

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: John Burke
PRB Docket No. 2013.280

Decision No. 175

This matter was heard on the issue of sanction on June 17, 2014, before Hearing Panel Number 10, Danielle Fogarty, Esq., Chair, Joseph O'Dea, Esq. and Roger Preuss. Respondent was present as was Deputy Disciplinary Counsel Kimberly Rubin. The panel orders that Respondent be publicly reprimanded for his failure to act with diligence and promptness in handling an estate, his failure to keep his client informed about the case in violation of Rules 1.3, 1.4(a)(3) and 1.4(a)(4) of the Vermont Rules of Professional Conduct and failing to cooperate with the Office of Disciplinary Counsel (ODC) in violation of Rule 7D of Administrative Order 9.

Procedural History

Respondent was served with the Petition of Misconduct on March 17, 2014. The Petition informed Respondent of his obligation under A.O. 9 Rule 11(D)(3) to file an answer to the Petition within 20 days of service. Respondent failed to file an answer and did not ask for additional time to respond. On May 7, 2014, Deputy Disciplinary Counsel filed a Motion to Deem the Charges Admitted pursuant to A.O. 9, Rule 11(D)(3). Respondent did not reply to the Motion and by Order of the

Hearing Panel dated June 5, 2014, the charges in the Petition of Misconduct were deemed admitted.

Facts

Respondent is currently licensed to practice in Vermont, having been admitted in 1975.

In April of 2011, Respondent was contacted by an Ohio attorney for assistance in transferring property in Vermont owned by her client. The following day that Ohio attorney notified Respondent that the client had died, and one of Respondent's employees emailed back asking if Respondent's office could be of help.

In August of 2011, the Ohio attorney sent Respondent a letter seeking transfer of the decedent's property to decedent's son. Two months later, Respondent sent a letter in reply asking for a \$1000.00 retainer and enclosing the paperwork necessary to open the estate. At that time Respondent advised that the delay in opening an estate was due to the fact that the Probate Court was sending older records to be placed on microfilm.

On November 29, 2011, the Ohio attorney's staff sent Respondent the requested retainer and the executed probate forms. On April 30, 2012, the Ohio attorney's staff sent an email to Respondent following up the status of the matter and informing him that the Executrix wished to sell the Vermont property. Respondent did not answer this email.

On June 22, 2012, the Ohio attorney emailed Respondent requesting a status report. She received no reply. In addition the Executrix of the estate left numerous voice messages which were not returned.

On May 1, 2013, Respondent told the Executrix that he was filing the papers that day and would let her know the next day if more was needed from her. Respondent did not file the paperwork in May as promised nor did he get back to the Executrix.

On May 2, 2013, the Ohio attorney's staff contacted the Probate Court and learned that no estate had been opened for the decedent.

On May 22, 2013 the Ohio attorney sent a final request for a status update before filing a professional conduct complaint. She received no answer and filed a complaint with the ODC on June 24, 2013.

On June 24, 2013, the ODC sent Respondent a letter advising him of the complaint and that his answer was due on July 15, 2013. Respondent did not answer by the deadline and on July 19, 2103, the ODC sent a reminder that his answer was late. On July 26, 2013, Respondent wrote to the ODC requesting a two week extension of time to respond to the complaint. He did not file a response and on August 27, 2013, the ODC sent him a certified letter asking for his answer.

On September 16, 2013, Respondent filed the Petition to open the estate and two days later, following a phone call from Disciplinary Counsel, provided an answer to the complaint. The time between receipt of the completed documents from the Executrix and the filing of the probate documents was approximately 22

months. The delay in filing a response to the disciplinary complaint was three months.

On October 22, 2013, Deputy Disciplinary Counsel sent Respondent a letter outlining his options for resolving the matter and asking for a response by November 21, 2013. She received no response and on December 5, 2013, sent Respondent a letter by certified mail, return receipt requested, asking for a response by December 15, 2013, and advising him that if he failed to respond that she would seek a charge of failure to cooperate with the disciplinary process. The ODC received no response, although Respondent did sign the acknowledgment that he received the December 5, 2013, letter.

On February 18, 2014, the ODC informed Respondent by certified mail that probable cause had been found and again detailing Respondent's option for resolution of the matter. Respondent signed the return receipt but again failed to contact the ODC.

The Petition of Misconduct was filed March 17, 2014. Respondent never filed an answer to the petition.

The delay in opening the estate caused actual injury to the out-of-state client. She was delayed in putting the Vermont property on the market and suffered stress and anxiety due to the delay and lack of response from Respondent.

Respondent testified that at some point during the period of the delay, he had had a flood in his office and in the clean up things were misplaced, among them the probate papers.

Respondent also suffers from a medical condition which has affected his eyesight. During a part of this period of delay his vision was poor. He has since had surgery and things have improved. In addition, in early 2011 he was appointed to a three year term as Chairman of the Committee on Telecommunications of the National Association of Regulatory Utility Commissioners. This was a demanding position and required frequent travel.

