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[Filed 18-Jun-2007]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: Matthew Colburn, Esq.
PRB File Nos. 2006.200, 2006.251, 2006.267

Decision No. 102

Respondent is charged with several violations of the Vermont Rules of Professional Conduct in connection with misrepresentations made to three separate clients about the progress of their litigation. Respondent and Disciplinary Counsel stipulated to the facts and joined in a recommendation that we find the violations and impose a three year suspension. Respondent also waived certain procedural rights including the right to an evidentiary hearing.

The matter was heard on May 14, 2007, on the issue of sanctions before Hearing Panel No. 3, consisting of Leo Bisson, Esq., Peter Bluhm, Esq. and Paul Rumley. Disciplinary Counsel Michael Kennedy was present as well as Respondent and his attorney David Putter. The Hearing Panel finds that Respondent neglected matters entrusted to him, failed to keep his clients informed about their cases, engaged in conduct involving dishonesty, deceit and misrepresentation, which conduct adversely reflects on his fitness to practice law, in violation of Rules 1.3, 1.4(a), 8.4(c) and 8.4(h) of the Vermont Rules of Professional Conduct. Respondent is suspended for a period of three years.

Facts

PRB File No. 2006.200

In May of 2001, the CJ family bought a home in Morrisville. Within weeks of moving in, rain came through the walls necessitating the replacement of a significant amount of rotted drywall. Shortly thereafter, two of the CJ children became sick. Initially the parents could not determine what had made the children sick, but in the course of repairing a pipe that had come out of the wall, the CJs discovered mold along an entire wall which had been covered up with sheet rock. They took a sample of the mold to the doctor who told them that the mold had caused the children's illness.

In the summer of 2001, the CJs found several exposed electrical wires in the house. They also learned that the foundation was cracked, and that the house needed to be jacked up to keep it stable. The CJs suspected that the sellers knew of and failed to disclose many of the problems with the house and decided to seek legal advice. They found Respondent's name in the phone book, and met with him in August of 2001. Respondent agreed to represent them in their claims against the seller and the seller's real estate agent, and the CJs signed a retainer agreement with Respondent.

In September of 2001, there was a fire in the CJ home caused by faulty chimney construction. Shortly thereafter, they discovered that there was a swimming pool buried in the back yard which interfered with water drainage.

Also that fall, the CJs began having problems with their septic system. When the leach field was dug up, they discovered that the seller had taken actions to hide problems with the leach field. The CJs asked Respondent to include these other claims in the suit against the seller and the realtor.

The CJs were in regular contact with Respondent through the winter of 2001-2002, and Respondent sent them a draft complaint in December of 2001. They made some changes and sent it back to Respondent. Respondent also sent letters to the seller and the realtor and received responses from both denying liability.

On February 25, 2002, Respondent filed the complaint in the Lamoille Superior Court but never made service on the defendants. In May of 2002, the court informed Respondent that he had not filed proof of service. Respondent received the letter but took no action and did not inform the CJs.

In May of 2003 the court again wrote to Respondent telling him that the suit would be subject to dismissal unless he filed proof of service within ten days. Again, Respondent received the letter but took no action and did not inform the CJs.

Between February of 2002 and May of 2003, Respondent led the CJs to believe that their case was pending in court, when in fact he knew that the defendants had not been served.

In May of 2003, Respondent went to the CJ's home purportedly to inspect in preparation of trial. In December of that year he asked the CJ's to send money to cover deposition costs. When he asked for the funds, Respondent knew that there was no pending case and that no depositions were scheduled. The CJs sent $600 which was placed in the firm's trust account. It was never drawn out until it was returned to the CJ's in 2006.

On September 1, 2004, the court dismissed the CJ's complaint for failure to make service. In the spring of 2005, Respondent told the CJs that he had reached a settlement with the defendants' attorneys, and that the only remaining issue to be worked out was the amount each defendant would contribute to the settlement. When he told this to the CJs, Respondent knew that the case had been dismissed, and that there was in fact no settlement.

Through the summer and fall of 2005 the CJs called Respondent for updates, and each time Respondent provided a different reason why the settlement was not yet final. In November of 2005, Respondent called the CJs and told them that he and the defendants' attorneys had agreed to settle the case for $125,000. The CJs were about to leave for vacation, and Respondent told them that he would have a check for them on their return. Upon returning, the CJs called Respondent. He told them that he had not received the check, but expected it soon.

In December of 2005, the CJs applied to become foster parents. A state employee visited their home to determine if it was a suitable placement, and inquired about some of the structural problems. She was told by the CJs that they had just settled their case, and that they would use the money to rebuild. The state employee said that she would need to verify the settlement, and a few days later, she called the CJs and told them that the case had in fact been closed since September of 2004, a fact

which the CJs verified by going to the court and speaking with a clerk.

