

[29-Jan-1993]

STATE OF VERMONT
PROFESSIONAL CONDUCT BOARD

In re: PCB File 85.42

NOTICE OF DECISION
NO. 49

This matter was heard before a hearing panel consisting of Joseph F. Cahill, Jr., Esq., Chair, Nancy Corsones, Esq., and Mr. Donald Marsh.

Based upon the hearing panel's report to the Board, the Board finds that respondent violated DR 6-101(A) (3) and dismisses the remaining charges. The Board has voted to impose a private admonition.

The Board adopts the following findings of fact and conclusions of law based upon the hearing panel's report to the Board.

FACTS

1. Respondent has been a member of the Vermont Bar since 1970.
2. In 1990, he became co-executor of the estates of complainant's parents. Complainant and her sibling were the sole beneficiaries of these estates .
3. Respondent was required to file inventories of these estates within thirty days of his appointment as co-executor, to file an interim accounting one year after appointment, and yearly thereafter until the final accounting. He was also responsible for filing federal and state tax returns.
4. The required inventories were not filed with the Probate court until two years after they were due. Respondent did not request an extension for late filing of these returns.
5. Respondent filed the interim accountings, which were due by April of 1981, in September of 1982. Respondent did not request an extension for late filing.
6. Respondent filed the federal and state estate tax returns a year after they were due. Again, respondent did not request an extension to allow for late filing. No financial prejudice resulted to the estate. In fact, because of the rates of return on the estate assets and the deductions allowed for the interest paid, there was a net gain to the estates of nearly \$3500.
7. Final probate court action on these estates was delayed because of the late filing of the estate tax returns. The IRS did not issue estate tax clearance letters until December of 1982.
8. Respondent filed his final accountings in March of 1983. Hearings were held within a few weeks. However, the probate court did not issue its order on these two accountings until nearly a year later.
9. The probate court criticized respondent's delay in completion of the probate of the two estates and found respondent responsible for additional interest costs incurred by the estates due to the delayed filing of the returns. Therefore, the court ordered a total offset of \$14,289.32 against

respondent's attorney/executor fees. The court also ordered respondent and his co-executor removed as administrators of the estates.

10. Respondent filed a motion in probate court to alter or amend this decision. It was denied. Respondent then appealed to the superior court.

11. The appeal was resolved in March of 1985 by stipulation of the parties. The stipulation reduced the amount of offset to \$934.45, allowed respondent to continue as a co-executor until completion of the estates without further charge to the estates, and allowed complainant's fees for attorneys as administrative expenses. The stipulation also required respondent to pay complainant the sum of \$10,000 in damages to be paid within certain time frames. The court issued orders consistent with this stipulation.

12. Respondent did not file the final accountings until June of 1985. The probate court issued its final orders in October.

13. In the meantime, complainant filed a malpractice action against respondent and filed a complaint with the Professional Conduct Board. The Professional Conduct Board's review of the matter was stayed pending resolution of the litigation. The Board advised respondent to inform the Board when the matter was concluded so that it could then initiate its investigation.

14. The malpractice action was eventually settled in 1987. Under the terms of the settlement, respondent paid complainant \$5,000 cash and gave complainant a promissory note for \$7,500. Respondent did not pay the note in accordance with its terms because of respondent's continuing financial difficulties.

15. Respondent did not advise the Professional Conduct Board of the settlement because he was under the impression that, as part of the settlement, complainant would write a letter to the Board withdrawing the complaint. This was not, however, a formal condition of the settlement.

16. Respondent paid some of the interest on the \$7,500 note but, because of his poor financial situation, did not make the required principal payments.

17. Following notice to respondent that the investigation was going forward, counsel for complainant and respondent renegotiated the \$7,500 note to include the accrued unpaid interest. There was no connection between that renegotiated note and the pending Board investigation.

18. The new note has been partially paid in a timely manner in accordance with its terms.

19. Respondent offered in mitigation his personal situation with a manic-depressive wife, whose problems became acute about the time his representation of the estates commenced, and included heavy drinking, frequent suicide attempts and eventual hospitalization. Following the hospitalization, personal problems with his wife continued, compounded in the spring of 1981 with the death of his father. Finally, divorce proceedings were instituted. During this entire period, respondent was the primary parent for two minor children.

20. Since the investigation was reopened, respondent has co-operated with the investigation. He has no prior disciplinary record.

21. Respondent is no longer employed as a full-time, practicing attorney and is employed in another, law related occupation. He has provided

substantial pro bono services to his community.

CONCLUSION

The Board finds that respondent violated DR 6-101(A) (3) in neglecting his duties as fiduciary and attorney for the two estates. Because of respondent's neglect of the estate's deadlines, complainant had to hire counsel at additional expenses. However, once respondent pays the note, complainant will have been reimbursed for those expenses.

There was insufficient evidence to conclude that respondent's neglect of these two estates constituted prejudice to the administration of the probate court or that the respondent's appeal of the probate court order was wrongful-ly taken. The respondent's failure to pay his promissory note and respondent's request to complainant that she withdraw her complaint, under the facts here, also do not rise to the level of a disciplinary violation. The Board finds that respondent sought the withdrawal of the complaint not to impede the Board's investigation but to mitigate sanctions. For the above reasons, the Board does not find a violation of DR 1-102(A) (1), (4), (5) and (7) as charged and, therefore, dismisses those counts.

SANCTION

The question of whether a public reprimand or a private admonition should be imposed is a close one.

Section 4.43 of the ABA Standards for Imposing Lawyer Sanctions 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 to a client.

Section 4.44 of the Standards provides:

Admonition is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client and causes little or no actual or potential injury to a client.

In this case, the evidence established that complainant will suffer no net economic loss, assuming respondent pays his note in full. However, complainant was put to considerable aggravation and inconvenience because of the delay in closing the two estates.

The Board concludes that it is not necessary to determine in this case whether such aggravation and delay constitute injury sufficient to support a public reprimand, because the panel feels there are sufficient mitigating factors to support a private admonition. These include no prior disciplinary record, no dishonest or selfish motive, full co-operation with the Board, and expression of remorse. Most importantly, respondent experienced very substantial personal problems during the period of neglect which the Board finds compelling.

For the above reasons, a private admonition will issue.

Dated at Montpelier this 29th day of January, 1993.

PROFESSIONAL CONDUCT BOARD

/s/

J. Eric Anderson, Chairman

/s/

Deborah S. Banse, Esq.

/s/

Anne K. Batten

/s/

Rosalyn L. Hunneman

/s/

Robert P. Keiner, Esq.

/s/

Donald Marsh

Karen Miller

/s/

Edward Zuccaro, Esq.

Jane Woodruff, Esq.

/s/

Nancy Foster

/s/

Joseph F. Cahill, Jr., Esq.

/s/

Nancy Corsones, Esq.

/s/

Christopher L. Davis, Esq.

Hamilton Davis

Paul S. Ferber, Esq.

Ruth Stokes