

[Filed 18-Aug-2005]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No 2004.132

Decision No. 80

Respondent is charged with violations of Rules 1.3, 1.4 (a) and 8.4 (c) of the Vermont Rules of Professional Conduct in connection with his representation of three separate clients. With respect to all three clients Respondent failed to represent them with diligence. He failed to keep two of them informed about the status of their cases and with respect to one client he communicated to the client facts which he knew to be untrue. Respondent entered into a stipulation with respect to the facts and admitted the violations.

The matter was heard on the issue of sanctions on May 4, 2005, before Hearing Panel 7, consisting of Richard H. Wadhams, Jr., Esq., Keith Kasper, Esq. and Sam Hand. Michael Kennedy appeared as Disciplinary Counsel. Respondent was present and represented by counsel. At the hearing additional facts were stipulated to by the parties. The Hearing Panel accepts the stipulated facts and five of the six recommended conclusions of law and privately admonishes Respondent for the above violations. In addition the Hearing Panel imposes probation of one year in accordance with the terms set forth below.

Facts

Client A - Construction Claim

Client A, a construction company, was involved in a dispute over a house that it had built. It was alleged that there were defects in the construction caused by a subcontractor. The construction company's local attorney asked Respondent for advice on how to file a claim against the subcontractor's liability insurance policy with a large insurance company ("LIC"). On February 14, 2002, Respondent wrote a letter to LIC in which he argued that Client A was entitled to reimbursement for costs incurred in correcting the defect. By letter dated April 8, 2002, LIC's lawyers informed Respondent that they had advised LIC that the subcontractor's policy did not cover the alleged defects, and that LIC had no obligation to reimburse Client A.

Respondent so informed Client A and shortly thereafter agreed that he would reply to LIC's lawyers arguing that Client A in fact was entitled to reimbursement. Respondent sent Client A a bill for the services related to these activities, but did not reply to the letter. On June 11, 2002, Client A's attorney sent Respondent an email asking whether Respondent had completed his reply. Respondent did not reply to the email or to several messages left by Client A and its local attorney in June and July of 2002.

In August of 2002, LIC's attorney wrote to Respondent asking whether Respondent's client intended to pursue the matter any further. Again, Respondent did not respond to the letter.

Respondent's firm continued to bill Client A. By letter dated October 16, 2002, Client A's local attorney asked Respondent's firm to stop billing his client and informing him that his "clients have no intention of making any further payments, after [Respondent's name deleted] abdicated his responsibilities and went incommunicado not once but twice."

On January 3, 2003, Respondent faxed to Client A's attorney a draft of a letter that he proposed be sent to LIC's attorney. It was accompanied by a letter from the president of Respondent's firm. Client A's local attorney responded by letter dated January 22, 2003, stating that they no longer wished to deal with Respondent and asked that the file be closed and no further bill sent.

Client B - Tax Appeal

Respondent represented Client B in connection with a tax grievance before the Town Listers. In a decision dated July 7, 2003, the Listers denied Client B's grievance. Respondent received a copy of the decision on July 10, 2003. Client B had previously instructed Respondent to file an appeal with the Board of Civil Authority in the event the grievance was denied. The deadline for filing the appeal was July 21, 2003.

According to Respondent's records, a copy of the Lister's decision was delivered to his office by fax at 10:36 AM on July 10. He was unable to work on Client B's case that day. After receiving the fax, he worked for 6.2 hours on other client matters, then drove for 4.7 hours to Connecticut on a another client's matter. He remained in Connecticut overnight and then left for a day long meeting at 6:30 AM. When it ended, Respondent drove back to Vermont, arriving around midnight.

Respondent was scheduled to leave town on vacation on Sunday, July 13, 2003. On July 12, 2003, he went to work and billed 8.6 hours on client matters. He did not work on Client B's matter. He was, however, aware that the Listers' decision had been rendered and that the deadline for filing Client B's appeal was July 21, 2003. He thought that he would be back in the office on July 21, 2003, and that he could attend to Client B's appeal upon returning from vacation. Respondent failed to recall that he and his wife and son were scheduled to be in New York City for a doctor's appointment on July 21, 2003.

Respondent left town for a canoe trip on July 13, 2003. He returned at approximately 2:00 AM on July 20. Later on July 20, Respondent drove to Connecticut for the New York City doctor's appointment the next day. Before leaving, he did not take any steps to ensure that the appeal would be filed. He did not instruct an associate or staff member to file the appeal. Respondent was not in the office at all on July 21. He returned to the office on July 22.

