111.PCB

[4-Oct-1996]

STATE OF VERMONT
PROFESSIONAL CONDUCT BOARD

RE: Anonymous Attorney
PCB Docket No. 92.27

NOTICE OF DECISION

DECISION NO. 111

We have reviewed the hearing panel's report in which the panel found that Respondent violated DR 6-101(A)(3) by engaging in conduct which involved negligence in his failure to act with reasonable diligence in representing a client. We do not agree, however, with the panel's recommendation for a public reprimand and will issue an admonition.

Procedural History

A petition of misconduct was filed by bar counsel. Specifically, bar counsel alleged that Respondent violated DR 1- 102(A)(5), DR 6-101(A)(2) and DR 6-101(A)(3).

The matter was heard before a hearing panel. Evidence in support of the petition was presented by bar counsel and Respondent represented himself.

The panel submitted its report to us. Both parties were given an ample amount of time to submit briefs in accordance with A.O. 9, Rule 8D. Both parties filed briefs and both parties appeared before the board for a Rule 8D hearing.

FACTS

Respondent was admitted to practice law in the state of Vermont in 1983 and is currently on active status. He was admitted to the bar of Pennsylvania in 1977.

In July of 1987, Respondent agreed to represent a husband and wife (hereinafter referred to as "Complainants") in a claim against a car dealership (hereinafter referred to as "dealership"). Despite accepting this case on a contingency fee basis, Respondent did not realistically expect to receive any compensation. On the same day, Respondent also agreed to represent Complainants free-of-charge in a related case involving a lending institution (hereinafter referred to as "bank"). Complainants purchased a vehicle from the dealership with money they borrowed from the bank. When the car's transmission failed and the dealership refused to honor the warranty, Complainants stopped making payments to bank.

Subsequent to buying the car, Complainants learned that the car had been substantially wrecked prior to their purchase. Complainants told Respondent they were not informed of this at the time of sale.

Accordingly, Respondent promptly began to investigate the title of the car through New York and Canada. By the end of 1987 or early 1988, Respondent had the documents establishing that the car had been wrecked.

Before filing suit against the dealership, Respondent wanted to see the bill of sale confirming Complainants' claim that it did not indicate that the car had been wrecked. Complainants had lost their copy. At one point during Respondent's testimony, he indicated that he had obtained the bill of sale by 1988. Respondent later testified that he did not receive the bill of sale until discovery in the dealership case began.

Between July and November 1987, Respondent talked with an attorney who had represented the dealership (hereinafter referred to as "attorney") in the past and attempted to convince him to intercede with the bank so as to avoid repossession of the car. He also spoke with officers of the bank. Respondent, however, did not instruct the employees of the bank to negotiate directly with him or request that they not speak with Complainants even though he knew that one of the bank's employees was being unreasonable.

In November 1987, two individuals arrived at Complainants' home to repossess the vehicle. Complainant's wife was alone at her home at the time and felt scared. At their request, Complainant's wife signed a voluntary repossession agreement. The car was auctioned in January 1988.

During the first several months of 1988, the bank sent letters to Complainants indicating they were behind on their mortgage and still owed money on the car loan. The letters suggested that it might be possible to combine the car loan with their mortgage. Complainants did not wish to combine the loans. In accordance with Complainants' wishes, Respondent declined the bank's offer to combine the loans.

In a letter to Complainants dated May 5, 1988, Respondent indicated that a demand was going out to the dealership that week. That demand never went out. Respondent gave several reasons for not sending out the demand letter, including he did not have the bill of sale, Complainants had not forwarded $150 for costs as requested, and that he wanted to continue to negotiate with the bank. Each of these reasons was known to Respondent at the time he mailed the May 5th letter.

The bank filed a deficiency lawsuit against Complainants on August 24, 1988, seeking $3,819.81, plus collection costs, including reasonable attorney's fees, and interest of $1.05 per day from August 1, 1988. Respondent filed an answer and counterclaim on September 2, 1988. In the counterclaim, Respondent alleged that the dealership sold the car to Complainants without disclosing that it had been wrecked.

