

[12-Dec-2002]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2002.203

Decision No. 47

On October 8, 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 admonished by Disciplinary Counsel for violation of Rule 1.3 of the Vermont Rules of Professional Conduct. In handling a real estate closing, respondent failed to make a timely filing of the 2.5% withholding with the Vermont Department of Taxes.

Facts

In 1998, two couples, the KNs and the PKs, purchased property in Vermont as tenants in common, each couple acquiring a half interest in the property. In the summer of 2001, the KNs agreed to purchase the PKs' interest in the property. The Respondent agreed to represent the KNs in the transaction. At the time, the Respondent was also representing the PKs in an unrelated matter.

The closing was held in early September, and the next day, the Respondent paid off the existing mortgage. The KNs failed to properly execute the new mortgage and thus, the Respondent was unable to immediately record it and was not able to release the proceeds of the sale to the PKs. Shortly thereafter, the Respondent received the properly executed mortgage from the KNs. He recorded the necessary documents and finalized the disbursements related to the closing, and about two weeks after the closing, the Respondent sent the PKs a check in the amount of the net proceeds from the transaction. As required by law, the Respondent withheld from the PKs' proceeds, 2.5% of the total sale price and placed the funds in escrow. Around the same time, the Respondent's father became very ill. He was hospitalized and passed away a few days later. The Respondent was very close with his father.

Despite having withheld 2.5% of the total sale proceeds, the Respondent neither applied for a withholding certificate nor remitted the funds to the Vermont Department of Taxes. In April of 2002, Mr. PK's accountant was in the process of preparing his tax return and noticed that Mr. PK had not received tax forms related to the 2.5% withholding. Mr. PK assumed that the Respondent had sent the withholding to the State and prepared his tax forms in such a way as to request the refund that was due. The Respondent did not hear from the PKs until April 15 when Mr. PK called the Respondent. The Respondent then realized that he had forgotten about the transaction. He told Mr. PK that he should pay whatever taxes might be due and that he would send Mr. PK the money that had been placed in escrow. Mr. PK paid the tax, and on April 16, the Respondent sent Mr. PK a check

for the entire amount that had been withheld at the sale. The Vermont Department of Taxes did not penalize Mr. PK, though he was required to re-work his tax return to indicate that the tax on the proceeds of the real estate transaction had not been paid.

The Respondent is an attorney licensed to practice law in Vermont. He was admitted in 1972. The Respondent cooperated with the investigation of Mr. PK's ethics complaint. There is no evidence that the Respondent acted with a dishonest or selfish motive. Several years ago, the Respondent was admonished for violating the Code of Professional Responsibility.(FN1) The conduct in that case is unrelated to the conduct at issue here. Given the unique circumstances of this case it is unlikely that this problem will re-occur with this attorney in the future.

Conclusions of Law

Rule 1.3 of the Vermont Rules of Professional Conduct requires an attorney to act with reasonable diligence and promptness while representing a client. The Respondent's seven month delay in dealing with the funds withheld from Mr. PK's proceeds of the sale violates this rule. He neither filed for an application for a withholding certificate nor remitted the withheld tax to the Vermont Department of Taxes. The funds remained in escrow until Mr. PK called the Respondent in April of 2002. The Panel finds that the Respondent clearly violated Rule 1.3 of the Vermont Rules of Professional Conduct by failing to act with reasonable diligence and promptness with respect to the withheld funds.

Sanction

The Panel accepts the stipulation of the parties that admonition by Disciplinary Counsel is the appropriate sanction in this matter. This sanction is in accord with A.O. 9 of the Vermont Supreme Court (FN2) and with the ABA Standards for Imposing Lawyer Sanctions.(FN3)

ABA Standards

Section 4.44 of the ABA Standards for Imposing Lawyer Sanctions provides that an

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.

In this case, the facts establish that the Respondent neglected the tax withholding following the PKs' closing.

The Respondent's failure to act with reasonable diligence caused little actual injury. Neither the Department of Taxes nor the Internal Revenue Service penalized Mr. PK for the late filing. While he was required to redo his tax returns, he did not suffer an appreciable financial injury. Neither the aggravating nor mitigating factors warrant a departure from an admonition. In aggravation, the Respondent has substantial experience in the practice of law. ABA Standards, § 9.22(i). In addition, he has been admonished for unethical behavior in the past. ABA Standards, § 9.22(a). The aggravating factors are tempered by the mitigating factors. Within two weeks of the closing, the Respondent's father was hospitalized with a

serious illness from which he eventually died.

Thus, at the same time that he should have been attending to the withholding issue, the Respondent was understandably pre-occupied with his father's condition. In addition, there is no evidence of a dishonest or selfish motive, ABA Standards, § 9. 32 (b), and the Respondent made a timely good faith effort to rectify the consequences of actions once they were brought to his attention. ABA Standards, § 9. 32(d). Finally, the Respondent has fully cooperated with the disciplinary investigation. ABA Standards, § 9. 32(e). For these reasons, Section 4.44 of the ABA Standards for Imposing Lawyer Sanctions indicates that an admonition is appropriate.

A.O. 9

An admonition is only appropriate when three factors are present: (1) the misconduct is minor; (2) little or no injury results; and (3) there is little likelihood that the lawyer will make the same mistake again. A.O. 9, Rule 8(A) (5). The Respondent's misconduct was relatively minor. Little or no injury ensued, and it is unlikely that the circumstances peculiar to this case will repeat themselves.

For the reasons stated, the Panel approves the imposition of an ADMONITION by Disciplinary Counsel.

Dated 12/12/02

Hearing Panel No.7

/s/

Richard H. Wadhams, Esq.

/s/

Keith J. Kasper, Esq.

/s/

Sam Hand

Footnotes

FN1. In Re: PCB File No. 93.26, PCB No. 72 (July 15, 1994).

FN2. This sanction may only be imposed if the respondent consents to the sanction, the hearing panel approves and no formal charges have been filed. A.O.9, Rule 8(5) (a). All of these criteria are met here.

FN3. It is appropriate to refer to these standards in determining sanctions. In re Warren, 167 Vt. 259, 261 (1997); In re Berk, 157 Vt. 524, 532 (1991) (citing In Re Rosenfeld, 157 Vt. 537, 546-47 (1991)).