

[Filed 13-Jul-2006]

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In re PRB Docket No. 2006-167 (2006-287)

[Filed 02-May-2007]

ENTRY ORDER

2007 VT 50

SUPREME COURT DOCKET NO. 2006-287

DECEMBER TERM, 2006

In re PRB Docket No. 2006-167	}	APPEALED FROM:
	}	
	}	Professional Responsibility Board
	}	
	}	
	}	DOCKET NO. 2006-167

In the above-entitled cause, the Clerk will enter:

¶ 1. Disciplinary Counsel appeals from a decision of the Professional Responsibility Board. Disciplinary Counsel and respondent entered into a stipulation which recommended the Hearing Panel find that respondent had violated Rule 1.3 of the Vermont Rules of Professional Conduct. The parties further recommended that the Panel impose a private admonition as the appropriate sanction. The Hearing Panel found no violation of Rule 1.3, and dismissed the complaint. We affirm.

¶ 2. Respondent, admitted to the bar in 1985, represented a client in a criminal matter in district court. A jury convicted the client, and on November 29, 2000, the court imposed a sentence of incarceration. The client asked respondent to file a notice of appeal on his behalf, and respondent agreed to do so. Respondent filed his client's notice of appeal five days after the deadline, and this Court dismissed the appeal as untimely.

¶ 3. Fewer than sixty days after the appeal was dismissed, the Prisoners' Rights Division of the Defender General's Office filed a petition for post-conviction relief in superior court on behalf of the client alleging that the respondent's untimely filing of the appeal constituted ineffective assistance of counsel. Respondent cooperated in that proceeding as a potential witness. The parties settled the post-conviction relief case by providing the client an additional thirty days in which to file a new notice of appeal. The client filed his second notice of appeal within that time, and this Court eventually denied the client's appeal on the merits.

¶ 4. The client then filed a professional conduct complaint

against respondent, alleging that he failed to act diligently and promptly in filing the original notice of appeal. The Vermont Rules of Professional Conduct require an attorney to act with reasonable diligence and promptness in representing a client. V.R.P.C. 1.3. Respondent cooperated with the disciplinary process, and admitted the alleged misconduct. As noted above, Disciplinary Counsel and respondent entered into a stipulation in which respondent admitted misconduct and the parties recommended an agreed-upon sanction to the Hearing Panel of the Professional Responsibility Board. The Panel held that missing the deadline to file a notice of appeal did not constitute a violation of Rule 1.3 in this case. Therefore, the Board dismissed the complaint. One member of the Board dissented. Disciplinary Counsel appealed.

¶ 5. "This Court makes its own decisions as to attorney discipline, according deference to the Board's findings." In re Keitel, 172 Vt. 537, 538, 772 A.2d 507, 509 (2001) (mem.). "[W]e . . . give deference to the recommendation of the Hearing Panel," but we make our own determination as to which sanctions are appropriate. In re Blais, 174 Vt. 628, 630, 817 A.2d 1266, 1269 (2002) (mem.) (internal citations omitted). The Court "must accept the Panel's findings of fact unless they are clearly erroneous." Id. at 629, 817 A.2d at 1269. There is no challenge to the facts as found by the Hearing Panel.

¶ 6. The Vermont Rules of Professional Conduct require that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." V.R.P.C. 1.3. The definitions in the preamble to the Rules state that the term "reasonable" when used in relation to conduct by a lawyer "denotes the conduct of a reasonably prudent and competent lawyer." The standard of proof for charges of misconduct is "clear and convincing evidence." A.O. 9, Rule 16(C). Thus, the Panel was asked to find by clear and convincing evidence that a single instance of a missed appellate deadline was misconduct. The Panel held that "[a] single isolated act of negligence without any further acts compounding the error does not breach the standard of Rule 1.3." It reasoned that "[w]ere we to find a violation here, most attorney errors would be subject to the disciplinary system."

¶ 7. In arriving at this conclusion, the Panel looked to two prior disciplinary rulings for guidance. The Panel first examined a case in which an attorney missed a child support hearing due to a calendaring error. In re PRB File No. 2005.202, Decision No. 81 (Nov. 22, 2005). In that case, the Panel found no prior disciplinary record, and no dishonest or selfish motive. The attorney made a full and free disclosure to Disciplinary Counsel and expressed remorse for her actions. In addition, the client suffered no injury because the client appeared at the hearing and requested and received a continuance. There, the Panel held that a single instance of inadvertence or negligence was not misconduct, absent further inappropriate conduct after the inadvertence or negligence. Charges were dismissed.

