41 PRB

[18-Sep-2002]

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In re Andres (2002-428)

2004 VT 71

[Filed 6-Aug-2004]

ENTRY ORDER

2004 VT 71

SUPREME COURT DOCKET NO. 2002-428

OCTOBER TERM, 2003

In re Robert Andres, Esq.	}	APPEALED FROM:
	}	
	}	
	}	Professional Responsibility Board
	}	
	}	
	}	DOCKET NO. 2002-110

In the above-entitled cause, the Clerk will enter:

¶ 1 Respondent, Robert Andres, Esq., appeals a Professional Responsibility Board decision that he violated Rule 1.3 of the Vermont Rules of Professional Conduct by failing to attend a pretrial hearing and to respond to a motion for summary judgment. We adopt the Professional Responsibility Board's ruling and suspend respondent for a period of two months.

¶ 2 Respondent was assigned to represent Andres Torres in a post-conviction relief (PCR) petition arising out of Torres's 1997 guilty plea to a second offense of domestic assault. Torres was represented by counsel other than respondent when he entered his guilty plea. The information charging Torres with second offense domestic assault relied on an alleged 1995 domestic assault conviction. That charge had, in fact, been dismissed; there was no conviction. Torres therefore pled guilty to a second offense of domestic assault even though he lacked a conviction for a first offense.

¶ 3 On July 20, 2000, Torres filed a PCR petition pro se arguing that his conviction for second offense domestic assault was unlawful because he lacked the necessary prior domestic assault conviction. Respondent was assigned to represent Torres in the PCR matter and, on October 17, 2000, filed an amended PCR petition on Torres's behalf. He then engaged in a reasonable investigation of Torres's case, including speaking with Torres's prior counsel and listening to the taped Change of

Plea Hearing.

¶ 4 In June 2001, respondent received a Notice of Hearing scheduling a pretrial conference in Torres's PCR matter. Respondent failed to attend the pretrial conference. In July 2001, the State filed a motion for summary judgment seeking to dismiss Torres's PCR petition. Respondent failed to file a response to the State's motion, nor did he move the court for permission to withdraw from representing Torres. In September 2001, the court granted the State's motion for summary judgment dismissing Torres's PCR petition with prejudice. Respondent notified Torres of the dismissal in an undated letter. Torres obtained new court-appointed counsel and appealed the summary judgment ruling to this Court.

¶ 5 After pleading guilty in 1997, Torres was sentenced by Judge Jenkins. At some point during his engagement with Torres, respondent became aware that Judge Jenkins was also presiding over his PCR petition. In an undated letter, Torres informed respondent of this fact saying, "P.S. I've just now realized that Judge Jenkins was the judge who sentenced me on the charges that I am now serving time for, and the charge in question. Can he preside over my P.C.R. without bias? I doubt it." Because respondent had not attended the pretrial conference, he was never confronted with Judge Jenkins's presence in the case. Respondent testified that he knew 13 V.S.A. § 7131 prohibited the sentencing judge from hearing a subsequent PCR petition in the same matter. At no time, however, did he seek to have Torres's PCR petition reassigned.

¶ 6 When Torres appealed with new counsel to this Court, the parties stipulated to vacating the summary judgment ruling and remanding the case for consideration on the merits by a different judge. Torres's new attorney then filed an opposition to the State's summary judgment motion.

¶ 7 In October 2002, Torres filed a complaint against respondent with the Professional Responsibility Program alleging misconduct in the handling of his PCR petition. Respondent was charged with violating Rules 1.2(a) (failure to abide by a client's decision concerning the objectives of representation), 1.3 (failure to act with reasonable diligence and promptness), and 8.4(d) (engaging in conduct prejudicial to the administration of justice). The alleged misconduct consisted primarily of respondent's failure to attend a pretrial conference and to file a response to the State's summary judgment motion.

