

113 PRB

[Filed 18-Aug-2008]

STATE OF VERMONT

PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2008.129

Decision No. 113

The parties filed a Stipulation of Facts and Joint Recommendations as to Conclusion of Law and Sanctions. The Hearing Panel accepts the stipulated facts and the recommendations and orders that Respondent be admonished by Disciplinary Counsel for violation of Rule 8.4(c) of the Vermont Rules of Professional Conduct. Respondent filed electronically a bankruptcy plan indicating that debtors had signed the plan, when in fact they had not done so.

Facts

In late September of 2007 Respondent received a call from a woman who said that she and her husband were interested in filing for bankruptcy protection because their home was scheduled to be sold at a foreclosure auction in October.

Respondent met with the wife on October 12, 2007. After reviewing the client's financial situation, Respondent recommended that the couple file for protection under Chapter 13. At the initial meeting with the wife, Respondent reviewed the mandatory disclosure forms and provided copies for her to give to her husband as well as a receipt for the husband to sign acknowledging his receipt of the disclosure forms. Respondent also advised the wife of the requirement that that the couple undergo mandatory credit counseling and obtain written certification that they had done so.

That same day Respondent prepared the bankruptcy petition and emailed it to the wife for signature by both husband and wife. Three days later, Respondent received written certifications from the client confirming that she and her husband had completed the mandatory credit counseling. The

next day Respondent received the signed Chapter 13 bankruptcy petition and a signed receipt from the husband indicating that he had received the mandatory disclosure statements. That same day Respondent filed the bankruptcy petition electronically with the bankruptcy court. This filing put into place an automatic stay which prevented the home from being sold in a foreclosure auction scheduled for that day.

The next step in the bankruptcy process was to file a Chapter 13 Plan with the court, setting forth a debt repayment schedule. Respondent spoke on the phone with the wife a number of times over the course of the next few weeks about different options for the payment schedule. During that time Respondent obtained several extensions of the deadline for filing the plan.

Respondent spoke with the wife on the phone on November 19 or 20, and in that conversation the wife indicated that the proposed plan was acceptable. She gave Respondent verbal approval of the plan and indicated that both she and her husband would promptly sign and return the plan that had been sent to them.

Based on the wife's consent to the plan and her representation that both she and her husband would promptly sign and return the plan, Respondent filed the plan with the court electronically. The electronically filed version of the plan indicated that it had been signed.

When Respondent did not receive the signed copy in the mail, she called the wife who indicated that the plan had been damaged in the mail and that she needed another one.

Shortly thereafter it came to light that the husband did not approve of the bankruptcy, and that the husband's signatures on the documents which had been provided to Respondent were not his genuine signatures. Respondent was completely taken by surprise by these circumstances. She made a timely and good faith effort to rectify the situation by recommending that the wife find new counsel, by filing a motion to withdraw and by cooperating with the husband's new counsel in having his name expunged from the bankruptcy.

When Respondent filed the Chapter 13 Plan electronically, she had the wife's verbal consent to the plan and was relying on the client's past course of conduct in which the client had always promptly returned signed documents to Respondent. When an electronic version of a plan is filed, the form automatically completes the debtor's signature by adding the notation "/s/" followed by the debtor's name. Respondent did not specifically add this notation to the form, but failed to "uncheck" the box. By electronically filing a plan which indicated that the plan had been signed by the client, Respondent made a misrepresentation which undermined the integrity of the electronic filing system.

There are several mitigating factors present. Respondent has no prior disciplinary record, had no selfish or dishonest motive, has cooperated with the disciplinary proceedings and made a timely good faith effort to rectify the consequences of her misconduct. The only aggravating factor is Respondent's substantial experience in the practice of law. She was admitted to practice in Vermont in 1987.

Conclusion of Law

The Hearing Panel accepts the recommendation of the parties and we find that Respondent violated Rule 8.4(c) of the Vermont Rules of Professional Conduct which provides that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

Respondent had no reason to doubt that both debtors were in the process of signing the plan and returning it to her, but her filing of the plan constituted a representation to the court that the document had been signed, a fact which she had not verified prior to filing.

There is no evidence that Respondent intended to mislead the court or to commit any fraud. We find that her conduct was a “misrepresentation” under Rule 8.4(c), but does not rise to the level of conduct involving “dishonesty, fraud [or] deceit.”

