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[8-Sep-2004]

STATE OF VERMONT

PROFESSIONAL RESPONSIBILITY BOARD

In re: Mark L. Stephen, Esq.

PRB File No. 2004.053

Decision No. 71

On July, 20, 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 publicly reprimanded for neglecting to resolve benefit issues remaining in a worker's compensation case after resolution of the client's permanent disability in violation of DR 6-101(A)(3) of the Rules of Professional Conduct and Rules 1.3 and 1.4 of the Vermont Rules of Professional Conduct.

Facts

Respondent is an attorney licensed to practice law in the State of Vermont and was admitted to the practice of law in Vermont in 1982.

On June 18, 1992, complainant C.G. was injured on the job and filed a workers' compensation claim for her injury. Although the insurance carrier did not deny coverage, C.G. felt more comfortable having an attorney to shepherd her through the process. She hired her first attorney in 1992. In December of 1993, when he became unable to continue the representation, C.G. hired Respondent to take over her case. At that time C.G. and Respondent entered into a contingent fee agreement which provided that Respondent would handle the claim before the Department of Labor & Industry and would be paid 20% of her permanent disability benefits as his fee.

When Respondent took over her case, C.G. was receiving temporary disability benefits from the carrier. The carrier was also paying her work-related medical bills. C.G. was also entitled to vocational rehabilitation services which she began to receive in October of 1992.

In the summer of 1994, Respondent took appropriate steps to prevent the carrier from terminating C.G.'s temporary disability benefits and the coverage for her massage therapy. The carrier made a second effort to terminate C.G.'s temporary disability benefits in November of 1994. Since

her treating doctors agreed that she had reached a medical end point, terminating temporary disability benefits was appropriate. Respondent negotiated a settlement with the carrier on C.G.'s permanent disability and in December of 1994, Respondent was paid pursuant to his fee agreement. From the outset of his representation of C.G. through 1997, Respondent kept abreast of C.G.'s case. He corresponded with her medical providers; received monthly reports from the voc rehab service provider; monitored the payment of her medical bills and mileage claims and met with C.G. and her vocational rehabilitation counselor numerous times. During that period Respondent ensured that C.G. was receiving appropriate benefits and kept C.G. reasonably informed about the status and progress of her case.

As of January of 1998 there were two remaining benefit issues to be resolved.

Vocational Rehabilitation Benefits.

In 1994 C.G. enrolled in an associate's degree program at Community College of Vermont. Her tuition was covered by grants, and the carrier agreed to pay for books and other expenses. During the summer of 1996, C.G. learned that she could obtain a bachelor's degree in Human Services at Springfield College in the same amount of time that it would take to complete her associate's degree at CCV. A bachelor's degree would make her eligible for a better position at the Area Agency on Aging, where she was working as an intern.

In August of 1996, Respondent advocated for the carrier to pay C.G.'s tuition and expenses for the bachelor's degree, but the carrier declined to do so and in October of 1996, the carrier discontinued voc rehab services. At that time, Respondent and C.G. decided to challenge the carrier's decision to discontinue voc rehab by seeking a hearing with the Department of Labor & Industry. They decided, however, to wait until after C.G. obtained her bachelor's degree so that they would have a firm figure for C.G.'s claim. The plan was for C.G. to pay for school through grants and loans, and then seek reimbursement from the carrier at a hearing.

C.G. completed the bachelor's degree program in December of 1997. Despite informing his client that they would pursue the issue, Respondent did not request a hearing on whether C.G. was entitled to receive additional voc rehab services to cover her tuition, and he did not take appropriate steps to bring the issue to resolution.

Massage Therapy.

In September of 1997, the carrier stopped paying for C.G.'s massage therapy and informed her that she could request a hearing if she disagreed with that action. Respondent told C.G. that he would request a hearing on the issue, and she continued to receive massage therapy at her own expense, expecting to be reimbursed if she was successful at the hearing. Respondent did not request a hearing on the issue of coverage for the

client's massage therapy, nor did he take appropriate steps to bring the issue to resolution.

It has been more than seven years since the carrier denied coverage for C.G.'s tuition, and it has been more than six years since she received her degree (the time at which Respondent had agreed to take action). It has also been more than six years since the carrier discontinued payment of C.G.'s massage therapy bills.

Respondent did perform some work on C.G.'s workers' compensation case after January of 1998. On July 2, 1998, Respondent wrote to her doctor, seeking a medical opinion to support the appropriateness of the charges for massage therapy and requesting copies of relevant medical records.

In 2000 or 2001, C.G. filed for bankruptcy protection. In connection with that proceeding, several attorneys inquired of Respondent as to the status of the workers' compensation claim. On March 29, 2001, and again in April of 2001, Respondent responded indicating that the tuition and massage issues were still pending. On September 13, 2002, Respondent wrote to C.G.'s doctor, seeking a medical opinion to support various outstanding issues in the workers' compensation claim, and requesting copies of relevant medical records.

On March 7, 2003, Respondent filled out the Department of Labor & Industry's Request for Hearing form. He sent a copy of the completed form

to C.G., but did not file the form with the Department of Labor & Industry.

On April 30, 2003, C.G. and Respondent spoke on the telephone. Respondent told her that he would work on her case diligently and promptly and that he would update her on a regular basis.

