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[21-Apr-2000]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In Re: PCB File No. 97.49

Hearing Panel Decision No. 5

On February 24, 2000, Hearing Panel No. 5 convened a telephone hearing during which it considered the parties' stipulation of facts, recommended conclusions of law, and recommended sanctions. The Respondent and Deputy Disciplinary Counsel Michael Kennedy participated in the conference. The Panel accepts the stipulation of facts and, for the reasons stated below, approves Disciplinary Counsel's imposition of an admonition due to the Respondent's violation of DR 6-101(A)(3) of the Code of Professional Responsibility. See A.O. 9, Rule 8(A)(5).

I Facts

The Respondent is an attorney licensed to practice law in the State of Vermont.

The Respondent was admitted to the State's bar in 1982.

The Respondent does not practice law on a full-time basis. Rather, the Respondent is gainfully employed in another profession. However, on occasion, the Respondent handles small legal matters for friends.

In March of 1991, a person (hereinafter "the client") was injured in an automobile accident. The client retained the Respondent to represent him in an action against the other operator's insurance company. An investigation revealed that the other operator was at fault. As a result of the accident, the client incurred several thousand dollars in medical bills. The Respondent and the client agreed that the total value of client's claim was approximately \$15,000.

Based on conversations that the Respondent had with the opposing carrier, the Respondent expected the case to settle without the client having to file suit. The case did not settle. Thus, in March of 1994, the Respondent filed a complaint in the appropriate Superior Court. At the time, the parties expected the case to settle but the suit was filed in order to comply with the statute of limitations.

The Respondent did not attempt to serve the defendant until May of 1994. In the interim, the Respondent did not move to enlarge the period of time in which to serve the defendant. As a result, the defendant was not served within sixty days of the filing of the complaint. The defendant

moved to dismiss the complaint on the basis that service had not been made within sixty days of filing. The Court granted the motion to dismiss.

The Respondent immediately admitted the error to the client and advised the client to contact the Respondent's carrier. The Respondent's malpractice carrier eventually settled all claims with the client. In the settlement, the client received an amount roughly equal to the amount the client would have received if the client had prevailed at trial.

The Respondent does not have a prior disciplinary history. This ethics complaint was filed in April of 1997. The Respondent has cooperated with the Office of Disciplinary Counsel throughout this case.

II Conclusions of Law

DR 6-101(A)(3) of the Code of Professional Responsibility prohibits a lawyer from neglecting a legal matter entrusted to him. In this case, the Respondent neglected the legal matter entrusted to him by the client. The Respondent's neglect came in the form of the failure to complete service of the complaint within sixty days of filing. Thus, the Respondent violated DR 6-101(A)(3) of the Code of Professional Responsibility.

III Sanction

In Vermont, the Supreme Court has stated that it is appropriate to use

the ABA Standards For Imposing Lawyer Sanctions in determining the appropriate sanction in a disciplinary case. In *Re Berk*, 157 Vt. 524, 532 (1991) (citing *In Re Rosenfeld*, 157 Vt. 537, 546-47 (1991)). Factors relevant to the determination are: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury; and (4) any mitigating and/or aggravating factors. In *Re Berk*, 157 Vt. at 532. Analyzing each of these factors in conjunction with the ABA's Standards for Imposing Lawyer Discipline it is clear that a private admonition is appropriate in this case.

1. The Respondent violated the duty of diligence owed the client.

A lawyer has a duty to diligently pursue a legal matter entrusted to him. ABA Standards For Imposing Lawyer Sanctions, § 4.4. In this case, the Respondent did not diligently pursue the legal matter entrusted to the Respondent by the client. Rather, the complaint that was filed on the client's behalf was dismissed due to the Respondent's failure to serve the complaint upon the defendant within 60 days of filing.

2. The Respondent acted negligently.

The Respondent's mental state was one of negligence. The Respondent did not intentionally fail to serve the defendant.

3. The Respondent's lack of diligence caused injury to the client.

Due to the Respondent's lack of diligence, the client did not receive an opportunity to pursue the client's claims against the opposing motorist. Thus, the client was denied an opportunity to recover any damages in court.

4. Aggravating & Mitigating Factors

There are five mitigating factors. The Respondent does not have a prior disciplinary history. ABA Standards for Imposing Lawyer Sanctions, § 9.32(a). The Respondent did not have a dishonest or selfish motive. ABA Standards for Imposing Lawyer Sanctions, § 9.32(b). The Respondent has exhibited a cooperative attitude towards the disciplinary proceedings. ABA Standards for Imposing Lawyer Sanctions, § 9.32(c). By referring the client to the carrier, the Respondent made a timely, good faith effort to rectify the consequences of the misconduct. ABA Standards for Imposing Lawyer Sanctions, § 9.32(d). Finally, there has been a delay in moving this case forward that cannot be attributed to any fault of the Respondent. There are no aggravating factors.

5. The Sanction

In cases involving a lack of diligence, a public reprimand 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." ABA Standards for Imposing Lawyer Sanctions, § 4.43. Thus, in this case, absent consideration of any aggravating or mitigating circumstances, a public reprimand would be appropriate.

However, the mitigating factors outweigh the lack of aggravating factors. The neglect happened almost six years ago. The client received from the Respondent's carrier an amount that the client would have received had the client prevailed at trial. Moreover, it is well settled that punishment is not a goal of the lawyer disciplinary process. In *Re Berk*, 157 Vt. 524, 532 (1991). Given that the Respondent is not actively practicing law, it seems that a public reprimand would only serve to punish the Respondent.

IV Conclusion

For these reasons, the Panel approves disciplinary counsel's imposition of an admonition See A.O. 9, Rule 8(A)(5).

/s/

4/20/00

Mark L. Sperry, Esq., Chair

Date

/s/

4/10/00

The Honorable Sara Gear Boyd

Date

/s/

4/11/00

Jane Woodruff, Esq.

Date