That day, having learned that Client B might have filed an appeal itself Respondent called the Board of Civil Authority and asked whether an appeal had been filed on behalf of Client B. He was told that no appeal had been filed. Respondent did not contact Client B to inform him that no appeal had been filed. Client B left phone messages for Respondent on

October 20 and October 24 asking for an update on the appeal. Respondent did not return the messages. Client B wrote to Respondent on October 29, 2003. Respondent did not respond. On November 10, 2003, Client B called the firm's former president and asked for a status report.

Respondent finally responded to Client B by letter dated November 17, 2003. In his letter, Respondent stated that he had recently called the Board of Civil Authority and was told that the Board did not "have any record of an appeal being filed for [Client B]." In fact, Respondent had known since July 22, 2003, that no appeal had been filed for Client B. Respondent characterized his deceit about when he had learned about the missed deadline as an "irrational attempt to minimize my shame."

Client B filed a successful tax appeal in 2004 and the firm has made the client whole with payment of the tax difference and \$2500 toward Client B's expenses.

Client C - Superior Court Litigation

Respondent successfully defended Client C, a homeowner's association, in litigation in the Superior Court. The plaintiff appealed to the Vermont Supreme Court, and in September and October of 2002, plaintiff's attorney and Respondent reached an agreement to settle the appeal. Respondent agreed to revise a draft agreement that had been part of the negotiations. On October 23, 2002, plaintiff's attorney sent Respondent paperwork that was intended to facilitate Respondent's revision of the settlement papers. Respondent did not respond to the letter. On December 12, 2002, plaintiff's attorney sent a follow-up letter and wrote again on January 9 and March 7, 2003. Respondent did not respond to any of the letters.

In May of 2003, a partner in plaintiff's attorney's firm, contacted the former president of Respondent's firm asking him to spur Respondent into action. He did so, directing Respondent to finish preparing the paperwork necessary to settle the case. Respondent called plaintiff's firm, apologized for the delay, and agreed to complete the paperwork as soon as possible. Respondent did not complete the paperwork, and plaintiff's attorney wrote again on June 30 and July 17, 2003. Respondent did not respond to either letter. On August 19, 2003, plaintiff's attorney emailed the president of Respondent's firm asking for assistance in bringing the matter to conclusion. Respondent and plaintiff's attorney finally consummated the settlement in September of 2003.

Respondent's History with his Firm prior to Complaint

Respondent was first admitted to practice in 1973. He was admitted in Vermont in 1983 and began practicing with his present firm in 1995. He became a member of the firm in 1998.

Respondent originally joined the firm to manage the real estate division. Because Respondent had worked as in house counsel with a large business before coming to the firm, he very quickly accumulated clients who knew of the expertise he had gained prior to joining the law firm. Respondent very soon had a full and financially productive case load largely due to the number of clients drawn to this specialty, rather than the real estate work as had originally been anticipated.

As early as 1997, Respondent recognized that the workload was pressing his limits, and he initiated discussions with the firm about taking on an associate to assist him. The firm was initially resistant, because it felt firm attorneys who were under-producing should be able to assist Respondent, but in practice, that did not happen with any regularity. Several lawyers in the firm worked on one or two matters, but none was willing to devote the major part of their practice to Respondent's cases or to develop the expertise needed to provide consistent representation to Respondent's clients.

In 2000, the firm hired an associate to assist Respondent with his practice. It developed that the associate did not have an interest in Respondent's specialty. He took on other work at the firm when opportunities were offered, so his work for Respondent did not develop to the level of assistance that Respondent and the firm had anticipated.

Respondent's need for assistance increased, and in August, 2001, Respondent had discussions with a Chicago attorney with relevant experience who was considering a move to Vermont. In January 2002, the firm offered this attorney a position to work with Respondent on his cases. By that point the attorney's family situation had changed, and he was not able to leave Chicago.

By March of 2002, before the Chicago attorney's status was resolved, the firm agreed to begin a new hiring effort. The firm advertised for attorneys with 3-5 years litigation experience, but after several months of interviews, no applicant had the qualifications the firm was looking for and none was hired. Respondent was left still trying to manage his practice with minimal assistance from other members of the firm.

In the fall of 2002, the firm assigned the associate who had been working with Respondent to another member of the firm. By November 2002, he only worked occasionally for Respondent's clients.

In November, 2002, Respondent met with the head of the firm's litigation department to discuss getting help with his workload. The upshot was that this lawyer did handle a case for Respondent, but there was not the wholesale transfer of cases that Respondent actually needed.