Discovery and negotiation in the bank's case continued throughout 1989. A compromise and settlement agreement was executed by the attorneys on January 5, 1990. The settlement agreement was a complex document. Respondent did not meet with Complainant/husband, who is barely literate, to discuss the details of the settlement document. Complainant's wife took the six-page document home and read it to her husband. Complainant/husband then executed it.

Under the agreement, Complainants assigned $4,200 plus 12% interest of any judgment recovered from the dealership. There were provisions in

the agreement for a lesser assignment if the proceeds from the dealership were less than $4,200. Additionally, the bank had the option of obtaining judgment against Complainants pursuant to this agreement after one year, regardless of the status of the Complainants' suit against the dealership. If a judgment issued, the agreement prevented the bank from filing a lien against Complainants' real property.

From the early months of 1988 until the time of the settlement agreement in January 1990, Respondent did not pursue Complainants' claim against the dealership. Respondent wanted to wait to file a complaint against the dealership until the case with the bank was resolved. Respondent knew the dealership did business with the bank and was hoping the bank would go to the dealership and convince them to reach an agreement with Complainants.

Respondent knew it was in his clients' best interest to act within a year of the settlement. To "act" meant either filing a complaint against the dealership or settling the matter. Although the settlement agreement entered into by Complainants required them to "diligently" pursue their claim against the dealership and file a complaint within approximately 35 days if settlement with the dealership could not be reached, Respondent could not account for any activity of note between January 1990 and August 1991.

At one point, Respondent testified that he was negotiating with the attorney during this time, trying to settle with the dealership without filing suit. The attorney did not recall negotiating with Respondent until after complaint was served through mail. The panel found Respondent's testimony on this issue unpersuasive. This includes Respondent's testimony that during this time period his paralegal was working on several drafts of the complaint.

Respondent's expressed reasons for not filing the complaint were threefold. First, Respondent testified that he did not have the bill of sale and did not know if it indicated that the car had been wrecked. The panel found this reason unconvincing. At one point, Respondent testified that he received the bill of sale in 1988. If true, Respondent could have filed suit as early as 1988. At another point in his testimony, Respondent stated that he received the bill of sale in discovery from the attorney. If this is true, then Respondent ultimately filed suit without the bill of sale.

Second, Respondent wanted to settle this matter without filing suit so as to avoid embarrassment to the dealership with a public allegation of fraud. The panel found this reasoning unpersuasive. In Complainants' counterclaim against the bank dated September 2, 1988, Respondent alleged that the dealership acted fraudulently in selling the Complainants a vehicle. More importantly, the panel was not convinced that any substantial negotiations with the dealership were occurring during this time. Neither Mr. Trembly nor Attorney Martin recalled any settlement negotiations until after August 1991.

Finally, Respondent testified that he was waiting for the Complainants to forward $150 to him to cover the costs of filing. Respondent testified that at his initial meeting with Complainant's wife, he indicated to her that she would need to provide this amount up front. He stated that he did not receive this money until August 20, 1991.

Complainants, on the other hand, both testified that on July 8, 1987, Complainant's wife paid $100 in cash. She believed that was to cover the filing fees and phone calls. Complainants testified they paid another $100 or $110 to Respondent a couple of years later at his request. Neither Complainants nor Respondent could provide reliable accounting records. Respondent's records appear to be his best attempt to reconstruct his account with Complainants rather than an accurate record of an account that had been maintained throughout the representation. Furthermore, the front of one of the checks which Respondent provided does not correspond to the copy of the back of the check. While the panel did not find that Respondent attempted to mislead them, this error suggests that his records may not be entirely accurate. Thus, the panel found Respondent's inaction was not due to lack of funds from Complainants.

