suggest that suspension is appropriate when "a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client. . . ." ABA Standards for Imposing Lawyer Sanctions §4.42(a). By contrast, the ABA Standards call for reprimand when "a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client." Id. §4.43.

Based upon a consideration of the first three factors, it appears that suspension is the presumptive sanction in this matter. Respondent's actions after he knew of the dismissals were knowing, and there was injury to his clients.

Aggravating and Mitigating Factors.

We now turn to the consideration of aggravating and mitigating factors. In aggravation, there were multiple offenses, ABA Standards §9.22(d). However, both offenses occurred at almost the same time. We are not faced with an attorney who has a pattern of offenses over a long period of time, which we would find to be a much more serious aggravating factor. Also, both Mr. Crannell and Mr. Pratt were vulnerable victims. Since they were both incarcerated, their ability to contact their attorney was limited. Substantial mitigating factors are also present. Respondent had no dishonest or selfish motive. ABA Standards §9.32(l). Respondent also

has no record of prior discipline. ABA Standards §9.32(g).

Respondent's failures occurred during a short time period in which he was overwhelmed by a caseload over which he had little control. After signing a contract for a certain type of work, he then received an unexpected "flush" of cases, thirty more cases in a six-month period than either he or the Defender General had anticipated.

The record is not clear on whether Respondent had recourse through the Defender General which he did not use. Respondent had a conversation in early 2002 with the Defender General, but he apparently did not clearly request more assistance; the Defender General thought Respondent was asking for more money. The Defender General did increase Respondent's contract price in July of 2002.

The Defender General testified that under the contract, Respondent could not have limited his performance just because he was busy. Nevertheless, the Defender General has at least twice granted a contractor the right to limit his or her caseload. It is unclear whether the Defender General would have (or could have) granted Respondent relief if he had clearly asked for it. Respondent was concerned at the time that making a request for additional resources could have harmed his future business prospects as a contractor for the Defender General.

Respondent states that representing prisoners is important work, and

we agree. The Panel is also aware, however, that the Defender General's Office is under-funded and that attorneys who undertake to provide public defense have substantial caseloads. While the circumstances do not excuse Respondent's failure to communicate with his clients, they are a legitimate consideration for mitigation. Because the court backlog was a one-time overload to Respondent's practice, the circumstances do not suggest that Respondent is likely to have a continuing problem. This is consistent with Respondent's statements that he has improved his office procedures since 2002.

The Panel also finds that Respondent feels genuine remorse about his conduct. He made no effort to excuse it, and he freely admitted to the Panel that his clients did not receive the representation to which they were entitled. ABA Standards §9.32(l).

Finally, we conclude that there is no significant risk to the public from the Respondent's continued law practice. His only disciplinary problems involved a discrete period of time, and it appears that the number of incoming cases has fallen to the expected manageable level and that Respondent has made improvements to his office management practices.

Despite the presumptive sanction of suspension under the ABA Standards for Imposing Lawyer Sanctions, we conclude that the mitigating factors in this case are significant. This leads us to reject suspension.

Vermont Cases

In reaching our decision we have reviewed two recent Vermont cases with similar facts in which the Panel imposed a suspension. We believe that these cases should be distinguished on the facts.

In re Andres, PRB Decision No. 41, (September 18, 2002), also involved a public defender assigned to a post conviction relief matter. Respondent there investigated the case and formed the opinion that it was without merit. He intentionally took no action in response to the opposing party's Motion for Summary Judgment, and the motion was subsequently granted by the court. The Panel ordered that Andres be suspended for two months. The case is presently on appeal to the Vermont Supreme Court. What distinguishes Andres from the present case is the existence of substantial aggravating factors that are not present here. Andres also had a prior disciplinary history, ABA Standards §9.22(a), had substantial experience in the practice of law, ABA Standards §9.22(i), and had refused to acknowledge the wrongful nature of his conduct ABA Standards §9.22(g).