¶ 8 The matter was heard by a Hearing Panel of the Professional Responsibility Board. After reviewing the evidence, the Board found that respondent violated Rule 1.3 when he neglected to attend the pretrial conference and intentionally abandoned his client's case by failing to file an opposition to the State's summary judgment motion. Charges based on Rules 1.2(a) and 8.4(d) were dismissed. The Board recommended that he be suspended from the practice of law for a period of two months. Respondent appeals.

¶ 9 "On review, this Court must accept the Panel's findings of fact unless they are clearly erroneous." In re Blais, 174 Vt. 628, 629, 817 A.2d 1266, 1269 (2002) (mem.); A.O. 9, Rule 11(E). We will uphold the Board's findings - whether they are pure fact or mixed questions of law and fact - if they are "clearly and reasonably supported by the evidence." In re Berk, 157 Vt. 524, 527, 602 A.2d 946, 947 (1991) (internal citation

omitted).

¶ 10 Respondent does not dispute that he failed to attend the pretrial conference or to file a response to the State's summary judgment motion. Rather, he argues that he was justified in not responding to the State's motion because his client's argument had no merit. He also insists that, had he filed a response when there was no likelihood of success, he would have violated V.R.C.P. 11.

¶ 11 The evidence is to the contrary, however. There are several arguments respondent could have made to oppose summary judgment without violating V.R.C.P. 11. First, he could have challenged the factual inaccuracies of the information under which Torres was charged. Respondent admitted knowing that his client pled guilty to a second offense domestic assault charge under 13 V.S.A. § 1044(a)(2) absent a prior conviction, yet, he never raised the issue before the court; presumably because he thought it meritless.

¶ 12 Second, the State argued that 13 V.S.A. § 1044(a)(2) does not require a prior conviction for domestic assault, but can be satisfied by a prior offense. Respondent testified that he did not raise this issue because he agreed with the State's reading of the statute. That is no excuse. Respondent could and should have advocated for an alternative interpretation of § 1044(a)(2) without running afoul of V.R.C.P. 11. Even assuming his client had waived his right to challenge his conviction on this ground, respondent had a duty to bring the matter before the court.(FN1) As the Board pointed out, to respond effectively, respondent need only show that credible issues existed for the court's consideration, not that he would ultimately prevail on each question.

¶ 13 Finally, at a minimum, respondent should have asked the court to reassign the case for consideration by another judge. Despite his failure to attend the pretrial conference, respondent acknowledged that he knew the PCR petition was being heard by the same judge who sentenced Torres in violation of 13 V.S.A. § 7131. His only defense was that he did not think it was a problem and that disputing it "might cause further delay." There is no merit to this justification. Respondent had a duty to diligently advocate for his client and his failure to do so violates Rule 1.3. No matter how foolish Torres's arguments might have seemed to him, respondent was not entitled to intentionally abandon his client's case. We hold that the Board's finding that respondent's conduct in this case violates Rule 1.3 of the Rules of Professional Conduct was clearly and reasonably supported by the evidence and we affirm.

¶ 14 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 Warren, 167 Vt. 259, 261, 704 A.2d 789, 791 (1997). Suspension is generally appropriate when a lawyer knowingly fails to serve a client's interests causing real or potential injury or when a lawyer has been reprimanded previously for the same or similar conduct. See ABA Standard 3.0. Although they are not binding upon this Court, we give deference to the Board's recommendation regarding sanctions. In re Gadbois, 173 Vt. 59, 63, 786 A.2d 393, 396-97 (2001).

¶ 15 The Board recommended a two-month suspension based on

findings that respondent's conduct was intentional and that he has faced three previous disciplinary actions, two of which involved a lack of diligence. Respondent does not challenge the Board's suggested sanction. We find the Board's recommendations regarding suspension clearly and reasonably supported by the evidence and thus we will not disturb them.

Robert K. Andres is hereby suspended from the practice of law for a period of two months. The suspension will commence thirty days from the issuance of this order to allow Mr. Andres time to comply with A.O. 9, Rule 23.

