

[14-Aug-2002]

STATE OF VERMONT  
PROFESSIONAL RESPONSIBILITY PROGRAM

In Re: Raymond Massucco, Esq.  
PRB File No. 98.50

Hearing Panel Decision No. 39

This matter has been submitted by Disciplinary Counsel, Michael E. Kennedy, Esq. and Respondent Raymond Massucco, Esq. through his counsel William Dorsch, Esq. on stipulated facts, and agreed on conclusions of law and recommended sanction. We accept the stipulated facts and the agreed on conclusions of law and recommended sanctions and impose a public reprimand on Respondent for violations of DR 6-101(A)(3) and DR 2-106 of the Code of Professional Responsibility.

Findings of Fact

1. The Respondent is an attorney licensed to practice law in the State of Vermont. He was admitted to practice in 1973. Prior to being admitted, he worked as a law clerk in the law firm of Kissell and Kissell in Bellows Falls. Upon being admitted, the Respondent became an associate in the firm. In 1975, he and Tony Kissell became partners in a law firm of Kissell and Massucco.

2. Attorney Kissell passed away in 1989. He left a wife and five children. His Last Will and Testament was allowed by the Westminster Probate Court on October 25, 1989. Mr. Kissell named his daughter, Mary Anne, and his law partner, Hal Miller, to serve as Co-Executors of his estate.

3. Attorney Miller served as Co-Executor until December 20, 1990. Prior to resigning, Attorney Miller filed an accounting that covered the period from Attorney Kissell's death to the date that Attorney Miller resigned. According to the accounting, Attorney Miller did not charge the estate a fee for the services that he rendered prior to resigning. This was consistent with the firm's practice that fees for estate services not be charged until the estate work was completed or the firm's services were no longer used.

4. On February 11, 1991, Westminster Probate Court appointed the Respondent to replace Attorney Miller as co-executor of Attorney Kissell's estate.

5. In January of 1992, Respondent filed an interim accounting for the period covering December 21, 1990, to December 31, 1991. Since the matter was not completed, the accounting did not include any charges for fiduciary or attorney fees.

6. Attorney Kissell's Last Will and Testament bequeathed real estate. In October of 1992, the Respondent prepared a Motion for Partial Distribution of Real Estate. All the heirs consented to the Motion by March

of 1993. The Respondent never filed the Motion. The real estate was not distributed to the heirs until May of 1997.

7. The Respondent next filed an accounting on July 27, 1995. That accounting covered the period from January 1, 1992 to December 31, 1992. Since the matter was not completed, the accounting did not include any charges for the Respondent's fiduciary or legal services.

8. In 1995, the court ordered the Respondent to file accountings for 1993 and 1994 by October 15, 1995. The court ordered the Respondent to have the estate closed by the end of 1995. The Respondent failed to do so.

9. In December of 1996, the court again ordered that accountings be filed. The Respondent filed the 1993 accounting in April of 1997. In May, he filed the accountings for 1994, 1995, and 1996.

10. One of the estate's assets was the building that housed the Law Firm of Kissell and Massucco. The estate held a one-third interest in the building. The accountings that the Respondent filed did not show that the estate had received any rents in connection with its one-third interest in the property. The firm had paid rents in accordance with an agreement with Tony Kissell. The rents were reported in the estate's tax returns. The Westminster Probate Court found that the rental payments were approximately \$1,800 per year below market value. The Court concluded that the Respondent should have made arrangements between his Law Firm and the estate relative to the amount of rent the estate should receive from the firm. As a result, the Court ordered the Respondent to pay the estate \$5,083.00.

11. Another of the estate's assets was a bond issued by the Vermont Education and Health Buildings Financing Agency. The bond had a face value of \$5,000 and was due on September 1, 1995. The Respondent did not redeem it.

12. In 1992, Respondent met with the deceased's family. The heirs were concerned that the Respondent had been suspended from the practice of law and, as a result, might not be able to represent the estate. They discussed the fact that he might not charge them a fee. There was never an agreement reached as to how Respondent would be paid.

13. The Respondent charged fees for the services that he and Attorney Miller had performed for the estates. The accountings that the Respondent filed showed total payments to his firm of \$67,637.52. The fee was challenged and the Westminster Probate Court reduced the fee to \$26,162.94.

14. The court based the fee reduction on Attorney Miller's waiver of any fee, as well as the determination that the estate had lost income and incurred increased legal expenses due to the Respondent's failure to act diligently in handling the estate. Specifically, the court concluded that the real estate that was distributed in 1997 should have been distributed earlier. As a result, the court concluded that the Respondent continued to charge the estate for time spent managing real estate that should have already been distributed. In addition, the court concluded that the Respondent failed to redeem a bond that was part of the estate. This failure cost the estate potential interest the money would have earned had the bond been redeemed when it should have been.

15. In January of 1998, the court removed the Respondent as Co-Administrator of the estate.

16. The Respondent promptly complied with the court's order requiring him to return fees to the estate and to pay the estate \$5,000 to compensate the estate for the rents that it had received from the firm that were below market value.

17. The Respondent's actions regarding the Tony Kissell estate were the direct result of his emotional reaction to Attorney Kissell's death. Attorney Kissell had been the Respondent's mentor, close friend, law partner, father figure and was the godfather of his child. Attorney Kissell's death deeply affected the respondent and the work he did on the estate was a painful reminder of his loss.

