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[Filed 26-Dec-2006]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No 2006.172

Decision No. 97

Respondent and Disciplinary Counsel filed stipulated facts and a recommendation that the hearing panel conclude that Respondent violated Rule 1.3 of the Vermont Rules of Professional Conduct in the context of four real estate closings in which he failed to take the necessary steps to conclude the transactions in a timely manner. The matter was heard on the issue of sanctions before Hearing Panel No.5 consisting of Robert Keiner, Esq., Elizabeth H. Miller, Esq. and Kim Montgomery, D.M.D. Disciplinary Counsel Beth DeBernardi was present as was Respondent. The Hearing Panel accepts the stipulated facts and concludes that Respondent violated Rule 1.3 of the Vermont Rules of Professional Conduct and orders that he be admonished and placed on probation for a period of eighteen months on the terms set forth below.

Facts

Respondent is a sole practitioner in a small town. He was first admitted to practice in 1997 in another jurisdiction and admitted in Vermont in 1999. He had no exposure to small town general practice until coming to Vermont. Initially litigation was a part of his practice, but after a time he determined that he would handle only transactional matters, such as real estate, estate planning and business law. His real estate practice began to accelerate in the summer of 2003, and he began to be overwhelmed by the volume of work. In June of 2004 he hired a full time employee, but since she had no real estate experience, it took some time to train her to become an effective assistant.

When Respondent began his practice he did not institute adequate file management procedures or a tickler system, the lack of which led to the problems that are the subject of these complaints.

South Londonderry Mortgage

Respondent represented a client who obtained a home equity loan on his residence. The transaction closed on June 24, 2005. It was subject to a three day right of rescission, and Respondent did not therefore immediately record the mortgage. He placed the mortgage in the file and forgot to record the documents. In August of 2005, the client entered into a contract to sell his home and was again represented by Respondent. The buyer's attorney did a title search on the property. He found no undischarged mortgages on the property and called Respondent to inquire. Respondent told the other attorney that there was a mortgage that had closed in June. The next day Respondent checked his file and discovered the unrecorded mortgage. He informed the buyer's attorney, and at the closing a check was made to the bank for the payoff on the mortgage which Respondent delivered to the bank on the day of the closing. Neither the client, the lender nor

any third party suffered any financial loss as a result of Respondent's failure to record the mortgage.

2004 Stratton Deed and Mortgage

Respondent represented clients in the purchase of property in Stratton. The closing was December 31, 2004. Respondent neglected to send the warranty deed and mortgage to the town clerk for recording. Some months after the closing Respondent received a call from the lender asking for copies of the recorded documents. Respondent looked for the documents, but was unable to find them. Eventually in January of 2006 Respondent found the documents which had been misfiled and archived. They were delivered to the town clerk for recording in April of 2006. At that time Respondent updated the title to insure that nothing had been recorded in the interim, informed the clients and provided them with copies of the documents. Neither the client, the lender nor any third party suffered any financial loss as a result of Respondent's failure to record these documents.

2005 Stratton Deed and Mortgage

Respondent represented a different set of clients in the purchase of another property in Stratton. The lender was the same. The closing on this transaction took place on January 6, 2005. Again, Respondent should have immediately delivered the documents to the town clerk for recording but neglected to do so. Some months later he received a call from the lender inquiring about the documents. Respondent looked for them and could not find them. The documents were eventually found in January of 2006. They too and been misfiled and archived. On March 23, 2006, Respondent delivered the documents to the town clerk and updated the title. He informed the clients what had happened and provided them with copies of the recorded documents. Neither the client, the lender nor any third party suffered any financial loss as a result of Respondent's failure to record the documents.

In the period prior to the two Stratton closings, Respondent's assistant began working. They tried streamlining practices and were archiving old files. In both of these matters the documents were misfiled and archived making it necessary to go through every file in the office to locate them. Respondent's assistant is now experienced, and he is able to delegate more tasks to her. They have developed and use checklists and maintain a separate file for documents subject to the three day right of rescission.

Dorset Fire District Charges

Respondent represented a buyer in the purchase of property in Dorset in September of 2004. At the closing the amount of $105 was due to the fire district and Respondent wrote a check for that amount. After closing he held the check aside briefly while he obtained the mailing address for the check. Respondent recalls that the check was mailed on September 24, 2004. Assuming that Respondent's recollection is correct, the check was either lost in the mail or misplaced by the fire district. Some time later a representative of the fire district called Respondent's client seeking payment. The client called Respondent who made calls to the fire district in an attempt to follow up. Finally in April of 2006, Respondent issued a new check to the fire district including interest which he paid from his

own funds. Respondent now realizes that he should just have immediately stopped payment on the original check and issued a new check. Neither the client nor any third party suffered any financial loss as a result of Respondent's neglect.

