

56 PRB

[9-Jun-2003]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY

In Re: PRB File No. 2003.183

Decision No. 56

On April 7, 2003, the parties filed a stipulation of facts as well as conclusions of law and recommendations on sanctions. Respondent also waived certain procedural rights including the right to an evidentiary hearing. The panel accepts the facts and recommendations and orders that Respondent be admonished by Disciplinary Counsel for failure to act with reasonable diligence and promptness in his handling of a real estate closing in violation of Rule 1.3 of the Vermont Rules of Professional Conduct.

Facts

Respondent represented a married couple in the refinance of their home (together, the "clients" - the wife is referred to individually as "the wife"). Respondent also acted as closing agent for the loan which took place on December 20, 2002.

On the date of closing, the lender wired the loan proceeds to Respondent's trust account, and the clients signed the necessary documents. Since the transaction was a refinance, the loan proceeds could not be disbursed until three business days after closing. At the conclusion of the closing, Respondent told the clients that he would mail them copies of the documents.

On December 26, 2002, three business days after closing, Respondent sent a trust account check to pay off the clients' previous loan on their home. He did not send out copies of the closing documents, nor did he make the final disbursements of \$1,124 for the loan broker's commission, \$350 for the loan application and appraisal, and \$16,124.98 to pay off the balance on the clients' credit card account.

Respondent left town early on December 27, 2002, and did not return to Vermont until late on December 30, 2002. The following day, he mailed the closing package to the lender, as previously agreed. He also drafted a cover letter to the credit card company to accompany the check for payment of the balance due, but became distracted and neglected to send out the

letter and check.

During the first week of January, 2003, a friend of Respondent's was diagnosed with lung cancer and hospitalized. Respondent was very concerned for the health of his friend at that time. The friend and her husband asked Respondent to interrupt what he was then working on to counsel them and to prepare estate planning documents for them, and Respondent did so.

That same week the mortgage broker left a voice mail message at Respondent's office to follow up on the checks. Respondent did not return this call. The following week, she left another voice mail message, this time mentioning that she was concerned that the checks had not been sent. Respondent returned the broker's second call and left a voice mail message stating that a friend of his had recently been diagnosed with cancer. He apologized for the delay and said that he would send the checks out. Also during the first two weeks of January, the wife left two messages for Respondent on his voice mail, inquiring about their copies of the closing documents. These calls were not returned.

On or about January 15, 2003, when the broker had still not received the checks she called the wife to discuss the situation. The wife told the broker that she was waiting for copies of the closing documents, and that she would call Respondent and mention the broker's checks as well. The wife spoke with Respondent on January 16, 2003. He told her that he had been busy but would send out the closing documents soon. He also said that

he had sent out the broker's check that morning. On January 16, 2003, Respondent had mailed the broker a check for \$1,124 for her commission. He did not send her a check for the \$350 appraisal fee, because he thought that the check might need to be sent to the appraiser, and he needed to check on that.

After receiving just the commission check from Respondent, the broker called Respondent again and told him that she needed the check for \$350 for the appraisal. The wife also spoke with Respondent again about copies of the closing documents. The wife received copies of the closing documents from Respondent who hand delivered them to her father, an acquaintance of Respondent whose office is nearby. On January 22, 2003, Respondent mailed a check for \$350 for the appraisal fee to the broker. At that time all closing issues were taken care of, with the exception of the payment to the credit card company.

On or about January 21, 2003, the clients' received their monthly credit card statement and noticed that the \$16,124.98 payment had not been credited to their account. The next day the wife called Respondent at home late in the day and left a message on his answering machine. She was not specific as to the purpose of the call, but asked Respondent to call her back. Respondent received the message about 9:00 p.m. and decided that it was too late to return the call that day, especially as the message did not indicate that the call was urgent.

The following day Respondent made a day-long round trip to the Albany, New York area, leaving early and returning home around 5:00 p.m. Upon his return home, Respondent found another message from the wife. He returned the call to the wife around 5:10 p.m. The wife was upset. She informed Respondent that she and her husband had received their credit card statement, and that the balance of \$16,124.98 had not been paid, and interest and late fees had accrued. Respondent thought that he had sent out the payment to the credit card company back on December 31, but he was not in his office to check on it, so he told the wife that he would do so and get back to her. Respondent went to his office that evening to check his records and discovered that he had neglected to send out the letter and the check to the credit card company back on December 31.

When Respondent returned home that evening, he returned a call to the wife's father, who had called to follow up on the credit card payment, and early the next morning Respondent hand delivered a check for the credit card balance to the wife's father. He included an additional \$137.09 to cover the late fees and interest on the credit card bill and gave the clients a separate check for \$13.65, to cover the cost of sending the payment by express mail. Around this same time, the clients spoke with another attorney about the situation, and that attorney filed a complaint with the Office of Disciplinary Counsel on behalf of the clients. The clients incurred a bill for legal services from this other attorney for less than one hundred dollars.