The facts in this case are similar to that of *In re Free*, PCB Decision No. 62 (1993). In that case Respondent had represented the husband in a divorce. The divorce decree awarded the husband the right to collect a promissory note payable to both husband and wife. Four years after the divorce, Respondent brought suit to collect the note, naming both the husband and wife as plaintiffs. In doing so Respondent relied on the terms of the note and failed to recall that the right to collect the note had been awarded to the husband.

The Professional Conduct Board found that, by including the wife’s name in the collection suit, Respondent made a misrepresentation to the court that he represented her in violation of DR 1-102(A)(4) of the Code of Professional Responsibility, even though Respondent had no intent to defraud or deceive.

The present case is directly in line with this case and we find that Respondent’s misrepresentation violated Rule 8.4(c).

Sanction

In determining sanctions, it is appropriate to look to the ABA Standards for Imposing Lawyer Discipline as well as case law. *In re Warren*, 167 Vt. 259, 261 (1997). The ABA Standards require that we look at the recommended sanction and then determine if it should be modified by the presence of mitigating or aggravating factors.

Section 6.13 of the ABA Standards provides: “Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false . . . and causes injury or potential injury to a party to the legal proceedings, or causes an adverse or potentially adverse effect on the legal proceeding.”

Section 6.14 provides: “Admonition is generally appropriate when a lawyer engages in an isolated instance of neglect in determining whether submitted statements or documents are false . . . and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding.”

The present situation involves a single act of negligence. The real distinction under the two cited ABA Standards is the extent and character of the injury. The injury which we must look at here is the injury or potential injury to the integrity of the court's electronic filing system. The proximate cause of the harm to the husband, having to engage counsel to have his name expunged from the bankruptcy petition, was not the electronic filing by Respondent, but rather his wife's sending to Respondent the joint bankruptcy petition bearing his purported signature in the first place.

There is no evidence of harm to the legal system or to the specific bankruptcy proceeding, and thus the facts fall more within the range of admonition. This conclusion is strengthened by consideration of the aggravating and mitigating factors. Respondent has no prior disciplinary record, ABA Standards, § 9.32(a), had no selfish or dishonest motive, ABA Standards, § 9.32(b), cooperated with Disciplinary Counsel, ABA Standards, § 9.32(e), and made a timely good faith effort to rectify the situation. ABA Standards, § 9.32(d).

The one aggravating factor, Respondent's substantial experience in the practice of law, ABA Standards, § 9.22(i), in our opinion, does not warrant the imposition of a sanction greater than admonition.

Admonition is also consistent with Vermont case law. In the Free case cited above, the sanction was reprimand, but there were other violations of the code and more substantial aggravating factors. Thus the Free case is not good precedent on the issue of sanctions.

A more helpful precedent is In re PRB Decision No. 93 (2006). In this case the attorney handled a real estate closing and, after waiting the three day right of rescission period, disbursed the funds from her trust account without first determining whether the bank had in fact wired the funds. In fact, due to an error on the part of the bank, the funds had not been wired. The attorney was admonished for violation of the trust account rules. Like Respondent in this case, that attorney assumed that things would happen as expected, and acted without first confirming the actual facts.

Another case, with arguably more serious facts also resulted in admonition. In re PCB Decision No. 141 (1991). Respondent in that case was upset with his client because she owed him money for attorney's fees. The client wanted the attorney to continue to represent her and made a partial payment. The lawyer nevertheless filed a motion to withdraw and represented to the court that the client had discharged him which was untrue. In PCB Decision No. 141 the misrepresentation to the court was deliberate and knowing rather than negligent as in the present case.

An admonition is also consistent Administrative Order 9 which provides: "Only in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer, should an admonition be imposed." No client was injured in this case, no evidence is presented of injury to the legal system and we do not believe that there is a likelihood of repetition.

Order

For the foregoing reasons, Respondent shall be admonished by Disciplinary Counsel for violation of Rule 8.4(c) of the Vermont Rules of Professional Conduct.

Dated: August 18, 2008

Hearing Panel No. 5

FILED: 8/18/08

/s/

Robert Keiner, Esq., Chair

/s/

Elizabeth H. Miller, Esq.

/s/

Kim Montgomery, D.M.D.