The CJs were in fairly regular contact with Respondent from the fall of 2001 until February of 2006. From August of 2001 through February 2006, Respondent sent regular bills to the CJs for services which he had not performed. During the period of April 2002 through July of 2006 Respondent billed the CJs for 24 separate occasions of deposition preparation, though he knew that he had done no such work.

During the three year period beginning in December of 2002, Respondent billed the CJs for at least 18 conversations with unnamed attorneys though Respondent knew that the conversations had not taken place. He also billed for two conversations with a named attorney which had not taken place and for work related to the preparation of a motion for summary judgment which he had not done. Respondent continued to send bills for services that he claimed to have performed, but had not, in order to perpetuate his misrepresentation that he was continuing to prosecute the CJs case.

The CJs lost no funds in legal fees, and eventually they were able to pursue their claim. They have also engaged an attorney to represent them in a claim against Respondent's former firm.

PRB File No. 2006.125

In June or July of 2005 the WLs engaged Respondent to represent them in connection with a mortgage they had taken back on the sale of a campground. The WLs believed that the purchaser had buried barrels of waste water sewage on the property which put the security of their mortgage at risk. Respondent agreed to file a foreclosure action against the new owners of the campground. Throughout the summer and fall of 2005, the WLs left frequent phone and email messages for Respondent seeking updates on their case. Respondent answered some of the inquiries but not all. In November of 2005 one of the WLs spoke with Respondent. He led her to believe that he had filed the foreclosure action in the superior court and that it would take 12 to 18 months to get to trial. In fact, Respondent had not filed any foreclosure action and knew this to be the case.

In March of 2006 Respondent's firm terminated his employment, and his former partners informed the WLs that no foreclosure had been filed. The WLs agreed to let Respondent's former partners take over the case.

PRB File No. 2006.067

TD retained Respondent in February of 2003. At that time she was out of work with a work related injury. She had been cleared to return to work, but her employer refused to take her back. Respondent agreed to file suit against TD's former employer on a contingent fee basis. TD advanced $185 to cover the costs of filing and service which was placed in Respondent's trust account. Shortly after being retained, Respondent drafted a complaint for TD's review. Later, Respondent told TD that he had filed the suit, though he had not done so. Over the next three years, TD made several calls a month asking for updates on her case. Respondent always had an excuse why the case was not resolved. He would tell TD that he had not heard from the court, or that he was waiting for information from the court or opposing counsel, though in fact Respondent knew that suit had not been filed, and that therefore there was no case to discuss.

In early October of 2005, Respondent told TD that her employer had offered to settle the case for $5000, although Respondent knew that he had not filed suit and had not discussed settlement with the purported defendant. TD agreed to accept the offer. Respondent told her that he would send her the settlement paperwork. On October 12, 2005, TD called Respondent to inquire about the status of the paper work. Respondent told her he had not yet received it from opposing counsel. In December of 2005, TD called Respondent and told him that the "deal was off." Respondent never filed suit on TD's behalf and never notified her employer of the claim.

In July of 2005 Respondent's partners asked for an update on TD's claim. He told one of the partners that the case was no good, and that he would not be pursuing it. The partner instructed him to send a disengagement letter to TD and to refund her retainer. Respondent drafted the letter, showed it to his partners, and told them that he had sent it, though in fact he knew that he had never sent the letter. His former partners have since returned TD's retainer.

Other Facts

Respondent was admitted to the Vermont bar in 1992. He has been in private practice since then, forming his own firm in 1999 where he remained a partner until the firm terminated his employment in March of 2006. Since that time Respondent has not taken any clients and has not had a steady source of income, although he is working part-time at a non-legal job.

Respondent was married in 1986 and divorced in 2000. He has two teenage sons. During the period of the above complaints, Respondent experienced the death of his mother and one of his two brothers, both from long debilitating illnesses. The divorce and the illness and subsequent death of his mother and his brother caused emotional problems for Respondent.

Under the auspices of the Vermont Lawyers Helping Lawyers EAP, Respondent met for five sessions with a licensed psychologist. The psychologist did not testify, but his report to Respondent's counsel was included as part of the stipulated facts. The psychologist diagnoses Respondent as suffering from depression and Posttraumatic Stress Disorder coupled with dissociative process. The psychologist believes that Respondent's emotional illness can be treated, and that it would take approximately two years of weekly sessions, during which time Respondent would need to also refrain from the social use of alcohol.

In his testimony Respondent accepted full responsibility for his actions. He acknowledged that he hurt good people and is sorry. He knows that his behavior was wrong and has no explanation for his conduct.

