44 PRB

[29-Oct-2002]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2002.031
Robert DiPalma, Esq.

Decision No. 44

On September 4, 2002, the parties filed a stipulation of facts as well as conclusions of law and recommendations on sanctions. The Respondent also waived certain procedural rights including the right to an evidentiary hearing. The panel accepts the facts and recommendations and orders that the Respondent be publicly reprimanded and placed on probation for a period of two years for neglecting a client's litigation matter in violation of DR 6-101(A)(3) of the Code of Professional Responsibility and Rule 1.3 of the Rules of Professional Conduct and for failing to keep his client informed about the status of his case in violation of Rule 1.4 of the Rules of Professional Conduct.

Facts

The Respondent is an attorney licensed to practice law in the State of Vermont. He was admitted to the Vermont Bar in 1981 and is a partner at a large firm in Burlington.

KD, a client of the Respondent's firm, owns a company, which produces monitoring and control systems. (M&C). In 1995, M&C began to market and sell an environmental control system under a new trademark, and in 1996, applied to register the trademark. The application was rejected.

In 1997, KD learned that a company in the mid-west, (Mid-West) had a trademark for the same name which it used on lighting and electrical control boards. KD believed that M&C had used the trademark name before Mid-West. At that time, KD had been client of the Respondent's firm for many years, and the Respondent had represented him in other matters. KD and the Respondent discussed the trademark issue and the merits of filing a petition to cancel Mid-West's trademark. The Respondent told KD that it would be a difficult case to win. Nevertheless, KD chose to proceed. He believed that his company had used the name before Mid-West, and that if he vigorously asserted his rights, Mid-West might voluntarily acknowledge them.

In September of 1997, the Respondent, acting on behalf of M&C, filed a Petition to Cancel Mid-West's trademark with the Trademark Trial and Appeal Board of the United States Patent & Trademark Office (TTAB). After Mid-West filed an Answer, the TTAB issued a scheduling order setting deadlines for the completion of discovery, as well as for the completion of the testimony to be given by the respective parties.

On May 20, 1998, counsel for Mid-West served Interrogatories and a Request for Production of Documents and Things on M&C. The Respondent received and was aware of the discovery requests. On July 18, 1998, Respondent moved to extend the period of time in which his client's testimony had to be completed. In his motion, Respondent acknowledged that his client was obligated to provide Mid-West with responses to the outstanding discovery requests.

Between July of 1998 and March of 1999 the Respondent took no action in this matter, though Mid-West's attorney made several attempts to obtain discovery through pleadings and direct contacts with the Respondent.

_ On September 17, 1998, Mid-West's counsel moved to extend the period in which its testimony had to be completed. In the motion, Mid-West's counsel represented to the Board that he had yet to be contacted by the Respondent.

_ On October 21, 1998, Mid-West's counsel wrote the Respondent informing him that Mid-West would file a Motion to Compel if it did not receive responses to the discovery requests within ten days

_ On November 10, 1998, Mid-West filed a Motion to Compel responses to the discovery requests served in May. The Respondent received a copy of the motion.

_ Over the next several months, Mid-West's counsel made several calls to the Respondent none of which were returned.

_ On February 19, 1999, Mid-West's counsel advised the Respondent that a Motion to Dismiss would be filed if Respondent did not contact counsel within ten days. The Respondent received a copy of the letter.

_ On March 15, 1999, Mid-West filed a Motion to Dismiss M&C's Petition for Cancellation.

On March 31, 1999, Respondent filed a Memorandum in Opposition to Mid-West's Motion to Dismiss. On the same day, Respondent filed responses to Mid-West's Interrogatories and Requests for Admissions. By Order dated July 26, 2000, the TTAB dismissed M&C's Petition for Cancellation for failure to provide timely discovery responses to Mid-West.

By notice dated January 26, 2001, the Respondent appealed the dismissal. When he filed the Notice of Appeal, the Respondent had yet to inform KD that the Petition for Cancellation had been dismissed.

By notice dated February 7, 2001, the TTAB acknowledged receipt of M&C's appeal and indicated that M&C's brief had to be filed by March 27, 2001. The Respondent received a copy of the notice. The Respondent never filed a brief in support of the appeal and the appeal was dismissed in June 2001.

Throughout the course of events, the Respondent never told KD that the initial petition had been dismissed, never told him that he filed an appeal, and never told him that the appeal had been dismissed. Sometime in the summer of 2001, KD called another attorney in the Respondent's firm.

