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[23-Jul-2004]

STATE OF VERMONT

PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2004.062

Decision No. 68

On May 13, 2004, the parties filed a stipulation of facts as well as conclusions of law and recommendations on sanctions. Respondent also waived certain procedural rights including the right to an evidentiary hearing. The panel accepts the facts and recommendations and orders that Respondent be admonished by Disciplinary Counsel for neglecting to resolve an issue arising out of a real estate closing and failing to communicate with his client in a timely manner in violation of Rules 1.3 and 1.4(a) of the Vermont Rules of Professional Conduct.

Facts

Respondent is an attorney licensed to practice law in the State of Vermont. He was admitted to practice in New York in 1970 and in Vermont in

1995. Respondent represented the complainants in the purchase of a home. The closing occurred in February of 2002. The Seller was also represented.

The seller had built the house, and a local gas service company had installed an underground propane tank at the house. What was unknown to both Buyers and Respondent was that over the years the gas company had claimed ownership of the propane tank and had contacted the Seller on various occasions demanding payment for the tank. The gas company had threatened to dig up and repossess the tank if the Seller did not pay. At the time of the closing the Seller had not paid the gas company. The gas company had made no efforts to dig up the tank, and had not filed a lien asserting ownership of the tank.

At closing, the Seller and her attorney raised the issue of the gas company's claim to ownership of the propane tank. The parties went through with the closing and agreed to escrow the sum of $1,200 to be held by the Seller's attorney, in the event the gas company filed a lien asserting ownership of the tank after closing. If the gas company did not file a lien, the money would be released to the Seller. If the gas company filed a lien, the money would be used to resolve the claim. Both parties anticipated that any claim by the gas company would be in the form of a lien recorded in the land records, and they did not consider other ways in which the gas company might assert a claim. The escrow arrangement was not reduced to writing, but there was an entry on the HUD settlement for the sum of $1,200 described as "gas dispute escrow." The Buyers received a copy

of the HUD statement at closing.

Since Respondent would have to check the land records after closing to deal with a mortgage discharge, it was agreed that he would look for any gas company lien after closing.

From time to time after the closing the Seller's attorney would call Respondent to check the status of the title update. Respondent did not return these calls.

On June 25, 2002, a technician from the gas company came to the Buyers' home and threatened to disconnect the regulator from the propane tank unless the Buyers signed a rental agreement with the gas company on the spot. Feeling that they had no alternative, the Buyers signed a rental agreement for $13.00 per month but made no payments.

After the visit from the gas company, the Buyers spoke with the Seller, but they did not contact Respondent who did not learn about the dispute for several more months.

On July 18, 2002, Respondent provided his title abstractor with a written request to check the land records for any lien filed by the gas company after the closing. On July 22, 2002, the Seller's attorney sent a fax to Respondent inquiring whether he had checked the land records and whether the escrowed funds could be released. She received no response to

this fax.

Sometime in September of 2002, after receiving several monthly rental bills from the gas company, the Buyers contacted Respondent by telephone. They explained the situation with the gas company, and Respondent told them that he would request a Bill of Sale from the Seller to resolve the issue.

On October 11, 2002, the Seller's attorney wrote to Respondent, noting that eight months had passed since the closing, that she hadn't received any response to her inquiries, and stating that she would release the escrowed funds to her client in seven days if she heard no objection from him.

Despite having discussed the propane tank dispute with the Buyers in September, Respondent raised no objection to the release of the escrowed funds, nor did he investigate whether the Seller was willing to allow the funds to be used to settle the dispute in the absence of a lien.

Receiving no response to her October 11, 2002 letter, the Seller's attorney released the escrowed funds to her client on October 29, 2002. Respondent did not tell the Buyers that the Seller's attorney had contacted him about the escrowed funds. It was his opinion that because no lien had been filed, the Seller was entitled to the money.

The Buyers continued to call Respondent at various times throughout

the fall of 2002 for an update, but he did not return their calls. The Buyers remember calling Respondent on a weekly basis in September, thereafter on a bi-weekly basis, and later about once a month, until the December holidays.

In January of 2003, the Buyers went to Respondent's office without an appointment to discuss the gas company situation. Respondent told them that it was his opinion that they had owned the tank since closing, since it was affixed to the real estate which they purchased. Respondent also informed them that he would nevertheless try to obtain a Bill of Sale to confirm their ownership of the tank.

On several occasions in 2003, Respondent spoke with the owner of the gas company about the situation. Respondent took the position that his clients owned the propane tank; the gas company took the position that it owned the tank, and no agreement was reached.

The Seller's attorney first heard from Respondent that the gas company was still claiming in interest in the propane tank on February 11, 2003, when Respondent called her to discuss the possibility of her client providing a Bill of Sale.

On March 5, 2003, Respondent sent the Buyers their Final Owner's Title Insurance Policy, along with copies of other documents. His correspondence did not mention the gas company issue.

On May 14, 2003, having heard nothing further about the gas company issue since the January meeting, the Buyers sent a letter to Respondent by certified mail.

