

104 PRB

[Filed 18-Jan-2008]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No 2007.202

Decision No: 104

Respondent is charged with failing to abide by his client's objectives and with lack of diligence in his representation of an heir in a probate court proceeding. The parties filed a stipulation of facts as well as conclusions of law and recommendations on sanctions. The 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 violation of Rules 1.2(a) and 1.3 of the Vermont Rules of Professional Conduct.

Facts

Respondent's client, JS, was one of two heirs of his mother's estate. The other heir, his sister, had handled his mother's affairs pursuant to a power of attorney executed in 1996, five years prior to the mother's death from Alzheimer's Dementia. The disease had its onset at approximately the same time as the execution of the power of attorney. Prior to his mother's death, JS suspected that his sister was embezzling money from his mother and asked to review his mother's financial records. In December of 1997 the mother sold her house, and JS believes that his sister opened an account for their mother at Salomon Smith Barney, but he does not know whether his sister deposited all of the sale proceeds from the house in the account.

The mother died in June of 2001, and a Vermont lawyer was appointed as her executor pursuant to the terms of the will. In August of 2001, JS met with Respondent. Respondent recalls that the purpose of the meeting was to ask general questions about the estate and to determine if things were being handled correctly. Both Respondent and JS believed that JS could obtain the information that he wanted directly from the executor, and he did not retain Respondent at that time. JS has a severe hearing impairment and cannot use the phone. All of his dealings with Respondent were either in person or by letter.

JS prepared and filed a notice of appearance in the probate court. His notice documents that he was primarily concerned with obtaining a full accounting of his sister's activities, and he asked the executor to provide him with his mother's bank statements and her Salomon Smith Barney statements dating back to 1995.

Over the course of 2001 and 2002 the executor produced some Salomon Smith Barney statements, the earliest being from December 1998, but he never produced a complete set and never produced any bank statements.

JS grew frustrated with the executor's failure to provide information, and in February of 2002 met again with Respondent. JS expressed his concern that the estate was taking too long to administer and indicated a distrust of the executor. After the meeting JS wrote to Respondent with a list of questions about the estate. Respondent replied that he would require a \$500 retainer. They met again in July of 2002. JS paid the retainer, and Respondent entered his appearance in the probate court. Respondent had several telephone conversations with the executor who assured him that nothing improper had occurred prior to the mother's death and

that the estate was proceeding in a normal fashion. The executor's representations were credible and Respondent believed them.

Respondent also reviewed the Salomon Smith Barney records which had been provided to JS and found nothing to arouse his suspicions.

In December of 2002 JS wrote to Respondent expressing both his disappointment that they still did not have complete financial records and his concern that there might be a statute of limitations problem if the records were not forthcoming soon. JS again raised the statute of limitations issue in a letter of January 5, 2003. In February of 2003 Respondent received a letter from the executor offering to search for further financial records, but also suggesting that it might not be a wise use of the estate's limited financial resources. JS wrote to Respondent on February 18 that he wanted the executor to look for the earlier records, but Respondent never made the request of the executor.

Respondent wrote to JS in late February of 2003 offering to prepare written discovery for the estate if JS would provide him with five or so precise questions to be answered. JS responded in March that he wanted the financial records to examine first so that he would be able to ask appropriate questions. JS wrote to Respondent again in April reiterating his objective.

Respondent did not believe that written discovery would achieve a favorable result, and in April of 2003 Respondent wrote to JS returning his financial records and urging him to put the matter behind him. Both JS and Respondent understand that Respondent's active representation came to an end with that letter.

On May 2, 2003, JS's sister died and on May 14, 2003, the executor wrote to Respondent that JS and his sister had agreed to a partial distribution and enclosed a check payable to JS in the amount of \$10,000. In fact, JS had never agreed to the distribution, since he still believed that there was money missing from the estate. Respondent forwarded the check to JS who refused it. On July 1, 2003, Respondent wrote to the court that he had not known that his client would refuse the check. He wrote that he did not believe that the estate had been mishandled and that he was sorry that his client "cannot put this to rest."

The statute of limitations on the claim that the sister embezzled money from her mother ran on August 14, 2003. The opportunity to question the sister under oath ended with her death in May of 2002. Respondent's conduct had the potential to cause financial injury, but whether or not there was actual injury is unknown. Respondent's conduct caused emotional injury to JS due to his frustration in investigating his sister's handling of their mother's affairs.

There are three aggravating factors present. Respondent has two prior private admonitions, one in 1982 and one in 1992, neither of which involved lack of diligence. In addition, JS was a vulnerable victim due to his hearing impairment, and Respondent has substantial experience in the practice of law. He was admitted to practice in Vermont in 1973.

There are also mitigating factors. Respondent cooperated with the disciplinary proceedings, the prior offenses were remote in time and Respondent had no dishonest or selfish motive. Respondent believed that past embezzlement was extremely unlikely as was any mishandling of the estate by the executor. Respondent honestly believed that it would be in his client's best interest to let go of his concerns and move on with his life, thus reducing the emotional injury to JS.