In 2003, the firm executive committee again authorized advertising for and hiring an associate, in Respondent's specialty, and interviews were conducted in the spring of 2003. In June of 2003 the firm authorized hiring an attorney from New York. This attorney, however, accepted another position.

The net result was that, although Respondent received some assistance during some periods of time, he was essentially left with a growing work load without developing within the firm the capacity to adequately handle the work. Respondent increased his hours in office as necessary to meet his increased workload, but that type of expansion has limits. During the time frame when the events at issue in this investigation occurred - roughly April 2002 to November 2003 - Respondent's billable hours were second highest among the members of the firm.

At no time during this period did Respondent consider reducing his case load by turning away clients or refusing to take on additional matters. He continued to respond to his clients needs and to work longer

hours to accomplish the work.

Respondent's History with the Firm Since Filing of Complaints

At about the same time that the report was made to Disciplinary Counsel, the members of Respondent's firm met outside of his presence to decide if they would ask him to leave the firm. They decided to retain him with the firm, but set up what Respondent characterized as a "pretty invasive process" to protect clients and the firm and to support him. While he was on vacation, members of the firm went through his files, his office and his desk. The firm appointed an oversight committee to monitor his practice consisting of a transaction attorney, a litigator and an attorney who had been placed on probation in connection with another disciplinary matter. They have structured his practice so that the committee has access to all of his email; all of his voice messages are transcribed by a secretary who does not report to him and sent to the committee. His incoming mail is scanned and the originals are not sent to Respondent. Responsibility for litigation of most of Respondent's cases has been transferred to another attorney of record. Respondent meets with the committee to review all of his cases. In the beginning they met every two to three weeks and in the summer every three months. In addition Respondent has been relieved of the leadership role he had previously enjoyed in connection with some areas of firm management.

The firm paid for professional counseling with a psychologist specializing in business matters. The focus was on delegation and not taking all the work that came along and on the underlying factors leading to the lie to Client B. Within several months that professional suspended practice, and Respondent is now working with someone at his own expense on issues of trusting others to work with his clients and dealing with his own perfectionism. Respondent admitted to the panel that he has had to rethink how he practiced law and to learn to trust his clients with others.

As a result of the disciplinary matters, Respondent's share of law firm profits has been substantially diminished. The testimony was unclear as to exact amounts, but there was general agreement that, but for the disciplinary complaint, Respondent would have had much larger year end bonuses than he has actually received.

Both Respondent and his wife testified that this matter has had a profound effect on Respondent and his family. He is extremely remorseful and feels shame at his behavior. Other mitigating factors include the fact that Respondent self-reported the matters and has no prior disciplinary record. The only aggravating factor is Respondent's long experience as an attorney.

Conclusions of Law

Respondent has stipulated to violations of the code with respect to all three clients, and with one exception we accept the stipulation.

Client A

With respect to Client A, at sometime around April of 2002, Respondent agreed to communicate with the attorneys for the insurance company. He failed to write the letter as promised and failed to respond to e-mail and

telephone messages from Client A and its attorney. Respondent took no action until January of 2003 after Client A's attorney had asked Respondent to stop billing his client. We find that the long delay in writing the promised letter and Respondent's failure to respond to his client and to keep his client informed violates of Rules 1.3 and 1.4(a) of the Vermont Rules of Professional Conduct.

Client B - Tax Appeal

Respondent failed to file his client's tax appeal within the ten day appeal period which ended July 21, 2003. Respondent discovered this fact when he returned to his office on July 22, 2003. He did not inform the client, nor did he respond to phone messages or letters from the client until November of 2003. In that letter he told the client that he only recently talked to the Board of Civil Authority and learned that no appeal had been filed, whereas in fact Respondent had known since July that this was the case.

Disciplinary Counsel has charged and Respondent has admitted that his failure to file the appeal is a violation of Rule 1.3 of the Vermont Rules of Professional Conduct which requires that an attorney act with diligence in representing clients. One instance of missing a short statute of limitations may be negligence for purposes of the tort system, but does not automatically constitute a violation of the Code. While there may be instances where missing a statute of limitations may be found to be misconduct, we do not believe that the facts presented to us here are sufficient to find a violation of Rule 1.3, and that portion of the charge is dismissed.

Respondent's failure to respond to inquiries from his client and his failure to promptly communicate with him about the state of his appeal does violate Rule 1.4(a), which requires an attorney to keep his clients reasonably informed about the status of their cases.