The clients had a preferred (i.e., lower) interest rate on the credit card at issue. This rate will be revoked if the clients are late on two payments within a one year period. The late payment resulting from Respondent's neglect constituted the first instance within a year that a payment was late. The clients are not aware of any specific adverse consequences to their credit rating as a result of the late payment on the credit card, but they were frustrated in their dealings with Respondent and were anxious about the unpaid credit card bill and their credit rating.

The following mitigating factors are present in this matter: the absence of a dishonest or selfish motive, timely good faith effort to make restitution, full and free disclosure to the Office of Disciplinary Counsel, remorse and no prior disciplinary record. Respondent is licensed to practice law in the State of Vermont. He was admitted in Vermont in 1984.

Conclusions of Law

Rule 1.3 of the Vermont Rules of Professional Conduct provides as follows:

"A lawyer shall act with reasonable diligence and promptness in representing a client."

In this matter, Respondent neglected to send out three checks following a

closing in which he acted as the closing agent. The closing occurred on December 20, 2002, and the date for disbursing funds was December 26, 2002. Respondent disbursed a check to the loan broker for her commission on January 16, 2003, and he disbursed a second check to the loan broker for the appraisal fee on January 22, 2003. Respondent neglected to disburse a check to his clients' credit card company until January 24, 2003, after his client brought the oversight to his attention and after late fees and interest had accrued on the clients' account.

What constitutes unreasonable delay is a function of the circumstances of the matter. While the time between the date for disbursal of funds and the final payment to the credit card company was less than a month, this amounts to an unreasonable delay and a neglect of the client's affairs in the context of a residential real estate transaction where the expectation is that funds will be disbursed immediately at the end of the three day period, and particularly where funds are to be paid to a credit card company. Delay in payment to a credit card company potentially can cause serious harm to the client. The Panel finds that Respondent's conduct violated Rule 1.3 of the Vermont Rules of Professional Conduct.

Sanction

In Vermont, it is appropriate to follow the ABA Standards For Imposing Lawyer Sanctions in determining the appropriate sanction in a disciplinary case. *In Re Warren*, 167 Vt. 259, 261 (1997); *In Re Berk*, 157 Vt. 524, 532

(1991) (citing *In Re Rosenfeld*, 157 Vt. 537, 546-47 (1991)). The ABA Standards enumerate four factors relevant to the determination of the appropriate sanction: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury; and (4) any mitigating and/or aggravating factors. *In Re Warren*, 167 Vt. at 261. An analysis of each of these factors demonstrates that a private admonition is the appropriate sanction for Respondent's conduct in this case.

1. The Duty Violated

A lawyer has a duty to his client to act with reasonable diligence and promptness. ABA Standards, Section 4.4. Respondent violated that duty by failing to disburse funds after a real estate closing in a timely fashion.

2. The Lawyer's Mental State

Respondent's mental state was one of negligence. He did not intentionally or knowingly fail to serve his client.

3. Injury

Respondent's neglect caused little or no actual injury to his client. Because the credit card bill was not paid in a timely fashion, interest and penalties were added to the client's account. Respondent paid those additional amounts in full and also covered the cost of sending in the late

payment via express mail. Nevertheless, the clients were distressed about their credit card bill not being paid on time, and they worried about their credit rating and whether their preferred credit card rate might be jeopardized. The client also had to spend time making phone calls to get the matter taken care of. It is unknown to the clients whether their credit rating has in fact been impacted by the events described in the stipulation of facts.

4. Aggravating and Mitigating Factors

There are five mitigating factors present. First, Respondent has no prior disciplinary record. ABA Standards, Section 9.32(a). Second, Respondent had no dishonest or selfish motive. ABA Standards, Section 9.32(b). Third, Respondent has made full and free disclosure to the Office of Disciplinary Counsel and has exhibited a cooperative attitude toward this proceeding. ABA Standards, Section 9.32(e). Fourth, Respondent immediately paid the interest, penalties, and express mailing fees, thus making good faith restitution to the client before the complaint was filed. ABA Standards, Section 9.32(d). Finally, Respondent has expressed his remorse on several occasions and is sorry that he neglected this matter. ABA Standards for Imposing Lawyer Sanctions, Section 9.32(l).

An admonition is 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." ABA Standards, Section

4.44. In this case, the Respondent acted negligently when he failed to send out the post-closing checks in a timely manner, but fortunately little injury resulted.

Considering all the relevant factors, the Hearing Panel agrees that an admonition by Disciplinary Counsel is appropriate in this matter.

Conclusion

For the reasons stated herein, the Hearing Panel orders that Respondent be admonished by Disciplinary Counsel for violation of Rule 1.3 of the Vermont Rules of Professional Conduct.

Dated: June 9, 2003

Hearing Panel No. 4

/s/

Paul Ferber, Esq.

/s/

Robert M. Butterfield, Esq.

/s/

George Coppenrath

FILED JUNE 9, 2003