¶ 8. The Panel also considered a case in which all of the difficulties in the case stemmed from one act of negligence. In re PRB File No. 2005.191, Decision No. 90 (Mar. 17, 2006). In that case, the attorney, appearing pro hac vice, failed to file a notice of appearance, and so he did not receive notice of a crucial discovery-scheduling order. As a result, he filed numerous untimely discovery requests which were all denied. The Panel found that the respondent knew a discovery order would

be issued but made no effort to obtain a copy of the order and discover its contents within the discovery period. It was the attorney's failure to follow up on an order that he never received but should have known would be issued that changed the case from one of simple negligence into one of misconduct.

¶ 9. In the case before us, the Panel found that a single isolated act of negligence did not constitute misconduct under the Rules. We agree with manner in which the Panel balanced the attorney's conduct in this case against the public protection goals articulated by the Rules of Professional Conduct. In general, the Rules are "intended to protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar." In re Berk, 157 Vt. 524, 532, 602 A.2d 946, 950 (1991) (per curiam) (although Berk referred particularly to sanctions, it is clear that these are the overarching goals of the Rules). The respondent missed an important deadline, but he worked to remedy his error with the client and subsequent counsel. In the end, the client was afforded his appellate rights. Respondent's cooperation distinguishes his conduct from cases in which the Panel found misconduct based on failures to act. Further, there was no evidence that respondent attempted to evade or deny his error. Cf. In re PRB File No. 2004.062, Decision No. 68 (July 3, 2004) (attorney's negligence followed by a long period of inaction and a refusal to answer client's calls); In re PRB File No. 2002.219, Decision No. 57 (July 7, 2003) (attorney's negligence was followed by eighteen months in which attorney failed to communicate with client); In re PRB File No. 2003.183, Decision No. 56 (June 9, 2003) (attorney's failure to pay credit card bills immediately after a real estate closing prompted phone calls from client, and attorney did not take immediate action). And, the Panel found respondent took remedial action after he discovered his negligence. Cf. In re Furlan, Decision No. 65 (May 5, 2004) (attorney's negligence in missing two court dates was compounded by the fact that when the court ruled against his clients after failure to appear, he took no action because he believed the case had no merit).

¶ 10. This decision should not be read to excuse single negligent acts or omissions by attorneys in all situations. Missing a filing deadline is never insignificant, but the availability of remedies to correct a mistake may tend to mitigate the seriousness of an error. The absence of an opportunity to cure a negligent misstep may render an error more serious and, depending on the circumstances, constitute misconduct even though isolated. The Panel exercised its authority in reasonably balancing the competing interests in this case. We agree with the Panel that respondent's error was appropriately remedied through the post-conviction relief process, and none of the goals of attorney discipline would have been served by imposing discipline here. See In re Blais, 174 Vt. at 631, 817 A.2d at 1270 (goal of attorney discipline is to protect the public). It is true that respondent has been disciplined once before, and we acknowledge that the concerns stated by the dissenting Panel member in this case are important. However, we agree with the Board's conclusion that respondent's actions did not rise to the level of misconduct. To so hold would result in bringing all instances of an attorney's inadvertence or negligence within the realm of misconduct. We do not believe that the Rule is this broad and far reaching. Attorneys are held to a high standard of conduct, but absent injury or other factors, a single mistake does not show a lack of reasonable diligence or promptness.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice

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STATE OF VERMONT  
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No 2006.167

Decision No. 92

Respondent failed to file a timely notice of appeal in a criminal matter and is charged with failure to represent his client with "reasonable diligence and promptness" in violation of Rule 1.3 of the Vermont Rules of Professional Conduct. The parties filed a stipulation of facts and recommended conclusions of law. The Panel accepts the stipulation of facts but a majority of the Panel does not find that the evidence supports a finding of misconduct and the case is dismissed.