Respondent responded to their letter on June 12, 2003, and he wrote to the Seller's attorney the same day, requesting a Bill of Sale from her client. In June of 2003, the Buyers had an ongoing correspondence with the gas company.

On July 2, 2003, the Buyers faxed copies of their recent correspondence with the gas company to Respondent, for his information and assistance. Also during the summer of 2003, the Seller's attorney asked her client to consider signing a quitclaim bill of sale, and she renewed that suggestion by letter on August 6, 2003. The Seller did not respond to her attorney.

On August 26, 2003, having received no response from Respondent to their July 2, 2003, inquiry, the Buyers again sent a fax to Respondent asking for a reply and an update. On September 15, 2003, Respondent responded to the Buyers' faxes with one of his own. In September of 2003, the Buyers filed a complaint about Respondent with the Office of Disciplinary Counsel.

After receiving a copy of the complaint, Respondent contacted the gas

company and paid $1,000 for the propane tank and related equipment out of his own pocket. He obtained a Bill of Sale confirming his clients' ownership of the tank from the gas company and recorded the Bill of Sale in the land records.

The complainants suffered injury as a result of Respondent's failure to act. They suffered anxiety from the fact that the situation was unresolved; they were frustrated in their efforts to communicate with Respondent, because he did not promptly return their calls, and they were exposed to a potential injury in the amount of $13 per month for the life of their rental agreement when the escrowed funds were released without their knowledge or consent; The fact that Respondent paid for the propane tank negated any actual financial injury to the Buyers.

The following mitigating factors are present in this case. Respondent has no prior disciplinary record; he had no dishonest or selfish motive; he has cooperated with the disciplinary proceedings; he has made restitution, and expresses remorse for his actions.

Conclusions of Law

Rule 1.3 of the Vermont Rules of Professional Conduct provides that a lawyer "shall act with reasonable diligence and promptness in representing a client." Respondent first learned that the gas company was seeking payment from his client for the propane tank when the client called him in

September of 2002. He then learned on October 11, 2003, that the Seller's attorney intended to release the escrowed funds in a week. The time for Respondent to take action was before the escrowed funds were released, however, Respondent did not notify opposing counsel at that time that there was an ongoing dispute with the gas company, nor did he take other steps to try to resolve his clients' problem prior to the planned release of the escrowed funds. Beginning in January of 2003, Respondent began trying to resolve the dispute and once notified of the professional conduct complaint, Respondent resolved the matter quickly at his own expense.

While the period of time between Respondent's learning of the dispute over the tank and the planned release of the escrowed funds was relatively short, approximately one month, it was the critical time for him to assert his clients' right to the funds while they were still being held by the Seller's attorney. Neglect is not determined merely by the passage of time, but by what effect the passage of time, however short, has on the rights of the client. Respondent's failure to assert a claim to the escrowed funds before disbursement is a violation of Rule 1.3 of the Vermont Rules of Professional Conduct.

Rule 1.4(a)

Rule 1.4(a) of the Vermont Rules of Professional Conduct provides as follows:

"A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."

Again the critical time is the period prior to the release of the escrowed funds. Respondent should have at the very least informed his clients that the Seller's attorney planned to release the funds. Had he shared with them his opinion that the Seller was entitled to the funds since no lien had been filed, his clients would have had full knowledge of the situation and could have either requested Respondent to take action on their behalf or they could have taken steps on their own. Respondent's failure to communicate this information to his clients on a timely basis violates the provisions of Rule 1.4(a) of the Vermont Rules of Professional Conduct.

Sanction

An admonition is appropriate in this case under both Administrative Order 9 of the Vermont Supreme Court and the ABA Standards For Imposing Lawyer Sanctions.

Under A.O.9, admonition is appropriate only when the misconduct is minor, little or no injury results and there is little likelihood that the lawyer will make the same mistake again. A.O. 9, Rule 8(A)(5). Viewed in context, the Respondent's misconduct was relatively minor. The period of

time involved is short and though the clients' suffered frustration and anxiety, monetary injury was prevented by Respondent's purchase of the propane tank from his own funds.

Admonition is also indicated under the ABA Standards for Imposing Lawyer Sanctions. Section 4.44 is similar to A.O.9, providing for admonition "when a lawyer does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client."

There are a number of mitigating factors present. Respondent has no prior disciplinary record. ABA Standards, Section 9.32(a). He had no dishonest or selfish motive. ABA Standards, Section 9.32(b). Respondent made a full and free disclosure to disciplinary counsel and has cooperated with the proceedings, ABA Standards, Section 9.32(e). Respondent has expressed remorse for his conduct, ABA Standards, Section 9.32(l), and has made full restitution, ABA Standards, Section 9.32(d).

Conclusion

For the above reasons the Hearing Panel orders that Respondent be admonished by Disciplinary Counsel for violation of Rules 1.3 and 1.4(a) of the Vermont Rules of PrOfessional Conduct.

Dated: July 23, 2004

HEARING PANEL NO. 1

FILED JULY 23, 2004

/s/

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Barry E. Griffith, Esq. Chair

/s/

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Kristina Pollard, Esq.

/s/

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Stephen Anthony Carbine