

STATE OF VERMONT  
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2013.150

Decision No. 178

The parties have filed a Stipulation of Facts, Recommended 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 the recommended conclusions of law and orders that Respondent be admonished by Disciplinary Counsel for violation of Rule 1.4(a)(3) of the Vermont Rules of Professional Conduct for failing to keep his client reasonably informed about the status of a criminal case.

**Facts**

Respondent was admitted to practice law in Vermont in 1987. His present private practice includes case assignments from the Defender General to represent clients in post conviction relief (PCR) matters.

MP is a former resident of Vermont who is currently incarcerated in Kentucky for a criminal conviction in Vermont. In March of 2011, he filed a PCR action alleging ineffective assistance of counsel in his criminal case. He was appointed counsel who worked on the case through May 1, 2012, at which time she moved to withdraw. On May 8, 2012, Respondent entered his appearance on behalf of MP.

One of MP's concerns with Respondent is his prior relationship with another attorney. MP brought this to Respondent's attention and in June of 2012 Respondent wrote MP stating that he had no professional relationship with this attorney and that there

was no problem.

The court held a status conference in the matter on July 31, 2012, at which time the court issued an oral order that Respondent file a memorandum and argument by October 1, 2012, with the State to respond by November 1, 2012.

In September of 2012, Respondent wrote to MP stating that there had been a status conference and that he would let MP know when the hearing would be. He apologized for the delay, stating that he had been out of the country dealing with an unrelated matter. He made no mention of the requirement for filings.

On October 29, 2012, the court issued an order indicating that since no filings were received the case would be dismissed unless Respondent showed some basis for his failure to reply. Respondent made no filings and on November 21, 2012, the court dismissed the PCR action based on Respondent's failure to abide by the court's previous orders.

On December 20, 2012, Respondent filed a motion to reinstate the PCR action explaining to the court that because of his travelling to deal with his father's health problems and his own health issues which had required hospitalization, he had not received the October 29, 2012 order and did not see the November 21, 2012 order dismissing the action until mid-December.

The court reinstated the PCR action in January of 2013, "[g]iven the extenuating circumstances". Shortly thereafter MP requested a new attorney, and Respondent filed a motion to withdraw. The court granted the motion and another attorney was assigned to represent MP.

Respondent did not communicate with MP about the court's October 29, 2012,

order, the November 21, 2012, dismissal, his motion to reinstate or the court's order reinstating the matter.

In January of 2013, MP filed a complaint against Respondent alleging that he had failed to communicate with him at all. He also alleges that Respondent had a conflict due to his association with another lawyer and that Respondent never addressed this. This is not entirely accurate. Respondent had addressed the conflict issue and had communicated about the status conference, albeit not completely. It is his failure to communicate further that gives rise to the violation.

There was no actual harm to MP since the PCR case was reinstated and new counsel was appointed.

There are a number of mitigating factors present. Respondent has no prior disciplinary record, he had no dishonest or selfish motive and has expressed remorse. He also had serious personal problems. During Respondent's representation of MP, he was travelling to deal with his father's medical issues and he was himself experiencing pain and mobility problems which required hospitalization. There are no aggravating factors.

### **Conclusions of Law**

Rule 1.4 (a)(3) of the Vermont Rules of Professional Conduct provides that a lawyer shall "keep the client reasonably informed about the status of the matter."

Despite MP's allegations that Respondent never communicated with him, it does not appear that the entire course of this representation is flawed. MP had a concern about Respondent's relationship with another attorney and Respondent addressed this by letter in June of 2012. He also wrote to MP on September 8, 2012, about the July status conference. He could have been more prompt in this communication, but taken by itself

we do not believe that it rises to the level of a violation of Rule 1.4(a)(3).

It is when Respondent's leaves to deal with his father's health problems and also experiences health problems of his own requiring hospitalization, that his failure to communicate with MP raises concerns. It was incumbent on Respondent to communicate to MP the fact that his case had been dismissed, that he was filing a motion to reinstate and that the court had indeed reinstated the matter. The comment to Rule 1.4(a)(3) suggests that it "requires that the lawyer keep the client reasonably informed about the status of the matter, such as **significant developments** affecting the timing or the substance of the representation (emphasis added)." Respondent violated this Rule when he failed to communicate about the dismissal of the PCR action and his own steps to reinstate it.

### **Sanctions**

The parties have recommended that Respondent be admonished by Disciplinary Counsel. This sanction is consistent with both the ABA Standards for Imposing Lawyer Sanctions and Vermont case law and we accept the recommendation.