Mitigating and Aggravating Factors

The following mitigating factors are present: absence of a prior disciplinary record, absence of a dishonest or selfish motive, full and free disclosure in the disciplinary process and cooperation with disciplinary counsel, inexperience in the practice of law and remorse. In addition, Respondent kept the relevant parties fully informed about the situation of the missing documents and check. Apparently no client became irritated with Respondent. He still does business with the bank involved and did not lose clients as a result of his negligence. There are no aggravating factors.

As part of the joint filings the parties recommended that the Hearing Panel order a Risk Management Audit of Respondent's firm. This had been accomplished just prior to the hearing, but Respondent had not yet received the report.

Conclusion of Law

The parties join in recommending that we find a violation of Rule 1.3 of the Vermont Rules of Professional Conduct which provides that "[a] lawyer shall act with reasonable diligence and promptness in representing clients." In three of these cases Respondent failed to record documents immediately after the closing or the expiration of the period of rescission. In the third he failed to make the required payment to the fire district. Immediate recording of documents and disbursal of funds is essential in a real estate practice. Failure to do so puts both the landowner and the lender at risk and violates Rule 1.3.

Sanctions

Disciplinary Counsel argues, and with some justification, that reprimand is the appropriate sanction in this matter. In determining the sanction in a disciplinary case it is appropriate to apply the ABA Standards for Imposing Lawyer Discipline. In re Warren, 167 Vt. 259, 261 (1997); In re Berk, 157 Vt. 524, 532 (1991). In applying the ABA Standards we look at the duty violated, the lawyer's mental state and the injury or potential injury, to arrive at a presumptive sanction. Aggravating or mitigating factors are then considered to determine if the presumptive sanction should be either increased or decreased.

Respondent violated the duty to his clients to act with reasonable diligence and promptness. In failing to record the real estate documents and to follow up on the fire district payments, Respondent's mental state was one of negligence. The issue of injury is a more difficult one to address. Clearly there was no actual injury. We do not even find the frustrated and angry client that usually accompanies complaints of neglect, since Respondent kept them informed. There was, however, the potential for serious injury. Had another creditor secured a mortgage or attachment on either of the Stratton properties or the South Londonderry property, or had the owners stopped paying on their mortgages, there was the potential for serious injury to the landowners and the bank. We do not in any way seek

to diminish the seriousness of the potential for injury in this case, and as Disciplinary Counsel points out, the ABA Standards for Imposing Lawyer Discipline suggest that "[r]eprimand 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." (emphasis added) Section 4.4

Alternatively, "[a]dmonition is generally appropriate when a lawyer is negligent and does not act with reasonable diligence and promptness in representing a client, and causes little or no actual or potential injury." We cannot say that there was no potential for injury in this case, and thus the presumptive sanction should be reprimand.

The are two other factors that might lead us to order reprimand rather than admonition as a sanction. The first is the fact that this was not one incident but four. Each involves a different client, though they all result from Respondent's lack of proper office procedures and occur during a discrete six month period. The other factor which concerns us is the delay between the discovery that the documents were not recorded and their final recording. Especially troubling is the delay between the actual location of the documents and the recording with the Town Clerk, which in the 2004 Stratton case was almost three months. We are concerned that Respondent did not appreciate the absolute necessity for prompt recording of documents.

We now look to the mitigating factors set forth in the ABA Standards for Imposing Lawyer Discipline. Respondent is a relatively inexperienced attorney, §9.32(f); he has no prior disciplinary record, §9.32(a); he had no dishonest or selfish motive, §9.32(b); he has made full and free disclosure to disciplinary counsel, and has cooperated with the proceedings, §9.32(e), and he feels genuine remorse for his conduct. §9.32(l). Respondent also offered in mitigation the fact that he was suffering from what his doctor described as "mild depression not needing treatment." We do not believe that this rises to the level of "physical or mental disability or impairment" contemplated by the mitigating factors set forth in the ABA Standards. §9.32(h). Nor do we believe that his wife's loss of her job and the unexpected birth of another child are matters to be considered in determining a sanction. These are events of ordinary life, and it is the responsibility of the attorney to manage his practice in conjunction with such occurrences in his personal life.

There are no aggravating factors and the mitigating factors could be sufficient to reduce the presumptive sanction to admonition. In order to confirm this decision we turn to Vermont professional conduct cases. In general, the misconduct in this case was more serious than most admonition cases and less so than most reprimand cases. In PRB Decision No. 47 (2002), Respondent failed to send the required 2.5% withholding to the state after a real estate closing. When the matter was brought to his attention, Respondent acted quickly to remedy the situation.

In PRB Decision No. 56 (2003), Respondent failed to send out all of the required payoff checks after a real estate closing. The Respondent sent the required checks as soon as the oversight was brought to his attention. PRB Decision No. 68 (2004) also arose in the context of a real estate transaction and is very similar.

In each of these cases there was only one incident, and in each Respondent acted quickly to remedy the oversight. In each there were

mitigating factors, and an admonition was ordered. Here we are faced with four transactions and a delay in acting upon discovery of the problem. The misconduct is more serious, and the difficult question for the panel is whether it is serious enough to warrant reprimand.

