

118 PRB

[Filed 12/3/2008]

STATE OF VERMONT

PROFESSIONAL RESPONSIBILITY BOARD

In re: John Davis Buckley, Esq.

PRB File No. 2008.026

Decision No. 118

The parties filed a Stipulation of Facts and Joint Recommendations as to Conclusion of Law and Sanctions. Respondent also waived certain procedural rights including the right to an evidentiary hearing. The Hearing Panel accepts the stipulated facts and the recommendations and orders that Respondent be publicly reprimanded for neglecting several matters for one client in violation of Rule 1.3 of the Vermont Rules of Professional Conduct.

Facts

The issues in this case began with Respondent's representation of the husband in several matters arising after the conclusion of a divorce proceeding. Though the parties were no longer married when the events complained of occurred, they are referred to here as husband and wife for convenience.

The divorce decree was issued in September of 2005. Several days after the divorce decree was issued, an altercation occurred between the husband and wife, and the wife alleged that the husband had tried to hit her with his car. Shortly thereafter the wife moved to modify the divorce decree asking the family court to grant her sole custody of the children. In December of 2005, the wife sued the husband in superior court for intentional infliction of emotional distress related to the alleged automobile incident. Up to this point both parties were represented by the attorneys who had represented them in the divorce proceedings. In the fall of 2006, the husband's attorney withdrew and Respondent was engaged to represent the husband in the pending matters.

Child Support Issue in Family Court

When Respondent took over representation of the husband, there was pending a post-judgment motion to modify child support. On November 14, 2006, Respondent represented the husband before the magistrate on the wife's motion to modify child support. In April of 2007, the magistrate granted the wife's motion and substantially increased the husband's child support obligation. Respondent filed a timely appeal of the magistrate's order to the family court.

In May of 2007, the family court issued a scheduling order, outlining what Respondent needed to do to pursue the appeal which included meeting the following filing deadlines; appellant's statement of questions due May 31, 2007, and appellant's memorandum of law due by June 30, 2007.

Respondent received the scheduling order but neglected to comply with it. He did not move the court for additional time to comply and never filed the required documents with the court.

On August 3, 2007, Respondent filed a motion to withdraw from representing the husband in family court. The motion was granted on August 13, 2007.

On August 22, 2007, the wife's lawyer filed a motion to dismiss Respondent's appeal of the magistrate's child support order on the grounds that Respondent had failed to file the documents required by the court's scheduling order. On September 13, 2007, the family court granted the motion to dismiss the appeal, and thus the husband lost his opportunity to have the family court review the order for increased child support.

Appeal of Custody to the Vermont Supreme Court

On June 29, 2006, the family court granted the wife's post-judgment motion to modify the final divorce decree to grant her sole custody of the children. The husband's then attorney filed a timely notice of appeal with the Vermont Supreme Court. In October of 2006, Respondent filed his notice of appearance with the Supreme Court and in January of 2007 filed the appellant's brief with the Court.

On March 5, 2007, the Court notified Respondent and opposing counsel that if they desired oral argument, that the Court must be notified in writing by March 19, 2007.

Respondent had discussed the issue of oral argument with his client and agreed to argue the case before the Court. Respondent, however, failed to notify the court that he desired oral argument by the deadline, and the Court considered the matter on the written briefs without oral argument and affirmed the family court's award of sole custody to the wife.

Civil Suit in Superior Court

Mediation in trial on the alleged automobile assault was scheduled to take place on January 22, 2007. On January 18, 2007, Respondent wrote to opposing counsel informing him that the mediation could not go forward on that date due to the procedural posture of a related case. He was at that time working to have the automobile insurance carrier provide defense and indemnity for his client, and it made sense not to mediate until the carrier was involved. Respondent, however, neglected to inform

the mediator, and on the appointed date the mediator, the wife and her attorney appeared for the mediation. Respondent and his client were not present and the mediation did not take place.

On February 26, 2007, the superior court held a status conference on the issue of why Respondent did not appear for the mediation. Respondent failed to appear at the status conference. As a result of Respondent's failure to appear at the mediation and the status conference, the court scheduled a show cause hearing for April 9, 2007, for Respondent to show cause why he should not be held in contempt.

Respondent appeared at the show cause hearing and informed the court that, with respect to the mediation, he had informed opposing counsel that the mediation could not take place as scheduled. With respect to his failure to attend the status conference, Respondent was at that time operating his practice without employees. He was opening his own mail and calendaring things himself and neglected to place the status conference on his calendar.

Injury

Respondent's conduct caused minor actual injury and had the potential to cause more serious injury. There is actual injury in his client's frustration with his representation and his discouragement about the legal process.

With respect to the child support matter, his client lost the opportunity to have the family court review the magistrate's child support order. We cannot know whether the family court would have reduced the support obligation if it had considered it, thus there was the potential for injury.

