

STATE OF VERMONT  
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2012.129

Decision No. 153

The parties have filed a Stipulation of Facts, proposed Conclusions of Law and a Recommendation for Sanctions. The Respondent has waived certain procedural rights, including the right to an evidentiary hearing. The panel accepts the stipulated facts and recommendations and orders that Respondent be admonished by disciplinary counsel for delay in handling the final matters in a probate estate in violation of Rule 1.3 of the Vermont Rules of Professional Conduct.

**Facts**

In October of 2009, Complainant's brother died. Shortly thereafter he hired Respondent to assist with the probate of the estate. Complainant was the executor and handled most of the affairs of the estate. In August of 2010 he informed Respondent that he had completed his tasks and that it was time for Respondent to take the final steps which included preparing the accounting and obtaining a tax clearance. Respondent agreed to handle these two matters and assured Complainant that the process would be wrapped up as soon as possible.

Complainant did not hear from Respondent during the next four months and became frustrated with the lack of progress. Between February 2, 2011, and November 28, 2011, Complainant called and emailed Respondent multiple times in an effort to move the estate to completion. Respondent did not reply to every call or email but did generally respond and apologized for the lack of progress and promised prompt action,

though he then failed to carry through on his promises. He was trying to maintain an optimistic and positive approach in the face of difficulties in his personal life at that time. He did not intentionally mislead Complainant.

In August of 2011, Respondent obtained the tax clearance but had not completed the accounting. In November of 2011 he emailed Complainant that he would “send you the documents tomorrow,” which he did not do. After waiting three weeks, Complainant filed a complaint with Disciplinary Counsel. After verifying that Complainant still wanted his assistance with the estate, Respondent filed the accounting and the proposed decree of distribution with the probate court on February 10, 2012. The account was approved in April 2012 and the decree issued. The estate closing report and the discharge of the executor are now awaiting court approval, at which time the estate will be closed.

Complainant suffered minor injury as a result of the neglect of his brother’s estate. The process was emotionally difficult and was made more so by the long delay. Complainant was frustrated that he was unable to get Respondent to complete the work in a timely fashion and by the fall of 2011, he began to experience sleepless nights as a result.

During this period Respondent’s law practice was impacted by unavoidable health issues. Respondent did not, however, make appropriate arrangements to either complete the estate or to recommend transfer to another attorney who could complete it in a timely manner.

### **Aggravating and Mitigating Factors**

In aggravation, Respondent has one prior disciplinary offense. There are several mitigating factors; family health issues discussed below, cooperation with the

disciplinary proceedings, absence of a dishonest or selfish motive remorse and the remoteness of the prior disciplinary offense.

### **Health Issues**

In mid-July of 2010, Respondent's wife began a rapid descent into debilitating back pain. As a result, Respondent had to care for his wife, three children and their household while also running his law practice. Respondent and his wife made multiple trips to doctors in Vermont, New Hampshire and New York seeking treatment. In November of 2010, she underwent spinal surgery. The surgery was successful, but she developed complications and required additional surgery in January of 2011. Her condition began to improve in the months thereafter.

In the fall of 2011, Respondent caught a respiratory infection. He began to miss work in his office on October 24, 2011. In January of 2012 the infection developed into asthma, and Respondent suffered severe breathing difficulties. His health did not begin to improve until February of 2012.

In addition, at the onset of his illness Respondent was without an office assistant for a period of four weeks. Respondent and his wife are healthy again and he is now able to devote sufficient attention to his law practice.

### **Conclusion Law**

Rule 1.3 of the Vermont Rules of Professional Conduct requires that: [a] lawyer shall act with reasonable diligence and promptness in representing a client.”

It was just a year between the time Complainant told Respondent that the estate was ready for him to take the final steps and the date that Respondent obtained a tax clearance. It was another six months after that when the accounting was filed. This is an

unreasonable delay and violates Rule 1.3.

### **Sanction**

We accept the parties' recommendation of admonition by disciplinary counsel. We are guided by the ABA Standards for Imposing Lawyer Discipline and prior Vermont decisions.

The Vermont Supreme Court has long approved the use of the ABA Standards in determining the appropriate sanction. "When sanctioning attorney misconduct, we have adopted the ABA Standards for Imposing Lawyer Discipline which requires us to weigh the duty violated, the attorney's mental state, the actual or potential injury caused by the misconduct, and the existence of aggravating or mitigating factors." *In re Andres*, 177 Vt. 511, 513, 857 A.2d 803, 807 (2004).

In failing to wrap up the estate in a timely fashion, Respondent violated his duty to his client to act with reasonable diligence and promptness. *ABA Standards* § 4.4. His mental state was one of negligence. He did not intentionally fail to perform the work, but was unable to get to it.

There was no financial injury, but the client suffered frustration and sleeplessness at the delay.

Based upon these factors, the presumptive sanction under the ABA Standards would be public reprimand. "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." § 4.43.

The next step is to consider whether this sanction should be changed due to the presence of aggravating or mitigating circumstances.

The only aggravating factor here is one instance of prior discipline. *ABA Standards § 9.22(a)*.

There are a number of mitigating factors and collectively we give them substantial weight. First, Respondent had no selfish or dishonest motive, *ABA Standards § 9.32(b)*. He made full and free disclosure to disciplinary counsel and cooperated with the proceedings. *ABA Standards § 9.32(e)*. He has expressed remorse to his client during the representation, and he remains sorry that he did not handle the matter more promptly, *ABA Standards § 9.32(l)*.

The fourth mitigating factor is the remoteness of prior discipline. In 2004-2006, when Respondent was a relatively new attorney starting his own practice, he failed to set up an effective system for following up on real estate matters after closing and as a result he neglected to follow up on several matters. He was admonished and placed on probation. PRB Decision No. 97 (2006).

It has been five years since the prior discipline and the conduct here is different from that seen in the prior case and we consider it remote.

The final and most substantial mitigating factor is the health issues of both Respondent and his wife. His wife's health issues arose in July of 2010 and did not start to resolve until after her final surgery on January of 2011. During this time Respondent had to devote more time to dealing with household and children as well as support his wife through her medical treatment.

Respondent's own health issues began in the fall of 2011 and did not begin to improve until February of 2012. Both of these health issues were unanticipated and took longer to resolve than could have been expected.

We consider this to be a substantial mitigating factor, *ABA Standards § 9.32(c)*, and taken in conjunction with the other mitigating factors is sufficient to reduce the presumptive sanction from reprimand to admonition.

Admonition is also consistent with prior hearing panel decisions. In *PRB Decision No. 131 (2010)*, an attorney was admonished for failing to provide his clients with a written title opinion in a timely fashion. The panel noted that under the ABA Standards either reprimand or admonition would be appropriate, but due to mitigating factors chose admonition. See also *PRB Decision No.125 (2009)* in which the panel chose admonition over reprimand due to mitigating factors.

**Order**

Respondent shall be admonished by Disciplinary Counsel for violation of Rule 1.3 of the Vermont Rules of Professional Conduct.

Dated: August 20, 2012

Hearing Panel No. 2

Theodore C. Kramer

Theodore C. Kramer, Esq., Chair

Jean Brewster Giddings  
Jean Brewster Giddings, Esq.

Christopher G. Chapman  
Christopher G. Chapman