We turn now to recent reprimand cases in which the Respondent was found not to have acted with diligence and promptness. In In re Farrar, Decision No. 82 (2005), Respondent neglected a litigation matter and failed to keep his client informed. There was actual injury to the client and Respondent was an experienced attorney with one prior discipline.

In In re Stephen, PRB Decision No. 71(2004), Respondent failed to resolve benefit issues in a worker's compensation case. The delay was over a period of years, and it was also found that Respondent filed to keep his client informed about the status of her case and the client suffered actual injury.

In In re DiPalma, PRB Decision No 44, the neglect was again combined with failure to keep the client informed. The delay was over a period of years and there was actual injury to the client.

We believe that each of these cases is more serious than the case before us now. We believe that the DiPalma case is also instructive in the approach employed by the Hearing Panel. The Panel noted that once DiPalma's firm discovered the misconduct, the firm instituted file review practices to protect clients, and counseling and mentoring to assist DiPalma in improving his case management practices. Client protection and rehabilitation of the attorney were as important as the sanction imposed by that Hearing Panel.

Respondent appears to us a diligent and hard working attorney who values and cultivates his client relationships. His first and only practice experience has been as a solo practitioner, and starting out he did not have the practical knowledge and business skills needed for a successful practice in which clients matters are efficiently handled and monitored to conclusion.

It is apparent that Respondent realized that he needed help in mid-2004 and, from his testimony, we believe that he has begun to put in place systems that would prevent recurrence of this type of failure to follow through on matters. He also engaged the risk management audit in advance of this hearing and appears committed to implementing better management practices.

Despite Respondent's present commitment to better case management, the Hearing Panel is committed to a sanction that insures that clients are protected and that Respondent receives the necessary training and mentorship that will prevent the recurrence of the negligence now before us. We believe that admonition, together with probation, will underscore to Respondent that his conduct was unacceptable, will provide him with the tools necessary for his practice, and will protect his clients during this period of training and into the future.

Order

Respondent is hereby admonished for violation of Rule 1.3 of the Vermont Rules of Professional Conduct and is placed on disciplinary

probation under the following conditions:

1. The term of probation shall be eighteen months from the date this order becomes final and shall not be terminated unless or until Respondent complies with the provisions of Rule 8(a)(6) of Administrative Order 9.

2. Upon receipt of the report of the recent Risk Management Audit, Respondent shall provide a copy to Disciplinary Counsel and shall promptly implement all reasonable suggestions contained in the report. An explanation of how Respondent is implementing these suggestions shall be included in the reports to Disciplinary Counsel required under paragraph 10.

3. Respondent shall obtain another Risk Management Audit in 12 months. Again this shall be shared with Disciplinary Counsel, the suggestions implemented, and an explanation of how Respondent is implementing these suggestions included in the reports to Disciplinary Counsel required under paragraph 10.

4. As soon as practicable Respondent shall attend Continuing Legal Education programs that offer at least three credit hours of Real Estate Law and three credit hours of Law Office Management. In order to satisfy this provision, the choice of program shall be approved by Disciplinary Counsel.

5. Respondent shall associate with another experienced attorney who will agree to mentor him during the course of his probation. Respondent's choice of a mentor shall be approved by Disciplinary Counsel.

6. Respondent shall meet with his probation mentor at least monthly to discuss issues relating to best practices and any recent changes in real estate law and law office management.

7. Respondent shall accept and implement all reasonable suggestions offered by the mentor.

8. If Respondent misses a scheduled meeting without notifying the mentor in advance, or if he goes more than eight weeks without meeting with his mentor, the mentor shall report this fact to Disciplinary Counsel.

9. Respondent shall permit and authorize his mentor to respond to Disciplinary Counsel's requests for information relating to Respondent's compliance with the mentoring arrangement and his probation.

10. Respondent shall secure from his mentor a brief report summarizing each meeting, including any recommendations made pursuant to this agreement, and Respondent shall file a copy of the report with Disciplinary Counsel within three weeks of the meeting with his mentor.

11. Respondent shall bear all costs and expenses related to compliance with the probation and mentoring.

12. In the event that Respondent is unable to secure a mentor, or if the agreed upon mentor is unable to continue to serve, Respondent shall immediately notify Disciplinary Counsel and, as soon as possible, find a replacement mentor. Respondent's choice of a replacement mentor must be

approved by Disciplinary Counsel. If Respondent is not able to secure a new mentor within eight weeks of the departure of his mentor, Respondent shall report this fact to Disciplinary Counsel while continuing the mentor search and shall follow any recommendations Disciplinary Counsel shall make in this regard.

13. Should Respondent fail to comply with the terms of probation, Disciplinary Counsel may move for an immediate interim suspension under Rule 18 of Administrative Order 9.

Dated: December 26, 2006
FILED: DECEMBER 26, 2006

/s/
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Robert Keiner, Esq.

/s/
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Elizabeth H. Miller, Esq.

/s/
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Kim Montgomery, D.M.D.