He asked about the status of the trademark case and, for the first time, learned that the petition and appeal had been dismissed. KD recalls speaking with the Respondent in the fall of 2000 and recalls that the Respondent told him that the matter was under control.

Once the Respondent's firm learned of what happened in the M&C case, the firm's managing partner reported the matter to Disciplinary Counsel. In addition, the firm notified its malpractice carrier and advised KD that he should seek independent advice. KD was not interested in pursuing a claim against the Respondent or his firm and he proposed a settlement which the firm accepted. KD is an experienced businessman and is satisfied with the resolution. He has indicated that while the situation was somewhat painful for him, he does not begrudge the Respondent and intends to remain a client of the firm.

Around the same time that his firm reported the matter to Disciplinary Counsel,the Respondent began a course of professional counseling, primarily with a workplace counselor and psychotherapist. The purpose of the counseling has been to assist the Respondent in three areas; first, to help him identify and correct any office management practices of the type that contributed to the trouble he had attending to KD's file; second, to help him understand how his personality traits allowed the result to occur; and finally, to help the Respondent prepare a plan to repair the relationships with the other members of his firm and his client that were damaged by the way he handled KD's case. In addition, the Respondent met with a psychiatrist who believes that the Respondent is not suffering from any type of depression or Attention Deficit Disorder which could have contributed to the manner in which he handled the KD matter.

In addition to the counseling, the Respondent's firm began to audit his files. Each month, three files were selected at random for review by three partners. The audits continued for several months. The firm has indicated that the audits went well and that no other problems were discovered. The firm believes that the Respondent is a good attorney and has no worries about continuing to employ him.

The Respondent has a disciplinary record. He has previously been admonished for neglecting a client matter.

Conclusions of Law

To the extent that Respondent's actions occurred prior to September 1, 1999, they are governed by DR-6101(A)(3) of the Code of Professional Responsibility which prohibits a lawyer from neglecting a legal matter entrusted to him. To the extend they occurred after this date, they are governed by Rule 1.3 of the Rules of Professional Conduct which requires lawyers to act with reasonable diligence and promptness while representing a client.

Respondent's conduct clearly violates both provisions. After filing his initial petition and requesting an extension of time Respondent did nothing on the matter from July of 1998 until faced with a Motion to Dismiss in March 1999. This was despite the fact that during this eight month period opposing counsel went to some lengths to prod Respondent to provide discovery by letters, phone calls and other motions. This delay was the direct cause of the dismissal of his client's petition. The Respondent behavior with respect to the appeal was the same. After filing the Notice

of Appeal, he failed to abide by the court's order to file a brief and the appeal was dismissed.

Rule 1.4 of the Rules of Professional Conduct provides that "a lawyer shall keep a client reasonably informed about the status of a matter." Respondent's complete failure to keep his client informed about the status of his case clearly violates this rule. KD had no knowledge of the downhill progress of his case as it went from Motion to Dismiss the Petition in March of 1999 to dismissal of the appeal in June of 2001. Even at that point, the Respondent did not inform him of the status; KD had to learn about it through a chance conversation with another lawyer in Respondent's firm.

Sanctions

The Panel accepts the recommendations of Respondent and Disciplinary Counsel that Respondent be publicly reprimanded and placed on probation for a period of two years. In accepting the recommendation the Panel is guided by several factors.

The sanction is consistent with the ABA Standards for Imposing Lawyer Discipline the use of which has been approved by the Supreme Court.(FN1) Section 4.43 provides that "[r]eprimand 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." Since there is no evidence that Respondent's conduct was intentional, we believe that it does not warrant suspension.(FN2) Because, however, there was actual injury to the client, an admonition is not appropriate.(FN3) In addition the fact that Respondent has substantial experience and has been previously admonished for neglecting a client matter weighs against admonition.(FN4)

The Panel is most impressed with the manner in which the Respondent's firm has dealt with this matter since it came to light and with its commitment to working with the Respondent in the future.

The neglect was promptly reported to both the disciplinary authority and to the firm's malpractice carrier. The client was appropriately advised to see other counsel and though he declined to do so, a settlement was reached that not only compensated him for his loss but was handled in such a way that he remained a client of the firm. The fact that the firm immediately audited Respondents files insured that no other clients were being neglected.