### ABA Standards

The ABA Standards require that we look at the duty violated, the lawyer's mental state and the extent of actual or potential injury to arrive at a presumptive sanction. We then look to aggravating or mitigating factors to assess whether that sanction should be modified.

The situation in the present case fits most closely within Section 4.44 of the ABA Standards which provides that "[a]dmonition is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes

and causes little or no actual or potential injury to a client.”

Respondent had a duty to keep his client reasonably informed about the status of his case which he failed to do. Respondent did not intentionally fail to communicate with his client, rather his failure to act promptly was as a result of negligence brought about by his health problems and those of his father.

There was no actual injury to MP. When Respondent realized that the matter had been dismissed he took the necessary action to have it reinstated and moved to withdraw at MP’s request.

There are no aggravating factors present, and the mitigating factors only serve to support the imposition of admonition. Respondent has no prior disciplinary record, *ABA Standards §9.32(a)*, he had no dishonest or selfish motive, *ABA Standards §9.32(b)*, he has expressed remorse, *ABA Standards §9.32(e)*, and has cooperated with the disciplinary process, *ABA Standards §9.32(a)*.

It appears that Respondent stopped communicating with MP at the same time that both he and his father were experiencing serious medical problems, an additional mitigating factor *ABA Standards §9.32(c)*. From the facts presented to the panel, it does not appear that Respondent had any partner or associate available to step in to take care of his practice during this emergency. It is incumbent on all attorneys to make arrangements to cover their caseload in such events; and had Respondent had such a plan in place, the misconduct in this case could well have been avoided. Rule 1.3 of the Rules of Professional Conduct requires that a lawyer “act with reasonable diligence and promptness in representing a client. The Comment to this section makes it clear that this obligation continues in the event of the death or disability of an attorney. “To prevent

neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent attorney to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action."

#### Vermont Case Law

Admonition is also consistent with Vermont cases on failure to communicate. In *In re PRB Decision No. 131* (2010), the attorney was admonished for failure to return phone calls or emails over a three month period. He was also charged with neglecting the client's matter.

In an earlier admonition case, the panel made it clear that failure to communicate is separate and distinct from neglect. *In re PRB Decision No. 94* (2006). In that case, the attorney was taking appropriate steps to work on the client's social security claim, but had stopped communicating and failed to return calls.

The present case can be distinguished from *In re Carroll, PRB Decision No. 73* (2005), in which the attorney was publicly reprimanded for failing to return most of the 83 phone calls that his client made over a two year period. Public reprimand was appropriate in the *Carroll* case due to the number of calls, the length of time and the fact that in that case there was "serious potential for harm to [the complainant's] claim against his father's estate." The present case is distinguishable in terms of both the length of time, the number of attempted contacts and the lack of serious harm.

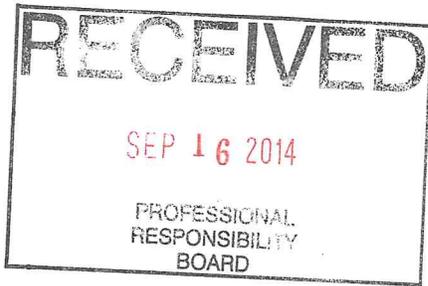
#### **Order**

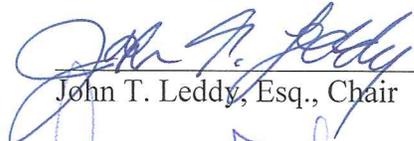
Based upon the foregoing, we order that Respondent be admonished by

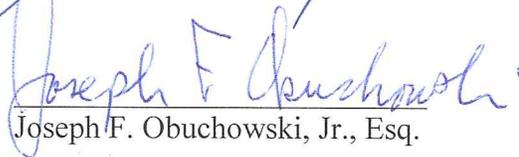
disciplinary counsel for violation of Rule 1.4(a)(3) of the Vermont Rules of Professional Conduct.

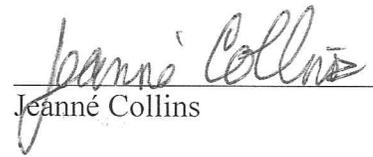
Dated: September 16, 2014

Hearing Panel No. 8



  
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John T. Leddy, Esq., Chair

  
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Joseph F. Obuchowski, Jr., Esq.

  
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Jeanné Collins