There is the same potential for injury in the child custody matter. It cannot be known whether the Supreme Court would have reached a different result had there been oral argument.

With regard to the civil suit, Respondent's conduct caused no injury. It was appropriate to wait until the automobile insurance carrier was in the case. Respondent's failure to calendar a hearing is of concern, but the oversight did not cause any injury.

Aggravating and Mitigating Factors

The only aggravating factor is Respondent's substantial (15 years) experience in the practice of law. In mitigation, he has no prior disciplinary record, no selfish or dishonest motive, has cooperated with the disciplinary process and has expressed remorse for his conduct.

Another factor for consideration is the setting in which Respondent was practicing. Respondent successfully practiced law in a law firm setting for ten years. He then ran a solo practice for about two years before returning to a law firm setting. Respondent concedes that he had trouble with practice management tasks as a sole practitioner operating without employees. This experience has influenced his decision in July of 2007 to return to a law firm setting where systems are in place for practice management. In the spring of 2008 that firm began dissolution and in August of 2008 Respondent returned to firm practice with other attorneys.

Conclusion of Law

We accept the parties recommendation that Respondent violated Rule 1.3 of the Vermont Rules of Professional Conduct. The Rule provides that: "A lawyer shall act with reasonable diligence and promptness in representing a client." In each of the matters in which Respondent represented the husband, he failed to meet this standard. In the child support case, he failed to complete the appeal of the magistrate's order. In the custody matter, he failed to request oral argument before the Supreme Court, and in the civil suit he failed to inform the mediator that he had cancelled the mediation and failed to attend the subsequent status conference.

Sanctions

It is appropriate to look to the ABA Standards for Imposing Lawyer Discipline as well as case law, for determining the appropriate sanction in a disciplinary matter. In re Andres, 177 Vt. 511, 513 (2004), citing In re Warren, 167 Vt. 259, 261 (1997).

The ABA Standards require us to look at the duty violated, the lawyer's mental state and the actual or potential injury to arrive at a tentative sanction. We then look to the aggravating and mitigating factors to determine if that sanction should be modified.

Respondent violated his duty to act with "reasonable diligence and promptness" in his representation of the husband. His failures were due to negligence, not intentional disregard of his client obligations. As stated above, there was injury to the client due to frustration, and there was the potential for serious injury.

There are two provisions of the ABA Standards to consider here. Section 4.42 provides: "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."

Section 4.43 provides: "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."

In looking at the first section, the fact that there is a pattern of neglect tends us toward suspension, though the conduct was not knowing. Respondent's conduct also fits within the reprimand section since his conduct was the result of negligence.

We now look to the aggravating and mitigating factors to determine how they bear on the sanction. There is only one aggravating factor, Respondent's substantial experience in the practice of law. ABA Standards, § 9.22(i). There are several mitigating factors: Respondent has no prior disciplinary record, ABA Standards, § 9.32(a); he had no selfish or dishonest motive, ABA Standards, § 9.32(b); he has cooperated with the disciplinary process, ABA Standards, § 9.32(e); and has expressed remorse for the injury he caused his client. ABA Standards, § 9.32(l)

Weighing these factors, we believe that reprimand is the more appropriate sanction. While we do not believe the lack of support staff to be a mitigating factor, we are encouraged by the fact that Respondent has apparently realized the difficulties of solo practice and has no desire to return to it. This gives us some assurance that this type of neglect will not be repeated.

Reprimand is also consistent with prior Vermont professional responsibility cases. In *In re Farrar*, PRB Decision No 82 (November 2005), Farrar's client was sued by a neighbor for trespass. Farrar handled the case diligently, but failed to explain to the client what he needed to do after he lost the case on appeal. As a result, the client was held in contempt of court and a lien placed on his property. The Hearing Panel imposed public reprimand.

Reprimand was also imposed in *In re Massucco*, PRB Decision No. 39 (August 2002). In this case the lawyer neglected to wind up an estate. He had prepared a motion for distribution, which was consented to by all of the heirs, but neglected to file it with the court, and thus the real estate was not distributed until five years later. He also failed to file estate accountings in a timely manner.

In *In re Stephen*, PRB Decision No. 71 (September 2004) the attorney represented a client in a workers' compensation case and failed to deal diligently with the client's vocational rehabilitation issue and her claim for a specific course of medical treatment. Like the present case, there were mitigating factors and the Hearing Panel imposed a public reprimand.

We believe that the parties' recommended sanction of public reprimand is consistent with both the ABA Standards for Imposing Lawyer Discipline and Vermont case law and we accept the recommendation.

Order

John Davis Buckley is hereby PUBLICLY REPRIMANDED for violation of Rule 1.3 of the Vermont Rules of Professional Conduct.

Dated: December 3, 2008

Hearing Panel No. 6

FILED 12/3/08

/s/

Alison J. Bell Esq., Chair

/s/

Bruce C. Palmer, Esq.

/s/

Lisa Ventriss