While all of these factors might have had some affect on Respondent's ability to keep up with his obligations to his clients, the panel was not persuaded that any one of these was a substantial factor in causing the delay.

While Respondent sent the ODC a response to the original complaint, he never answered the Petition of Misconduct which required an answer within 20 days. Respondent's testimony that he felt that he had already provided an answer to the ODC and did not need to do anything in addition was unpersuasive. It appears to the panel more likely that he did not want to acknowledge the consequences of his failure to serve his client.

Respondent freely acknowledged that he neglected this matter. He regrets that it happened and is embarrassed that he did not handle it better.

Conclusions of Law

Rule 1.3 of the Vermont Rules of Professional Conduct provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." Respondent violated this rule when he failed to take any action at all in opening an estate for a period of approximately 22 months.

Rule 1.4(a)(3) provides that a lawyer shall “keep the client reasonably informed about the status of the matter.” Rule 1.4(a)(4) requires a lawyer to “promptly comply with reasonable requests for information.” Respondent violated these two rules by his repeated failure to communicate with both the forwarding attorney and the Executrix when they were seeking information about the progress of the estate.

Administrative Order 9, Rule 7 (D) provides that one of the grounds for discipline of attorneys is “[f]ailure to furnish information to or respond to a request from disciplinary counsel . . . without reasonable grounds for refusing to do so.” Respondent offered no convincing reason for the long delay in responding to the complaint despite numerous reminders and generous extensions of time from the ODC and we find a violation of this rule.

Sanctions

Deputy Disciplinary Counsel recommends that we impose public reprimand for these violations. Respondent concedes that discipline is appropriate in this matter and did not strongly argue against this sanction.

We also believe that the sanction is consistent with the ABA Standards for Imposing Lawyer Discipline and prior Vermont case law.

The ABA Standards require us to look at the duty violated, the attorney’s mental state, any actual or potential injury and the existence of aggravating or mitigating factors. Attorneys owe a duty both to their clients and to the profession.

Respondent's duty to his client was to probate the estate in a timely fashion and to keep his client and the Ohio attorney informed about the case and to provide them with requested information.

An attorney's duty to the profession is to cooperate with the disciplinary process which is predicated on receiving cooperation from attorneys. This makes for efficient operation and works to enhance the public perception of lawyers and in the profession's ability to administer a prompt and efficient system of self-discipline. An attorney's failure to cooperate with the process has a negative effect on both of these objectives.

In determining the level of sanction, the attorney's mental state is an important factor. Intentional violation of the rules may be sanctioned more severely than negligent behavior.

In the petition of misconduct, all of which has been deemed admitted, the ODC characterized Respondent's conduct as knowing or intentional. Deputy Disciplinary Counsel conceded at the hearing that the evidence did not support that finding, and that she was more comfortable with a finding of negligence. We agree and find that Respondent's mental state was one of negligence.

In this case there was actual injury in the stress and anxiety caused to the Executrix by the delay and by her fruitless efforts to contact Respondent. We do not know if the delay in opening the estate caused actual monetary damages.

Section 4.4 of the ABA Standards provides that reprimand is “generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client and causes injury or potential injury to a client.”

Similarly, section 4.63 provides that reprimand is appropriate “when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client.”

Were we to have found that Respondent’s mental state was knowing or intentional it might have been appropriate to impose suspension. We do not, however, believe that the violations warrant suspension.

There are two aggravating factors. The first is Respondent’s substantial experience in the practice of law, *ABA Standards §9.22(i)*. The second is his obstruction of the disciplinary process by failure to communicate with the ODC, *ABA Standards 9.22(e)*. We give some weight to these factors in our decision.

In mitigation we can consider the flood in Respondent’s law office, *ABA Standards §9.32(c)*(personal problems) and his vision problems, *ABA Standards §9.32(h)*(physical disability). Respondent failed to make a credible connection between his misconduct and either the flood or his vision problems and we give them little weight.

Reprimand is also consistent with Vermont cases.

In a similar case, *In re PRB Decision No. 149*, (Jan. 2012), the attorney neglected an estate and failed to cooperate with disciplinary counsel. The hearing panel considered reprimand in that case, but imposed admonition with probation

based in large part on substantial mitigating factors which had been resolved by the time of the hearing. The sanction in another case involving neglect, lack of communication with clients and failure to cooperate with Disciplinary Counsel, *In re PRB Decision No. 137* (Feb. 2011), was also reduced from reprimand to admonition because of substantial mitigating factors.

In the present case, we have similar misconduct, but without the mitigating factors that would suggest that the sanction be reduced.

Order

Respondent is publicly reprimanded for violation of Rules 1.3, 1.4(a)(3) and 1.4(a)(4) of the Vermont Rules of Professional Conduct and Rule 7D of Administrative Order 9.

Dated: 9/2/14

Hearing Panel No. 10

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