BY THE COURT:

_____
Jeffrey L. Amestoy, Chief Justice

_____
John A. Dooley, Associate Justice

_____
Denise R. Johnson, Associate Justice

_____
Marilyn S. Skoglund, Associate Justice

Footnotes

FN1. See our decision in In re Andres Torres, 2004 VT 66, ¶ 9-11, as it relates to his client's appeal from the same criminal conviction referenced here.

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41 PRB

[18-Sep-2002]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

Decision No: 41

In re: Robert Andres, Esq.
PRB File No 2002-110

Respondent is charged with failing to abide by a client's decision concerning the objectives of representation in violation of Rule 1.2(a) of the Vermont Rules of Professional Conduct, failure to act with reasonable diligence and promptness in violation of Rule 1.3, and engaging in conduct prejudicial to the administration of justice in violation of Rule 8.4(d), arising principally out of his intentional failure to respond to a motion

for summary judgment in a criminal case.

This matter was heard on August 2, 2002 before Hearing Panel No. 1, consisting of Douglas Richards, Esq., Lawrin Crispe, Esq. and Michael Filipiak. Beth DeBernardi appeared as Disciplinary Counsel. Respondent appeared pro se. Based upon the evidence, and in consideration of the aggravating factors present, Respondent is suspended for a period of two months for violation of Rule 1.3. The charges of violation of Rules 1.2(a) and 8.4(d) are dismissed.

Facts

Respondent Robert Andres was admitted to practice law in the State of Vermont in 1983 and is currently licensed to practice law in Vermont. The charges of misconduct in this matter arise out of Respondent's representation of Andres Torres in a petition for post conviction relief. In August of 1996 Torres was charged with violation of 13 V.S.A. § 1044(a)(2), which provides that "A person commits the crime of second degree aggravated domestic assault if the person commits a second or subsequent offense of domestic assault which causes bodily injury." The information charging Torres with second offense domestic assault cited a previous conviction of domestic assault in 1995. Although Torres had been arraigned on this charge, it was subsequently dismissed, and thus in fact Torres had no prior conviction for domestic assault. In January of 1997, while represented by counsel other than Respondent, Torres entered into a plea agreement in Vermont District Court. He plead guilty to a second offense of domestic assault, as well as burglary, petty larceny and violation of conditions of release. At the same time three other charges of second offense domestic assault were dismissed as well as a simple assault and a retail theft. During the hearing on the change of plea Torres testified under oath that he had in fact been previously convicted of domestic assault.

On July 20, 2000, Torres filed a pro se Post Conviction Relief (PCR) petition in Chittenden Superior Court arguing that his conviction of second offense domestic assault was unlawf since it was not supported by a first conviction for domestic assault. In filing this petition Torres was concerned primarily with his classification by the corrections department as having a high risk of violence. He had been required to attend the violent offenders program, but failed to complete it and was thus denied parole at his minimum release date.

Respondent was assigned to represent Torres in the PCR matter and on October 17, 2000, Respondent filed an Amended Petition with the Chittenden Superior Court on behalf of Torres. After filing the amended petition Respondent undertook appropriate investigation in the PCR matter. He spoke to Torres' original counsel and listened to the tape of the Change of Plea Hearing.

On June 22, 2001, the Chittenden Superior Court issued a "Notice of Hearing" scheduling the PCR matter for a Pre-Trial Conference on July 13, 2001, at 8:30 a.m. Respondent received a copy of the Notice of Hearing but did not attend the Pre-Trial Conference. On July 12, 2001, the State filed a Motion for Summary Judgment requesting dismissal of the PCR petition. Respondent did not file a response to the state's motion nor did he move the court for permission to withdraw from representing Torres in the PCR matter. Respondent testified that he believed that Torres had no

defense to the state's motion, and that his failure to file a response was intentional rather than negligent. On September 25, 2001, thuperior Court granted the state's motion for summary judgment. By undated letter, Respondent notified Torres that the Superior Court had dismissed his PCR petition and on October 8, 2001, Torres filed a Notice of Appeal in the Vermont Supreme Court. Torres was not represented by Respondent in the appeal.