Respondent also testified that part of the delay in this case was due to lack of timely responses from his clients to requests that he made of them. Indeed, there were occasions when Complainants procrastinated in getting responses to Respondent and this procrastination contributed to the delay in the handling of their case. However, only a very small percentage of the overall delay can be attributed to the Complainants.

During his interviews with bar counsel's investigator, Respondent was unable to account for activity on Complainants' cases from January 1990 until August 1991. Respondent indicated that he was experiencing personal difficulties as a result of separating form his wife. He was also preparing to move. Complainants reported difficulty in contacting Respondent during this time. From January 1990 to January 1992, Complainant's wife tried to contact Respondent over a dozen times. At one point, she went to Respondent's office and found it empty. Eventually, she received a change of address card from Respondent.

Respondent replied that Complainants were difficult to contact because they did not have a phone. Respondent, however, did not provide any letters or notices mailed to Complainants from January 1990 through June 1991.

On June 3, 1991, Respondent took his first action in pursuit of Complainants' claim against the dealership by mailing a draft complaint to them for their review. One week later, on June 10, 1991, the bank demanded judgment against Complainants in accordance with the compromise and settlement agreement of January 5, 1990. The bank's attorney sent Respondent a stipulation to judgment for Respondent's execution as provided for in the compromise and settlement agreement. Respondent failed to follow through on the stipulation, resulting in the bank's attorney filing for judgment on July 17, 1991. As a result, the court ordered Complainants to pay attorney's fees in an additional amount of $140. Respondent indicated that throughout his representation of Complainants he was not concerned with a judgment being entered against them because they could simply file bankruptcy.

Not having heard from Complainants about the drafted complaint, Respondent mailed a copy of Complainants' claim to the dealership in August 1991. Although the dealership did not accept service at this time, the owner contacted his attorney and authorized him to negotiate with Respondent about Complainants' claim. The attorney recalls having two or three phone calls with Respondent prior to the actual filing of the lawsuit on or about March 9, 1992.

On January 1, 1992, Complainant's wife wrote a letter to the Professional Conduct Board complaining that her case was taking a long time to resolve and that she could not contact Respondent. She sent a separate letter to Respondent indicating that she would file a complaint if he did not take some action on her case. Although Respondent denies receiving that letter, he acknowledged that he received a letter from the Professional Conduct Board in February 1992 indicating that the Complainants had filed a complaint. Despite the complaint, Respondent continued to represent Complainants, as bar counsel and her investigator requested. He also believed he should continue to represent them because it was more likely than not that no other lawyer would represent them. Respondent told Complainants that this complaint caused him stress and interfered with his ability to represent them. He requested that Complainants withdraw their complaint. Respondent did so in part because he felt defending against their claim would impede his ability to represent them. In July 1992, Complainant's wife withdrew the complaint.

On July 14, 1992, the dealership's attorney filed interrogatories and requests to produce. Respondent failed to answer. Ultimately, the court granted a motion to compel on October 15, 1992. Respondent blames this on Complainants' failure to answer them. He also criticized Complainants for failing to fill them out completely. Respondent has the responsibility of meeting discovery deadlines to the best of his ability. Respondent presented no evidence of any attempts that he made to follow-up with Complainants to ensure that he complied with his discovery obligations.

Complainant's wife continued to experience difficulty in contacting Respondent as is evidenced by her two letters to Respondent dated August 8, 1992 and June 26, 1993. The case against the dealership was settled in November 1993 and the action dismissed May 10, 1994. In resolving both of these matters, all of Complainants' objectives were met. Complainants expressed some dissatisfaction with the legal system feeling their case dragged on too long.

While Bar Counsel was investigating Complainants' claim of misconduct, she sent several letters asking Respondent to go forward his accounting records regarding Complainants beginning in June 1994. Respondent failed to provide this information to bar counsel until he answered the allegations in the petition of misconduct on approximately April 27, 1995. Respondent stated that he had given this information to the former bar counsel Wendy Collins when she was still handling the case.