Disciplinary Counsel also points to In re Sunshine, PRB Decision No. 28 (Nov. 29, 2001), in which Respondent received a four month suspension. The greatest factual difference between Sunshine and the present case is the duration of the misconduct. Sunshine involved neglect of two cases, one of which was in the attorney's office for a period of seven years and the other for a period of five years. Despite mitigating factors, the

on-going misconduct raised fundamental questions as to the attorney's fitness to practice, questions that are not present here. There is no evidence of any misconduct on the part of Respondent before or after the spring and summer of 2002. Unlike the Sunshine panel, we find no underlying pattern or inclination to neglect clients. Respondent's difficulties arose out of a poor response to a single crisis situation. We believe that this case is closer in its overall character to In re

DiPalma, PRB Decision No 44, (October 22, 2002), in which the lawyer received a public reprimand for neglect. Like the present case, the facts in DiPalma could have led to the imposition of suspension based solely upon a consideration of the ABA Standards for Imposing Lawyer Sanctions. In DiPalma the neglect of client matters lasted for a much longer time. The DiPalma panel did not impose a suspension, however, because of the approach of both DiPalma and his firm. DiPalma's firm took control of the problem, reported the violations, sought counseling for DiPalma, monitored his practice and thus preserved the services for the firm of a valuable lawyer. Though Respondent has not had the support of a large law firm that was available to DiPalma, he too has made improvements to his practice procedures. DiPalma's firm recognized his worth and sought to preserve his right to continue to practice while protecting the needs of the public.

Conclusion on Sanctions

In summary, under the ABA Standards for Imposing Lawyer Sanctions, and

Vermont case law, it would be possible to impose either suspension or public reprimand. Due to the substantial mitigating factors described above, we conclude that suspension is not necessary to protect the public. We do nevertheless believe that a substantial sanction is appropriate in addition to a public reprimand and therefore, we place Respondent on probation for a period of one year.

Although Respondent has substantially improved his office practices since 2002, we believe that he would benefit from structured supervision. Because the expert assistance available in DiPalma is not readily available to Respondent, we require Respondent to obtain a probation monitor to provide him with expert assistance to ensure his continued effective practice. The probation monitor should be an attorney with substantial experience in managing a large defense caseload, possibly an experienced contract public defender. The probation monitor should be someone acceptable to Disciplinary Counsel and with the experience to assist Respondent in establishing reliable office procedures. The probation monitor should be available to periodically review Respondent's case load with him and make recommendations. With this type of mentoring and supervision, Respondent should be able to structure his practice so that he does not again find himself in a situation like that which led to the present charges.

The specific terms of probation shall be as follows:

1. Respondent shall be placed on probation for a period of one year as provided in A.O. 9 Rule 8 (A) (6).

2. Respondent shall engage a probation monitor acceptable to disciplinary counsel, preferably one with substantial experience as a contract defense counsel with a substantial caseload.

3. Within 30 days of the date of this decision, Respondent shall meet with his probation monitor to review his office management procedures and his methods for handling and tracking cases and ensuring timely responses to clients and courts.

4. Respondent shall implement case management procedures recommended by his probation monitor.

5. During the term of probation, Respondent shall meet at least monthly with his probation monitor to review all open cases in his office and to review case management procedures.

6. Within three weeks after each monthly meeting, the probation monitor shall submit a written report to the Office of Disciplinary Counsel outlining Respondent's progress and compliance with the terms of probation.

7. Respondent shall completely and fully respond to requests from the Office of Disciplinary Counsel that relate to his compliance with the

terms of his probation.

8. In the event that the probation monitor is unable to continue, he or she shall give notice to the Office of Disciplinary Counsel as soon as practicable, in order to permit Respondent to obtain an alternate probation monitor. The substitute probation monitor shall be subject to the approval of the Office of Disciplinary Counsel.

9. All expenses associated with probation shall be borne by Respondent.

10. After one year, Respondent's probation shall be terminated in accordance with A.O. 9 Rule 8(A) (6)(b).

Order

Respondent Mark Furlan is PUBLICLY REPRIMANDED for violation of Rules 1.3, 1.4(a) and 1.4 (b) of the Vermont Rules of Professional Conduct. Respondent shall be placed on probation for a period of one year in accordance with the probation terms set forth above.

Dated 5/3/04

Hearing Panel No.8

/s/

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Eileen Blackwood, Esq.

/s/

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Peter Bluhm, Esq.

/s/

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Samuel Hand

FILED 5/5/04