

14 PCB

[16-Oct-2000]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PCB File No. 96.50
Respondent - Craig Wenk, Esq.

HEARING PANEL DECISION NO. 14

On September 6, 2000, the Panel convened a hearing via telephone. Disciplinary Counsel Jessica Porter appeared for the Office of Disciplinary Counsel. Despite having been sent notice, the Respondent was not present nor did he have counsel present.

The Panel concludes that the facts clearly and convincingly establish that the Respondent violated DR 6-101(A)(3), DR 7-101(A)(2), and DR 1-102(A)(4) of the Code of Professional Responsibility. The Panel agrees with the recommended sanction and hereby approves Disciplinary Counsel's recommendation of a six-month suspension.

I. Statement of the Case

On March 31, 2000, Disciplinary Counsel filed a Petition of Misconduct. The petition was sent to the Respondent at his address in Florida and to his last address in Vermont. No answer was received, although Respondent did acknowledge receipt of the Petition in a letter to Disciplinary Counsel dated May 1, 2000, in which he suggested a stipulation be sent to him. On May 9th, Disciplinary Counsel reminded Respondent that he needed to file a motion to show good cause for his failure to respond to the Petition with the Hearing Panel. Mr. Wenk never filed a motion. On June 13th, the Hearing Panel found Respondent had failed to answer the charges against him within the time prescribed by Rule 11.D (3) of Administrative Order 9, and granted Disciplinary Counsel's motion to deem the charges admitted.

II. Findings of Fact

1. The Respondent is an attorney licensed to practice law in the State of Vermont.
2. The Respondent was admitted to practice on December 3, 1974.
3. Mount Snow Village Association is a homeowner's association in West Dover, Vermont.

4. Beginning around 1988, the Association was involved in a dispute with the owner's of Lot #4 over unpaid homeowner's assessments. In June 1988, the Association requested Respondent to collect and, if necessary, to sue for past-due assessments on Lot #4. The Association provided to Respondent the necessary court fees.

5. On June 14, 1988, a Notice of Lien on Lot #4 was filed in the land records of Dover, Vermont by Respondent's office on behalf of the Association. The signature on the lien is not that of Respondent's.

6. On June 20, 1988, Lot #4 was sold to another couple.

7. From the perspective of the Association, there was no movement in the assessment case. Donald Epstein, President of the Association, called Respondent periodically for the status of the case. He reached only the secretary and never received return telephone calls from Respondent.

8. In 1991, Robert Fallon was the current Secretary of the Association. Mr. Fallon periodically called Respondent in 1991 as to the status of the assessment case and received no return telephone calls from Respondent. On April 10, 1991, Mr. Fallon wrote to Respondent requesting a written report on the assessment case by May 4, 1991.

9. Respondent responded to Mr. Fallon's inquiry letter of May 1,

1991. He wrote that "the suit (was) still pending and awaiting trial in the Windham Superior Court." He explained the delay was due to the state budget deficit and that he did not anticipate trial for another 1 - 1 1/2 years. The signature on the May 1, 1991 letter is that of Respondent's.

10. In May 1994, the Association retained the services of Attorney Ken Fisher who, after short investigation, informed the Association that it appeared no lawsuit had ever been filed. In actuality, none had.

11. Mr. Fisher and Respondent conversed occasionally about the assessment case. At least as of May 1995, Respondent was aware that Mr. Fisher and the Association were raising concerns over Respondent's apparent failure to file the lawsuit and the Respondent's apparent misrepresentation of that fact in his May 1, 1991 letter to the Association.

12. Respondent had a policy in his office of permitting his paralegal to sign his name to documents after his review. Such policy included the execution of legal documents.

13. Respondent had, at the time of this conduct, substantial experience in the practice of law.

14. Respondent settled the Association's claim against him in October 1997 in the amount of \$9,000 after a malpractice action had been

filed by Mr. Fisher.