Between April 30, 2003 and June 23, 2003, Respondent learned from the Department of Labor & Industry that a different carrier was now responsible for C.G.'s case. On June 23, 2003, Respondent wrote to the successor carrier asking them to locate C.G.'s file, so they could discuss tuition reimbursement and massage therapy. A representative of the carrier called Respondent and informed him that they were unable to locate the file. To the best of C.G.'s recollection, she last spoke with Respondent on June 6, 2003. She left subsequent phone messages for him, but he did not return her calls. To the best of Respondent's recollection, he last spoke with C.G. in late June or July. He received perhaps one phone message from her thereafter, which he did not return.

Hearing nothing further about a hearing date or a resolution of her case, C.G. filed a complaint with the Office of Disciplinary Counsel on September 5, 2003.

On January 26, 2004, Deputy Disciplinary Counsel discussed the complaint with Respondent for the first time. During that conversation, she clarified for Respondent that it was appropriate for him to work on

C.G.'s case while her disciplinary complaint was pending.

On February 13, 2004, Respondent filed C.G.'s Request for Hearing with the Department of Labor & Industry. The request is now pending at the Department. On May 17, 2004, the Department held an informal telephone conference with Respondent and the insurance adjuster to consider C.G.'s claim for coverage of past and future massage therapy. Through Respondent's efforts the carrier will reimburse C.G. for massage therapy already received and will cover future massage therapy. C.G.'s claim for tuition reimbursement will be heard by the Department at a later date.

C.G. suffered actual and potential injury when Respondent neglected her case and failed to communicate with her, including: stress and anxiety; financial hardship; and physical discomfort from not receiving massage therapy after 2002, when she could no longer afford to pay for therapy herself.

To the extent that payment for, and continuing coverage of, C.G.'s massage therapy was delayed, C.G. suffered actual injury. Since the claim for tuition reimbursement remains pending, any injury arising from the neglect of this matter is potential rather than actual.

The following mitigating factors are present in this case: the absence of a prior disciplinary record; the absence of a dishonest or selfish motive; cooperation with the disciplinary proceedings and remorse.

Conclusions of Law

Respondent's representation of C.G. covers the period of 1993 through the present. Respondent's actions prior to September 1999 are covered by the Code of Professional Responsibility. The Rules of Professional Conduct apply thereafter. Both DR 6-101(A)(3) of the Code of Professional Responsibility and Rule 1.3 of the Rules of Professional Conduct provide that a lawyer shall not neglect a legal matter entrusted to him.

C.G. completed her degree at Springfield College in late 1997. It was then that Respondent had promised to request a hearing on the issue of reimbursement. At the same time, the carrier refused to pay for further massage therapy and told C.G. that she could request a hearing. Respondent did not follow through on either matter despite requests from his client. While he did some minimal work on her case, nothing effective was accomplished until C.G. filed a disciplinary complaint some six years later. No explanation is offered for the delay and we find that Respondent's neglect of C.G.'s case prior to September 1999 violates DR 6-101(A)(3) of the Code of Professional Responsibility and the subsequent neglect violates Rule 1.3 of the Rules of Professional Conduct.

Rule 1.4 of the Rules of Professional Conduct requires a lawyer to keep his client reasonably informed about the status of a matter and promptly to comply with reasonable requests for information. Prior to June

of 2003, Respondent spoke with his client about the representation as warranted. Thereafter, however, he did not keep her reasonably informed about the status of her case and did not return at least one telephone call to her. This conduct violates Rule 1.4 of the Rules of Professional Conduct.

Sanction

The parties join in recommending that the Panel impose the sanction of public reprimand. The Panel finds that the recommendation is in accord with other hearing panel decisions and with the ABA Standards for Imposing Lawyer Sanctions and accepts the recommendation.

The ABA Standards for Imposing Lawyer Sanctions suggest that "Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence and promptness in representing a client and causes injury or potential injury to a client." ABA Standards §4.43. Where the failure is knowing rather than negligent, the ABA Standards for Imposing Lawyer Sanctions suggest that suspension can be the appropriate sanction. ABA Standards §4.42. We do not need to reach the issue of whether Respondent's conduct was knowing or negligent since even if we were to find it knowing, the presence of substantial mitigating factors would argue for reprimand. Respondent has no prior disciplinary record and no dishonest or selfish motive. He has cooperated with the disciplinary proceedings and has expressed remorse for his conduct. ABA Standards §9.32.

In Vermont, the neglect of client matters and failure to keep clients informed of the status of their cases are among the most common violations on the disciplinary rules. Hearing Panels have generally imposed admonition where the neglect is minor and the client has suffered no actual or potential injury. Where the neglect has been ongoing and where the client has suffered actual injury, reprimand has been imposed.

In In re DiPalma, Decision No.44 (2003), the attorney received a public reprimand for neglecting a client's case and failing to keep his client informed. As in the present case, the delay was over a period of years. There was also the potential for harm, which was avoided by the actions of DiPalma's law firm. In In re Massucco, Decision No. 39 (2002), the attorney failed to distribute the assets of an estate in a timely manner. Again, the delay lasted several years and there was some harm to the clients.

Based upon these cases and the ABA Standards for Imposing Lawyer Sanctions, we believe that public reprimand is the appropriate sanction in this matter.

Conclusion

Respondent, Mark L. Stephen, is hereby PUBLICLY REPRIMANDED for violation of DR 6-101(A)(3) of the Rules of Professional Conduct and Rules

1.3 and 1.4 of the Vermont Rules of Professional Conduct.

Dated: September 7, 2004

FILED: SEPTEMBER 8, 2004

Hearing Panel No. 9

/s/

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Stephen Dardeck, Esq.

/s/

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Mary Gleason Harlow, Esq.

/s/

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Barbara Carris