Torres had been sentenced by Judge Jenkins and at some point during the time he was represented by Respondent, Torres became aware of the fact that Judge Jenkins was also involved in his PCR matter. In an undated letter wrote to Respondent "P.S. I've just realized that Judge Jenkins was the judge who sentenced me on the charges that I am now serving time for, and the charge in question. Can he preside over my P.C.R. without bias? I doubt it."

Respondent testified that he was aware of the provision of 13 V.S.A. Sec. 7131 which provides that the sentencing judge shall not hear any application for post conviction relief. At no time did Respondent seek to have the PCR assigned to another judge and since he did not attend the pre-trial conference he was not confronted with Judge Jenkins presence in the case.

In April of 2000 the Supreme Court remanded the PCR matter to the Superior Court for consideration by a judge other than Judge Jenkins. As of the writing of this opinion the matter remains pending.

Conclusions of Law

Rule 1.2(a) provides that [a] lawyer shall abide by a client's decision concerning the objectives of represeation . . . and shall consult with the client as to the means by which they are to be pursued . . ." It is clear from the evidence and the exhibits that Torres was clear in his objectives. He wanted the court to grant his motion for post conviction relief and ultimately to vacate the conviction for a second offense of domestic assault. Disciplinary Counsel argues that Respondent's failure to respond to the motion for summary judgment meets the criteria of this rule; that the failure to present arguments on Torres' behalf constitutes a failure to abide by the client's objectives. We disagree. Torres's objectives in this matter were similar to those of other civil or criminal litigants. Like Torres they want to prevail.

The provisions of Rule 1.2 are narrower than this. They relate to the division of authority between the attorney and the client as to how the client's ultimate objectives will be achieved. "In criminal matters, the lawyer must defer to the client's decision regarding the plea to be entered, whether to waive a jury trial and whether to testify."(FN1) The decision as to tactical matters such as witness selection and pretrial practice is generally left to the attorney.(FN2) Respondent's decision not to file a response to the state's Motion for Summary Judgment cannot be termed a tactical decision. It was a complete abdication of his responsibility to his client. Thus, while the panel believes that Respondent's decision noteto file a response to the state's motion is far more serious than an error of trial tactics, we do not believe that it meets the standards for violation of Rule 1.2 (a) and that charge is hereby dismissed.

Rule 8.4(d) provides that "It is professional misconduct for a lawyer to . . . . engage in conduct that is prejudicial to the administration of justice." Disciplinary Counsel argues that the adversarial system of justice is built upon the premise that both sides will present their positions to the court, and that the court will then make its decision having heard the evidence and arguments of both parties. In general we agree, but the real issue is whether Respondent's failure to respond to the motion for summary judgment and failure to attend the pre-trial conference, actions which are clearly addressed under Rule 1.3, also go beyond the realm of individual representation and impact upon the legal system in general. The Reporter's notes to Rule 8.4 seem to suggest that the rule is concerned primarily with actions which reflect upon the attorney's fitness to practice or upon the legal profession as a whole. The ABA/BNA Manual states that "[t]his prohibition most often applies to conduct directly related to litigation, such as the interference with judicial proceedings or the abuse of process,"(FN3) or "conduct that "violates a lawyer's duty to maintain the integrity of the legal profession."(FN4) In a recent Kansas case, In re Farm ,(FN5) a lawyer was found to have violated the provisions of Rule 8.4(d) for actions similar to those of Respondent. Though in Farmer the failures were multiple and of long duration. The lawyer had a habit of failure to attend hearings, to file pleadings and to train his employees. These lapses were so great that they caused disruption in the operation of the two bankruptcy courts in which he practiced. The actions of the Respondent here, while similar, have clearly impacted his client, but Disciplinary Counsel has failed to show that these actions have impacted the court system in the same way that they did in the Farmer case. It is at best speculative that respondent's lapses caused additional work for the court system. The Supreme Court reversed the case not on the merits but because the same judge was involved. We cannot say for certain that had Respondent filed a response or appeared at the hearing that he would have raised this issue.