Respondent also believed that a more thorough investigation was not a good use of his client's financial resources, and that it would be inappropriate to do additional work and charge additional fees for work that he believed was extremely unlikely to result in a net recovery for the client.

Conclusions of Law

Rule 1.2(a) of the Vermont Rules of Professional Conduct provides that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. . . ."

JS's objective was to obtain a complete set of specific financial records; if those records indicated financial impropriety, then he wanted to pursue appropriate legal remedies. Respondent did not abide by his client's decision concerning the objective of the representation. Instead, after speaking with the executor and reviewing only a partial set of financial records, Respondent concluded that it was unlikely that any financial impropriety had occurred. Respondent thus did not make a concerted effort to obtain the financial records, but instead advised his client to be satisfied that the executor had handled matters reputably and to put the matter behind him. This disregard of his client's objective was in violation of Rule 1.2(a).

Rule 1.3 of the Rules of Professional Conduct provides that a lawyer "shall act with reasonable diligence and promptness in representing a client."

JS first consulted with Respondent in July of 2001, but JS did not hire Respondent to represent him until July 17, 2002. Respondent actively represented JS from July 17, 2002 until April 10, 2003.

During this nine month period, Respondent spoke with the executor and the probate clerk, and he reviewed the incomplete set of financial records that his client had provided to him. He also met with JS on several occasions. However, Respondent took no affirmative steps to obtain the rest of the financial records, nor did he seek to question the executor about her handling of funds under the procedures established in Title 14, Chapter 73. Further, Respondent did not advise JS of the statute of limitations. Overall, Respondent's effort demonstrated a lack of diligence and promptness in the representation of his client.

The Hearing Panel concludes that Respondent violated Rules 1.2(a) and 1.3 of the Vermont Rules of Professional Conduct.

Sanctions

In Vermont it is appropriate to apply the *ABA Standards for Imposing Lawyer Discipline* to determine the sanction in a disciplinary case. *In re Warren*, 167 Vt. 259 (1997). *The ABA Standards* enumerate four factors relevant to the determination of the appropriate sanction: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury, and (4) any mitigating and/or aggravating factors. *ABA Standards*, §3.0 (1991 edition); *In re Warren*, 167 Vt. At 261. An analysis of these factors demonstrates that an admonition is an appropriate sanction for Respondent's conduct in this case.

1. The Duty Violated

A lawyer has a duty to his client to act with reasonable diligence and promptness. *ABA Standards, Section 4.4*. Respondent violated that duty by failing to vigorously pursue his client's objectives with respect to the obtaining of financial records.

2. The Lawyer's Mental State

The *ABA Standards* require an examination of Respondent's mental state to determine whether he acted intentionally, knowingly or negligently. In the instant case, Respondent acted negligently.

3. Injury or Potential Injury

JS had concerns that his sister had been taking financial advantage of their mother prior to their mother's death. Because JS had never received a complete set of the financial records, he was unable to review those documents for evidence of misappropriation. Now it is too late for the estate to pursue legal remedies to recover funds, if, in fact, funds were misappropriated. Because it is unknown whether funds were actually misappropriated, this harm constitutes potential injury under the *ABA Standards*.

As to actual injury, JS was frustrated in his efforts to deal with his mother's estate and found the experience stressful and emotionally difficult.

4. Presumptive Sanction

a. The *ABA Standards*

Based on the factors set for the above, the *ABA Standards* guide the sanctioning authority toward a reprimand. In §4.43, the *ABA Standards* note 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 to a client."

b. Aggravating and mitigating factors

After suggesting a presumptive sanction, the *ABA Standards* advise consideration of any aggravating or mitigating factors. The aggravating factors in this matter are Respondent's substantial (30 years) experience in the practice of law, *ABA Standards* §9.22(i); the client's vulnerability due to his hearing disability, *ABA Standards* §9.22(h), and two prior admonitions, *ABA Standards* §9.22(a). Neither of the prior admonitions involved any lack of diligence or promptness; accordingly, Respondent's conduct in the instant case does not establish a pattern of lack of diligence over time.

There are three mitigating factors. First, Respondent has cooperated with the disciplinary process. *ABA Standards* §9.32(e.) Second, the two instances of prior discipline are quite remote in time, one dating back to 1982 and the other to 1992. *ABA Standards* §9.32(m.)

In addition, Respondent did not act from a selfish or dishonest motive, *ABA Standards*, §9.32(b). After looking at the situation over a period of nine months, Respondent concluded that the likelihood of financial improprieties was very small and that his client would be better served, financially and emotionally by not pursuing the matter further. This conclusion does not excuse Respondent's failure to act diligently in seeking his client's objectives during the nine months of representation, but it suggests that Respondent did what he thought was best for his client.

Conclusion

Based on the forgoing, we accept the recommendation and order that Respondent be admonished by Disciplinary Counsel for violation of Rules 1.2(a) and 1.3 of the Vermont Rules of Professional Conduct.

Dated: **January 18, 2008**

Hearing Panel No. 3

/s/

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Leo Bisson, Esq., Chair

/s/

Oreste Valsangiacomo, Jr., Esq.

/s/

Paul Rumley