15. The financial injury to the Association is speculative. The owners of Lot #4 had several, legitimate defenses to the past-due assessments. Had a court found them to be subject to the assessment prospectively at an earlier date, however, the Association could have been collecting the assessment earlier. There was also injury to the Association in that its members were frustrated by the delay in the legal proceedings they had requested and by the deception of the Respondent.

16. Respondent's state of mind was one of neglect before May 1, 1991. Once he wrote the letter to the Association stating that the suit was pending and awaiting trial, his state of mind was knowing.

17. Respondent has two prior disciplinary sanctions:

PCB File No. 90.20: a private admonition issued on October 25, 1991

and

PCB File No. 95.10: a public reprimand issued on April 30, 1996.

III. Conclusions of Law

1. DR 6-101(A)(3) of the Code of Professional Responsibility provides that: "A lawyer shall not...[n]eglect a matter entrusted to him."

Respondent neglected the water assessment case of the Association from

1988. Respondent is in violation of DR 6-101(A)(3).

2. DR 7-101(A)(2) provides that: "A lawyer shall not intentionally...[f]ail to carry out a contract of employment entered into with a client for professional services...." From 1988 until 1991, officers of the Association repeatedly inquired about the case. Respondent was on notice that the case was undesirably dormant. Respondent is in violation of DR 7-101(A)(2).

3. DR 1-102(A)(4) provides that: "A lawyer shall not....[e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation...." By falsely representing to his client he had filed a lawsuit and that it remained pending, Respondent is in violation of DR 1-102(A)(4). By having a policy that permitted his paralegal to execute legal documents with Respondent's name, thereby falsely representing the legal signature of the attorney to be true, Respondent is in violation of DR 1-102(A)(4).

IV. Sanction

The following aggravating factors are present:

1. At the time of the misconduct in questions, Respondent had substantial experience in the practice of law;
2. Respondent had a dishonest or selfish motive when he lied to this

client; and

3. Respondent has a prior disciplinary record:

Private admonition on PCB File No. 90.20, dated October 25, 1991

and

Public reprimand in PCB File No. 95.10, dated April 30, 1996.

The following mitigating factor is present:

1. Respondent suffered a serious and unexpected illness in November 1990 that totally debilitated him for an extended period. He resumed the full practice of law in March 1991.

Section 4.42 of the ABA Standards for Imposing Lawyer Sanctions provides that: "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 4.62 of the ABA Sanctions provides that: "Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to a client."

Section 6.12 of the ABA Standards provides that "Suspension is generally appropriate when a lawyer knows that ... material information

is being withheld, and takes no remedial action, and causes... an adverse or potentially adverse effect on the legal proceeding."

Respondent's initial state of mind was one of neglect. After May 1, 1991 Respondent acted with knowledge.

There was financial injury or potential injury to the Mount Snow Association in that they, at a minimum, lost prospective homeowner's assessment fees from the owners of Lot #4. There was emotional injury to the members of the Association resulting from Respondent's delay and deceit.

In PCB File No. 95.10 involving the respondent, the dissenting Justices Allen and Gibson would have imposed a suspension for essentially identical behavior to this case. The majority chose a public reprimand instead due to Respondent's apparent cooperation and remorse. In re Wenk, 165 Vt. 562 (1996). In this case, Respondent has not cooperated and a suspension is clearly the appropriate sanction.

Disciplinary Counsel has recommended that Respondent be suspended from the practice of law for six months so there can be no automatic reinstatement, and that Respondent be ordered to reimburse the Association the court filing fees it advanced to Respondent.

This Hearing Panel finds that a six-month suspension is the

appropriate sanction in this matter and that Respondent shall reimburse the Mount Snow Village Association for the court filing fees it advanced.

HEARING PANEL NO. 6

09/28/00

/s/

Dated

Judith Salamandra Corso, Atty.

10/05/00

/s/

Dated

George Coppenrath

10/04/00

/s/

Dated

James C. Gallagher, Esq.

FILED OCTOBER 16, 2000