Rule 8.4(c) prohibits attorneys from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation." Respondent's November letter to his client informing him that he had just learned that his tax appeal had not been filed was not truthful; he had in fact known since July 22. We are presented here with conduct that is deceitful, but where the misrepresentation was peripheral to the client's matter. This distinction is one which we will address in our discussion of sanctions, but we do not find that it removes the cases from the constraints of Rule 8.4 (c), and we find that this section of the Code was violated. It is central to the attorney client relationship that the attorney be truthful with the client in all things. If a client cannot count on truthfulness in small things, the client may be reluctant to believe the attorney in matters critical to the scope of representation.

Client C - Superior Court Litigation

In September and October of 2002 Respondent and the plaintiff's attorney agreed to settle the appeal and Respondent agreed to prepare a draft settlement agreement. Respondent failed to respond to communications from plaintiff's attorney about the progress of drafting the paper work and did not bring the settlement to a conclusion until September of the next year, and only after plaintiff's attorney sought the intervention of a former president of Respondent's firm. Respondent failed to act with

reasonable diligence in bringing this matter to a conclusion in violation of Rule 1.3 of the Vermont Rules of Professional Conduct.

Sanctions

In determining the appropriate sanctions in this matter we must decide whether to impose a public reprimand, as argued by disciplinary counsel, or private admonition as argued by respondent. There are compelling arguments for both positions, and for the reasons outlined below, we have determined that, based upon all the facts presented, admonition, is the more appropriate sanction.

In determining the appropriate sanction we have been guided by the ABA Standards for Imposing Lawyer Sanctions and prior decisions of this Board. The ABA Standards require the Panel "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 Andres, Supreme Court Entry Order, July 6, 2004, citing In re Warren, 167 Vt. 259, 261 (1997).

Respondent had a duty to his clients to handle their matters with due diligence, (Rule 1.3) and to keep them reasonably informed about the progress of their cases. (Rule 1.4 (a)). He also had a duty to be honest with his clients in all matters. (Rule 8.4 (c)). Respondent violated these duties in each of the three cases we consider here.

With respect to Client A and Client C, Respondent's mental state was one of negligence. He had accepted too much work and was unable to respond to all of his client's demands in a timely manner, and work required for these two clients was neglected. The same is true of Respondent's failure to respond to Client B's inquiries about his tax appeal. Were these the only complaints under consideration here, we would have no difficulty imposing a private admonition. There was little or no harm to the clients, and the mitigating factors which we discuss below also would point to an admonition.

The question for us here is whether the violation of Rule 8.4 (c) is of such gravity that public discipline is warranted. This case differs from the recent cases on this Rule in which the deceit either went to the heart of the matter involved, or in some way caused harm to the client. Respondent was truthful about the fact that the statute of limitations had been missed. When he had learned about it was not relevant to the tax appeal itself. On July 22, 2003, when the statute of limitations was missed, the damage was done. We are faced with the question of whether deceit about a peripheral matter carries the same weight as deceit about the central matter. This is not like the case of In re Sunshine, PRB Decision No.28, (Nov. 29, 2001) where the client's case had been dismissed and the attorney instead assured the client that it would soon go to trial, or In re Bailey, Supreme Court Entry Order (May 31, 2002) where, after letting the statute run, the attorney told the client that the case had been filed when it had not.

Neither is it the same as cases where the attorneys lied on affidavits in order to protect their right to practice. In In re Levine, PRB Decision No 63, (Sept. 10, 2004) the attorney misrepresented his disciplinary history on a pro hac vice application. In In re Heald, PRB Decision No 67 (June 15, 2004), the attorney misrepresented his status

with the tax department on his licensing application.

In the present case any harm to the client had already been done by the time that Respondent wrote the letter. The missed statute of limitations clearly had the potential for actual injury to the client. We have, however, failed to find a violation with respect to this action. What harm was done was not to the client's legal matter but rather to the client's respect for the integrity of the legal process. This is not a matter we take lightly and we believe that Respondent also understands the importance of his obligations to the legal system and now has a better understanding of how to structure his practice so that this obligation is met.

Violations of Rule 8.4 (c) are discussed in two sections of the ABA Standards for Imposing Lawyer Sanctions. Standard 4.6 deals with lack of candor and provides that "[r]eprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client." ABA Standards, §4.63. The section further provides that "[a]dmonition is generally appropriate when a lawyer engages in an isolated instance of negligence in failing to provide a client with accurate or complete information, and causes little or no actual or potential injury to the client." ABA Standards, §4.64.