Respondent's actions are not of the magnitude seen in the Farmer case and we decline under these facts to extend what is basically a matter between one attorney and his client to a violation of Rule 8.4(d) and that charge is hereby dismissed.

Respondent's conduct falls squarely into Rule 1.3 which provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." Generally speaking, cases falling under this rule involve an attorney's negligence in attend ng to a client's affairs, such as missing deadlines, failure to communicate with clients and failure to conclude matters in a timely fashion. Respondent's conduct goes beyond that. He intentionally failed to file a response to a motion that he knew would be dispositive of the issues in the case. It is Respondent's position that after investigation of the case, he determined that there were no viable arguments which he could put forth for his client and that he told his client of this fact before the deadline for filing a response. He argues that to file a response when there was no likelihood of prevailing would violate "VRCP Rule 11 and The Code of Professional Responsibility DR 102(a)(2)and (5)(FN6) [which] prohibit attorneys from filing frivolous claims or proceeding with a claim not supported in law or fact." His argument is basically that as he reads the statute under which Torres was convicted it does not require a subsequent conviction but a subsequent offense and that by pleading to the offense Torres had waived any factual defects to the elements of the offense.

Respondent is in effect acting as the judge in his client's matter by deciding not to go forward. He has however, been practicing law long enough to know that very often judges do not do what you expect them to do; that often one party may prevail or lose on an issue that they had not deemed important or had not anticipated. While not expressing an opinion on the interpretation of the statute or on whether or not Respondent would have prevailed, we are convinced that there were sufficient arguments that could have been made which would have avoided any charges of frivolous activity (FN7) and would have been in accord with the reporter's comments to Rule 1.3.

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf.

A failure or a refusal to act on a client's behalf has a twofold effect on the client. Not only is the client's case compromised by the lawyer's inaction, but the client, while obviously not precluded from acting on his own behalf, is not inclined to do so and thus is usually prevented from acting promptly to preserve his or her own rights. In a Pennsylvania case in which the lawyer and the client disagreed about how a case was to be handled, the disciplinary authority held that

> A lawyer who believes that a client is mistaken in his desire to take a particular legal action is obligated to either follow the clients instructions or withdraw from representation. Rule 1.2 (FN8)

While this case arose under a different rule, we believe that the same principle applies. Respondent had the duty to either zealously advance his client's case or to withdraw so that his client could pursue other ways of advancing his cause.

We find by clear and convincing evidence that Respondent violated Rule 1.3 by his failure to attend the pretrial hearing and his intentional abandonment of his client's case by failing to respond to the motion for summary judgment.

Sanctions

In determining the appropriate sanction in this matter we have applied the ABA Standards for Imposing Lawyer Discipline which require us to look at four factors: "(a) the duty violated; (b) the lawyer's mental state; (c) the actual or potential injury caused by the lawyers misconduct; and (d) the existence of mitigating or aggravating factors."(FN9) Section 4.42 of the ABA Standards provides that

> Suspension is generally appropriate when: (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

In this case the Respondent's failure to act was intentional and thus falls under the provisions of the first section. This is however not an isolated case of Respondent's failure to meet the standards of Rule 1.3. Three separate complaints against Respondent were considered in a prior disciplinary action in which he received a public reprimand.(FN10) Two of these cases involve lack of diligence. In one case Respo dent undertook representation of a criminal client charged with driving while intoxicated.

As a result of Respondent's failure to act the client's appeal was dismissed. In another case involving child support, Respondent failed to keep his client informed and failed to attend a hearing. In both of these cases the Respondent's failure to act was characterized as neglectful rather than intentional, but they are in many ways similar to the facts in the present case and show a pattern of lack of diligence. His mental state is however different in this case. He has acted intentionally rather than negligently.