This background leads the panel to find that probation is highly appropriate in this case. Probation can be imposed in conjunction with other sanctions and is a way of enabling the lawyer to remain in practice while protecting clients and the public. The probation agreement entered into by Respondent, his firm and Disciplinary Counsel is structured in such a way that clients are protected, the Respondent receives monitoring and additional training and the firm retains the services of a good attorney. The Panel approves its terms.

Order

Respondent is hereby PUBLICLY REPRIMANDED for violation of DR 6-101(A)(3) of the Code of Professional Responsibility and Rules 1.3 and

1.4 of the Rules of Professional Conduct. Respondent is placed upon disciplinary probation under the following conditions:

1. Period of Probation: The terms of this probation shall run for two years. The start date shall be the date that this agreement is accepted by a Hearing Panel of the Professional Responsibility Board.

2. Monthly Review of Files: As a condition of probation, the Respondent shall undergo a review of randomly selected client files. The review shall be similar to the random review that Respondent's firm instituted upon discovering the misconduct that resulted in the imposition of a public reprimand and this disciplinary probation. At a minimum, the review shall be structured to assess whether the Respondent is meeting deadlines. The random review of the Respondent's files shall be conducted as follows:

A. Months 0-8 shall include a review of 14 randomly selected files. No more than 2 files reviewed in any given month shall count towards the total of 14. A single file, if selected at random, may be reviewed more than once during this time frame.

B. Months 9-16 shall include a review of 8 randomly selected files. No more than 2 files reviewed in any given month shall count towards the total of 8. A single file, if selected at random, may be reviewed more than once during this time frame.

C. Months 17-24 shall include a review of 4 randomly selected files. No more than 1 file reviewed in any given month shall count towards the total of 4. A single file, if selected at random, may be reviewed more than once during this time frame.

3. Reporting: Within two weeks of each month's review, the Respondent shall submit a written report to Disciplinary Counsel and to the firm's president indicating that the review has taken place. The Respondent's report shall indicate whether the members of the reviewing team found any problems with the files being handled by the Respondent. The Respondent shall respond to Disciplinary Counsel's requests for information related to the on-going review of his files. The Respondent shall authorize the reviewing team and the firm's president to respond to Disciplinary Counsel's requests for information relating to the review of his files.

4. No Cost to Clients: A client whose file is selected for review shall not be billed or charged in any way for the time the members of the firm spend reviewing it, discussing the review with the Respondent and/or the firm president, or reporting the review to Disciplinary Counsel.

5. Continuing Legal Education: As soon as practicable, the Respondent shall attend a continuing legal education program that offers at least 3 hours of CLE credit in the area of law office management/practices & procedures. To satisfy this provision, the Respondent must receive advance approval from Disciplinary Counsel. Respondent shall provide Disciplinary Counsel with proof of attendance.

6. Letters to Affected Parties: Within thirty days of the commencement of his probation, the Respondent shall write letters to KD and the attorney for Mid-West apologizing for the manner in which he handled KD's case. The letters shall inform the recipients that the Respondent has been publicly reprimanded and placed on disciplinary probation for two years. The letters shall be approved by Disciplinary Counsel prior to being sent and, upon being sent, shall be copied to Disciplinary Counsel.

7. Costs: The Respondent shall bear the costs and expenses related to his compliance with the probation and monitoring agreement.

8. Termination of Probation: This probation shall run for two years from the date that a Hearing Panel of the Professional Responsibility Board accepts this agreement. The probation shall not be terminated unless or until the Respondent complies with Rule 8(a)(6) of Administrative Order 9.

9. New Disciplinary Violations: The Respondent shall not violate the Vermont Rules of Professional Conduct.

10. Violation of Terms: The Respondent agrees that any violation of the terms of this agreement may serve as the basis for a disciplinary prosecution alleging that he has violated the terms of his disciplinary probation.

11. Leaving the Firm: Should the Respondent leave the employ of his current firm prior to the expiration of this agreement, he shall immediately notify Disciplinary Counsel so that any appropriate modifications to this agreement may be made.

Dated: 10/29/02
FILED 10/29/02

Hearing Panel No. 6
/s/
_____
Judith Salamandra Corso

/s/
_____
James Gallagher, Esq.

/s/
_____
Toby Young

Footnotes

FN1. In re Warren 167 Vt. 259 (1997).

FN2. ABA Standards for Imposing Lawyer Discipline, §4.42.

FN3. Id at §4.44.

FN4. See Aggravating Factors, Id at §9.22.