There are aspects of Respondent behavior which fit within each of these two definitions. We believe that this is an isolated instance, but we also believe that, while there was no monetary injury to the client, there is injury or potential injury to the legal system. (FN1)

It is now appropriate to look at the presence of aggravating and mitigating factors to determine which of these two sanctions is the most appropriate under the circumstances.

The only aggravating factor is Respondent's substantial experience in the practice of law. ABA Standards §9.2 (i). In mitigation, Respondent has no disciplinary record, ABA Standards §9.2 (a); he made a full disclosure to Disciplinary Counsel and has cooperated with the proceedings, ABA Standards §9.2 (e), and he has suffered genuine remorse over his conduct, ABA Standards §9.2 (l). In addition, both Respondent and his firm took steps prior to this hearing to address some of the underlying issues which contributed to Respondent's misconduct. Respondent has been working with a psychologist to enable him to restructure his practice and the firm had put into place safeguards to ensure that other client matter are not jeopardized.

On balance we believe that a consideration of all of these factors points us toward admonition.

We must now also address whether the imposition of an admonition is within the bounds of A.O.9 Rule 8(A) (5) which provides that admonition is appropriate only "when there is little or no injury to a client, the public, the legal system or the profession, and when there is little likelihood of repetition by the lawyer."

We believe that as a result of the actions of Respondent's firm and the self knowledge that Respondent has gained through counseling, there is little likelihood of repetition of this misconduct. With respect to the

violations of Rules 1.3 and 1.4(a) the misconduct was minor and there was little or no harm to the client. The more difficult question is whether the violation of Rule 8.4(c) fits within the constraints of this rule. Generally when an attorney lies to a client it is not a minor matter and there is usually actual or potential harm.

We are, however, presented with a lie to a client in the context of a specific fact situation, and it is within the context of those specific facts that we address the application of A.O.9 Rule 8(A) (5). Respondent's lie was contained in the letter informing Client B of the missed statute of limitations. The purpose of the lie was to save Respondent from embarrassment. He did not deceive the client about the reality of his situation. The fact of the missed deadline was clearly conveyed. As far as the client was concerned, when his attorney knew of the missed statute was minor in comparison to the fact that his tax appeal had not been perfected. In the same manner, the major harm to the client was in the missed statute, not in the deceit about the date of discovery.

Viewed in the narrow context of these facts, the Panel believes that admonition is also appropriate under A.O.9. We also believe that the measures put in place by Respondent's firm are more than adequate to protect the public. In order to ensure that some form of supervision continues, we impose probation for a period of one year.

Order

Respondent is hereby privately admonished for violations of Rules 1.3, 1.4 (a) and 8.4 (c) of the Vermont Rules of Professional Conduct and is placed on probation for one year on the following terms:

1. Respondent shall be placed on probation for a period of one year as provided in A.O. 9 Rule 8 (A) (6).
2. Respondent shall engage a probation monitor acceptable to the Office of Disciplinary Counsel. The monitor may be a member of Respondent's firm.
3. Respondent shall meet with his probation monitor regularly to review his case management procedures and his methods for ensuring timely responses to clients and attention to their cases.
4. Respondent shall implement such procedures as are recommended by his probation monitor.
5. During the term of his probation, Respondent shall meet at least monthly with his probation monitor to review all open cases for which he has primary responsibility.
6. Within three weeks of each monthly meeting, the probation monitor shall submit a written report to the Office of Disciplinary Counsel outlining Respondent's compliance with the terms of probation.
7. Respondent shall completely and fully respond to requests from the Office of Disciplinary Counsel that relate to his compliance with the terms of his probation.

8. In the event that the probation monitor is unable to continue, he or she shall give notice to the Office of Disciplinary Counsel as soon as practicable, in order to permit Respondent to obtain an alternate probation monitor. The choice of substitute probation monitor shall be subject to the approval of the Office of Disciplinary Counsel.

9. Any expenses associated with probation shall be borne by Respondent.

10. Respondent's probation shall be for a minimum of one year and may be terminated after that time in accordance with A.O. 9 Rule 8 (A) (6) (b).

Dated: August 18, 2005

Hearing Panel No. 7

/s/

Richard H. Wadhams, Jr., Esq.

/s/

Keith J. Kasper, Esq.

/s/

Sam Hand

Footnotes

FN1. The ABA Standards for Imposing Lawyer Sanctions define injury as "harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct." § IV Definitions.