We do not find that there was a pattern of misconduct here.

CONCLUSIONS OF LAW

DR 1-102(A)(5) of the Code of Professional Responsibility provides that "[a] lawyer shall not...engage in conduct that is prejudicial to the administration of justice." The Professional Conduct Board has always frowned upon the practice of a lawyer encouraging a client to withdraw an ethics complaint. The panel supported that position. A review of the rules, coupled with the circumstances of this case, however, lead us to conclude that Respondent's actions with regard to this allegation do not violate the code. It is important to note that under Rule 13 of A.O. 9, the unwillingness of a complainant to prosecute a charge does not justify an abatement of the process. Here, Respondent was urged by (then) bar counsel for the board to continue in the representation of Complainants

notwithstanding the filing of the complaint. He agreed to do so. In so doing, Respondent was understandably anxious and disturbed about the prospect of continued representation of Complainants under the cloud of a disciplinary proceeding. While we do not take the position that such continued representation would be untenable, we are unable to conclude that under the facts here that Respondent's request of his clients to withdraw their complaint constituted a violation of DR 1-102(A)(5).

The only additional evidence presented that could provide the basis for a violation of DR 1-102(A)(5) was with regard to Respondent's failure to comply with bar counsel's investigation by providing accounting records in a timely fashion. Earlier in this decision, the panel found that Respondent's efforts to provide an accounting required a review and recreation of many different records and events rather than the mere retrieval of a single accounting that was kept contemporaneously, event by event. In addition, Respondent had closed his law practice by the time the requests were made by bar counsel. Most of the evidence regarding Respondent's response to the disciplinary process convinces us that it was his intention to cooperate with bar counsel. While Respondent was annoyed by the Complainant and corresponding investigation and did not feel that he had acted unethically, his actions in response to the process convince us that he was aware of his obligations to assist bar counsel in her investigation. While we do not commend his accounting procedures, Respondent's delay in providing the requested accounting does not provide the basis for a finding of misconduct under DR 1-102(A)(5).

DR 6-101(A)(2) provides that "[a] lawyer shall not...[h]andle a legal matter without preparation adequate in the circumstances." No evidence was submitted which indicated that Respondent failed to investigate the facts of this case or research relevant law. In fact, Respondent's efforts in finding the wrecked car title suggest he fully investigated the facts of this case. Moreover, Respondent demonstrated a full understanding of the law. Therefore, Respondent did not violate DR 6-101(A)(2).

DR 6-101(A)(3) provides that "[a] lawyer shall not neglect a legal matter entrusted to him." While some of Respondent's delay in filing suit against the dealership can be attributed to professional judgment in seeking to settle the case without filing suit, much of the delay is inexcusable. After Complainants entered into an agreement with the bank, they were under an obligation to file suit quickly. There is inadequate evidence that Respondent was negotiating with the dealership between January 1990 and June 1991. Because of the terms of the settlement agreement, this period of time was extremely important. Respondent's neglect is compounded by his failure to communicate with Complainants. Respondent's delay created a potential financial injury to the Complainants. Respondent's assertion that Complainants could have simply filed for bankruptcy had judgment entered does not excuse his neglect. Furthermore, Complainants experienced dissatisfaction with the legal system as a result. Respondent is in violation of DR 6- 101(A)(3).

We find the following aggravating factors:

(1) Respondent fails to acknowledge the wrongful nature of his neglect.

(2) Respondent has substantial experience in the practice of

law.

We find the following mitigating factors:

(1) Respondent has no prior disciplinary record.

(2) During the relevant time period, Respondent was experiencing personal difficulties and was in the process of relocating his office.

We believe that Section 4.44 of the ABA Standards is the appropriate guide for our recommendation of sanction. That section provides as follows:

> Admonition is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client.

We therefore will issue a private admonition here.

Dated at Montpelier, Vermont this 4th day of October 1996.

PROFESSIONAL CONDUCT BOARD

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