Conclusions of Law

In each of these three cases Respondent is charged with violating Rule 1.4(a) of the Vermont Rules of Professional Conduct by failing to keep his clients reasonably informed about the status of their cases; with violating Rule 8.4(c) by misrepresenting to his clients the true status of their cases, with violating Rule 8.4(h) by engaging in a pattern of conduct that adversely reflects on his fitness to practice law, and in the second two cases with violating Rule 1.3 by failing to act with due diligence in

representing his clients. Respondent has stipulated to a finding of these violations. It does not take much discussion to conclude that agreeing to represent someone in a litigation matter, failing to do the work and then misrepresenting to the client the true status of the case violates these rules, and we so find.

Sanctions

The parties have stipulated to a recommendation of a three year suspension and the only real question before the Hearing Panel is whether to accept the stipulation or to impose a harsher sanction. Egregious as Respondent's conduct was, our purpose is not to punish. Rather, sanctions are intended "to protect the public from harm and to maintain confidence in our legal institutions by deterring future misconduct." In re Hunter, 167 Vt. 219, 226 (1997). We believe that these objectives can be achieved with a three year suspension and that this sanction is in accord with both the ABA Standards for Imposing Lawyer Discipline and prior Vermont decisions.

ABA Standards

The ABA Standards for Imposing Lawyer Discipline look to four factors in determining a presumptive sanction. The first is the duty violated. Here we have found Respondent violated his duty to his clients. The second inquiry is to determine the attorney's mental state - whether he acted intentionally, knowingly or negligently. In the present case, the actions were clearly intentional. Respondent knew that he had not done the work, when he represented to his clients that their cases were progressing toward conclusion. The next inquiry is into the extent of actual or potential harm. There was actual harm in that these clients were deprived of having their cases concluded in a timely manner, and there was the potential for serious harm had the statute of limitations run or had another occurrence prevented full presentation of their cases to the court. After examining these four factors, the final inquiry is into the presence of aggravating and mitigating factors. ABA Standards Section II Theoretical Framework.

In cases involving fraud, deceit or misrepresentation, the ABA Standards recommend disbarment where the deception is knowing, and is done for the purpose of benefiting the lawyer or another, §4.61, and suspension in cases where the deception is knowing and causes injury or potential injury, §4.62. Respondent's conduct fits more appropriately under the suspension provisions. His deceptions did provide him with a temporary benefit by postponing accountability for his past failures. However, the deceptions were defensive and were intended merely to disguise his failings. The Respondent did bill the CJs $600 for work that he did not do. However, those funds were placed in the client's trust account and ultimately were returned to the client. We contrast this to a case in which, for example, a lawyer has lied to a client in order to improperly convert the client's funds to his or her own use. Because Respondent did not benefit personally, except by delaying accountability, we read the standard narrowly, and conclude that he satisfies the ABA Standard that there was no intention to benefit Respondent or any other person.

Similarly, in looking at the ABA Standards covering cases involving lack of diligence, disbarment is recommended where there is knowing neglect or failure to act, and serious or potentially serious injury, §4.41. Suspension is recommended where there is a knowing failure and injury or potential injury §4.42. Under these provisions, suspension is the

appropriate sanction.

Vermont Law

Suspension is also in accord with Vermont case law. In the case of In re Harrington, PRB Decision No. 53 (2003), the Hearing Panel noted that "[t]he Supreme Court has generally reserved disbarment for serious criminal activity involving fraudulent behavior and substantial harm." Since this decision, there have been several more disbarment cases involving criminal behavior: In re McGinn, PRB Decision No. 77 (2005), $650,000 shortfall in clients trust and a plea in federal court to mail fraud; In re Sinnott, PRB Decision No. 79 (2005), bankruptcy scheme and criminal prosecution; In re Daly PRB Decision No. 87 (2006) pleas of guilty in federal criminal prosecution; In re Ruggerio, PRB Decision No. 88, federal criminal conviction for mail fraud involving misappropriation of client funds. The only other disbarment case since Harrington involved long term use of client trust funds for the lawyer's benefit. In re Harwood, PRB Decision No. 83 (2006).

Respondent's conduct clearly does not rise to the level of these cases, especially when we consider the mitigating factor of his mental disability or impairment, ABA Standards, §9.32d(h).

We also believe that three years is an appropriate term for the suspension. Respondent's psychologist believes that he needs two years of weekly treatment for a successful outcome. A three year period is sufficient to permit Respondent to complete treatment and will protect the public. Should Respondent wish to return to the practice of law he will be required to present to a hearing panel clear and convincing evidence that he is fit to practice law, and we would anticipate that such panel would wish to inquire into the resolution of the mental problems enumerated by Respondent's present psychologist.

Order

Matthew Colburn is hereby SUSPENDED from the practice of law for a period of three years commencing on the date this decision becomes final. Respondent shall promptly comply with the provisions of A.O.9, Rule 23.

Dated June 12, 2007 Hearing Panel No. 3

FILED June 18, 2007

/s/
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Leo Bisson, Esq., Chair

/s/
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Peter Bluhm, Esq.

/s/
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Paul Rumley