This prior discipline is another factor leading the panel to consider suspension as the appropriate discipline. ABA Standard 8.2 provides that "[s]uspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession."

In determining whether a suspension is appropriate it is necessary to determine whether or not there has been actual or potential harm to the client. Respondent argues that there has been no harm to Torres; that Torres would not have been released from jail sooner nor would there have been any change in his programming while in custody.

Despite the fact that most of the facts were admitted, the panel would have benefited from the testimony ohe complainant Andres Torres. Since Respondent did not keep copies of correspondence leaving his office, nor did he maintain telephone notes, it would have been helpful to hear Mr. Torres version of events. This would have aided the panel in assessing the degree of actual harm suffered by Torres. Despite this lack, we find that there is clearly the potential for harm as well as the actual harm from the stigma and curtailment of rights that follow from a second conviction for domestic assault.

There are several factors in aggravation and mitigation which also must be considered. In aggravation, Respondent has been practicing law for 19 years and presented himself to the panel as an experience criminal practitioner. ABA Standards §9.22(i). He has prior discipline, ABA Standards §9.22(a) and has refused to acknowledge the wrongful nature of his conduct. ABA Standards §9.22(g). In addition Torres was a somewhat vulnerable victim. Despite his obvious familiarity with the criminal justice system, he was incarcerated throughout these proceedings and his attorney was his only real link to the court system. ABA Standards §9.22(h). In mitigation, we find that Respondent did not act with a dishonest or selfish motive. ABA Standards §9.32(b).

In reaching its decision the panel is guided by two recent decisions of the Professional Responsibility Board. In In re Wenk (FN11) the Board imposed a six month suspension. Like the Respondent, enk had substantial experience and prior discipline. Unlike Respondent he had a dishonest or selfish motive, but did not have a vulnerable client. In the Wenk case

there was both financial and emotional injury to the client.

In In re Sunshine (FN12) the Board imposed a four month suspension followed by probation. Sunshine had substantial experience but had never been previously disciplined and the panel found no likelihood of further similar violations. His clients, however, suffered serious harm.

Taking into account Respondent's intentional breach of his duty to his client, his mental state, the potential if not actual injury to his client and the aggravating and mitigating factors, the panel finds that a suspension is the appropriate sanction in this matter.

Respondent is hereby SUSPENDED from the practice of law for a period of two months commencing November 1, 2002.

Dated: 9/18/02

HEARING PANEL NO. 2

/s/

_____
Douglas Richards, Esq., Chair

/s/

_____
Lawrin P. Crispe, Esq.

/s/

_____
Michael H. Filipiak

Footnotes

FN1. §31.301, ABA/BNA Lawyers Manual on Professional Conduct, 2002 ABA BNA

FN2. Id., at §31.308.

FN3. Id. §101.501

FN4. Id.

FN5. 950 P2d 713 (Kan 1997).

FN6. The Panel finds it telling that Respondent is citing us to disciplinary rules which have not been in effect for more than two years.

FN7. It is indeed a fact that Torres was convicted of second offense domestic assault absent any prior conviction. It is also a fact that the PCR was heard by the sentencing judge. To respond effectively to the motion for summary judgment it was not necessary that Respondent show that he would ultimately prevail only that issues existed for the court to consider.

FN8. Op. 97-48(4/17/97) Committee on Legal Ethics and Professional Responsibility of the Pennsylvania Bar Association, ABA/BNA Lawyers Manual on Professional Conduct, Ethics Opinions 1996-2000.

FN9. ABA Standards §3.0, approved in In re Warren 167 Vt. 259 (1997).

FN10. PCB Decision No. 140, In Re: Robert Andres, Esq., PCB Docket Nos. 95.66, 98.08 and 99.02.

FN11. Decision No. 14, In re: PCB File No. 96.50, Craig Wenk, Esq.

FN12. Decision No. 28, In re PRB File Nos. 2001.001 & 2001.075, David Sunshine, Esq.