18. The Respondent's handling of the estate caused Attorney Kissell's heirs to experience unnecessary stress, anxiety, and other emotional turmoil that served to remind them of their own loss. In addition, they were unable to access property to which they would otherwise have been entitled but for the Respondent's failure to distribute such. Finally, the Respondent's neglect resulted in extensive litigation in the probate court that exacted a financial and emotional toll from the heirs.

19. The Respondent's license to practice law in the State of Vermont was suspended for four months in 1992 after it was determined that he failed to file and state and federal income tax returns in the 1980's.

#### Conclusions of Law

1. Respondent's conduct violated DR 6-101(A) (3) of the Code of Professional Responsibility.

DR 6-101(A) (3) prohibits an attorney from neglecting a legal matter entrusted to him. The facts establish three violations of DR 6-101(A) (3). Respondent was appointed co-executor of the Kissell estate in February of 1991. His first annual account was timely filed in January of 1992. However, he did not file another account until July of 1995 despite several orders from the court. Respondent did not bring his accounting current until April of 1997. Respondent failed to present any facts to show that he could not have complied with the court's orders and accounted in a timely fashion.

Respondent's failure to redeem the Vermont Education and Health Buildings Financing Agency bond which became due in 1995 also violated DR 6-101(A) (3). There is no evidence to show that the bond was ever redeemed before Respondent's removal as co-executor in 1998.

Respondent's four year delay in arranging for distribution of the real estate is the most troubling of the three instances of neglect. The Motion for Partial Distribution was prepared and approved by all the heirs. However, Respondent failed to file it with the court.

2. Respondent's Conduct violated DR 2-106.

DR 2-106 prohibits an attorney from charging or collecting fees that are clearly excessive. Whether or not a fee is excessive depends on a number of factors including the time and labor required, the results

obtained, and the nature of the relationship with the client. The fact that the court reduced the fee by more than half is persuasive evidence that the fee was excessive. The charging of the excessive fee is compounded by the fact that the delay which led to the fees also diminished the amount eventually received by the heirs.

#### Sanctions

The Hearing Panel accepts the recommendation of Respondent and disciplinary counsel that public reprimand is the appropriate sanction in this matter. In determining the appropriate sanction the Panel is guided by the ABA Standards for Imposing Lawyer Sanctions. The Standards suggest four factors that courts should weigh when determining whether the recommended sanction is appropriate. Standards C. 3. lists the following:

- (a) the duty violated,
- (b) the lawyer's mental state,
- (c) the actual or potential injury caused by the misconduct, and
- (d) the existence of aggravating or mitigating circumstances.

See *In re Warren*, 167 Vt. 259, 261.

#### Duties violated

Respondent had a duty to represent the Kissell estate in a timely and diligent manner. This he failed to do in more than one instance over the course of his representation. Respondent also violated his duty to the Kissell estate not to charge an excessive fee.

#### Respondent's Mental State

The parties stipulated that Respondent's mental state was one of neglect rather than intent to harm.

#### Actual or potential injury

There was actual injury in this case. The heirs suffered financial loss from the delays in distribution of the estate and redemption of the bond, as well as from excessive fees and inappropriately low rental fees on estate property. Both the excessive fees and the low rental created a financial benefit to Respondent. The fact that the Respondent paid the court ordered restitution is to his credit, but does not excuse the violation of his duties to his clients. These delays also took an emotional toll on the heirs.

#### Mitigating factors

In accepting the recommended sanction, the hearing panel has considered the following mitigating factors. The Respondent's neglect and excessive fee did not result from a dishonest or selfish motive. ABA Standards, 9.32(b). The Respondent's close emotional ties to Kissell and his family affected Respondent's ability to diligently attend to the administration of his estate. Kissell's death deeply affected the Respondent and the work he did on the estate was a painful reminder of his loss. ABA Standards, 9.32(c). The Respondent promptly and in good faith

complied with the court's order that he make restitution to the estate, ABA Standards, 9.32(d), and he made a full and free disclosure to Disciplinary Counsel. ABA Standards, 9.32(e). Finally, there has been a delay in presenting this case that cannot be attributed to the Respondent. ABA Standards, 9.32(i).

Aggravating factors

There are also aggravating circumstances to be considered. The Respondent has a prior disciplinary offense. In re Massucco, 159 Vt. 617 (1992). ABA Standards, 9.22(a). This earlier case is similar to the present one in that it involved neglect, but of Respondent's personal obligations rather than those of his clients. In addition, the Kissell heirs were somewhat vulnerable in that their family's special relationship with the Respondent resulted in a high degree of trust that he would diligently attend to his friend and mentor's estate. ABA Standards, 9.22(h). This case involves multiple violations. ABA Standards, 9.22(d). Finally, at all times relevant to this case, the Respondent has had substantial experience in the practice of law. ABA Standards, 9.22(i).

In view of all of the above, the ABA Standards indicate that a public reprimand is appropriate. In general, a public reprimand is 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, 4.43. A reprimand is also appropriate "when a lawyer negligently engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system." ABA Standards, 7.3. Since Respondent's negligence, both in administering the estate and determining whether his fee was appropriate, caused injury to the heirs, a public reprimand is appropriate. We do not believe that the aggravating and mitigating factors are sufficient to raise the sanction to a suspension or lower it to an admonition.

The Hearing Panel hereby publicly reprimands Respondent for violation of DR 6-101(A) (3) and DR 2-106 of the Code of Professional Responsibility.

Dated: July 29, 2002 - FILED AUGUST 14, 2002

/s/

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Paul Ferber, Esq.

/s/

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Robert M. Butterfield, Esq.

/s/

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George Coppenrath