Facts

Respondent was assigned to represent an indigent defendant in a criminal matter. Following a jury trial, the client was convicted and asked Respondent to file an appeal. The client was eligible for assigned counsel on appeal, and Respondent needed to file an income and expense affidavit in conjunction with the notice of appeal. Respondent prepared the notice of appeal in a timely fashion but neglected to obtain the required income and expense affidavit from his client in time, and the documents were filed 35 days after sentencing. The Supreme Court dismissed the appeal as untimely.

A post conviction relief petition was filed on behalf of the client on the grounds of ineffective assistance of counsel. Respondent acknowledged that the appeal was not timely and cooperated in the filing of the petition. The post conviction relief petition was resolved by giving the

defendant an additional 30 days to appeal. He did so with the help of other assigned counsel and ultimately lost the appeal on the merits. The stipulated facts are silent on how the client was informed of the dismissal of the appeal, but the time between the dismissal of the appeal and the filing of the petition for post conviction relief is less than sixty days. Respondent was admitted to practice in 1985 and has one prior disciplinary offense in 1995 for neglecting a client matter. Respondent had no selfish or dishonest motive, feels genuine remorse and cooperated fully with the post conviction relief case and with disciplinary counsel.

#### Majority Opinion

Rule 1.3 of the Vermont Rules of Professional Conduct requires an attorney to "act with reasonable diligence and promptness in representing a client." What is reasonable diligence depends on the circumstances. Where an appeal must be filed within thirty days it is clearly negligence to fail to act within that period of time. The more difficult question is whether this is also misconduct. This case is similar to *In re PRB File No. 2005.202*, Decision No. 81 (Nov. 22, 2005), in which a Hearing Panel declined to find misconduct when an attorney missed a child support hearing due to a "calendaring error." In that case, as well as in the case before us, there were no other charge of misconduct and no other acts which were detrimental to the client.

In *In re Furlan*, Decision No. 65 (May 3, 2004), the attorney's negligence in missing two court dates was compounded by the fact that when the court ruled against his clients after his failure to appear, he took no action because he did not believe that the cases had merits. In *Furlan* it was the inaction after the negligence that brought the case into the realm of misconduct. Here Respondent admitted his error and cooperated with the post conviction relief petition.

Similarly, there is no evidence presented that Respondent attempted to cover up his error. He acknowledged his error and cooperated with the filing of the post conviction relief petition. This distinguishes this case from *In re PRB File No. 2002.219*, Decision No. 57 (July 7, 2003), where the attorney's negligence was followed by failure to communicate with the client over a period of some eighteen months, or *In re PRB File No. 2003.183*, Decision No. 56 (June 9, 2003), where the attorney's failure to pay credit card bills immediately after a real estate closing prompted phone calls from the client but did not result in immediate action by the attorney. A violation of Rule 1.3 was found in *In re PRB File No. 2004.062*, Decision No. 68 (July 26, 2004), where the violation was followed by a long period of inaction and a refusal to respond to client calls.

In *In re PRB File No. 2005.191*, Decision No. 90, (March 17, 2006), the Hearing Panel found that all of the difficulties in the case stemmed from one act of negligence. Respondent failed to file a timely notice of appearance in a matter in which he was appearing pro hac vice, and thus missed a discovery order. The Hearing Panel distinguished Decision No. 81 and found a violation. In Decision No 90, Respondent knew that a discovery order would be issued but made no effort to obtain a copy of the order and discover its contents within the discovery period. It was Respondent's failure to follow up on an order that he never received but should have known would be issued that changed the case from one of simple negligence to one of misconduct.

A similar result was reached in a North Dakota case, *In re Hoffman*, 703 N.W.2d 345 (ND 2005). Here the attorney mis-informed his client about a statute of limitations and the case was dismissed. The court failed to find misconduct, stating that a simple act of negligence not accompanied by some other violation is not a violation of the ethical rules.

We agree with this ruling and find that it is consistent with the negligence cases we have reviewed. A single isolated act of negligence without any further acts compounding the error does not breach the standard of Rule 1.3. Were we to find a violation here, most attorney errors would be subject to the disciplinary system. While we concede that missing an appellate deadline could be deemed more serious than missing a child support hearing, Decision No. 81, there are provisions for dealing with this kind of attorney negligence outside the disciplinary system. In the present instance the post conviction relief process restored the defendant's appellate rights. In the case of negligence in connection with a civil matter, malpractice claims exist to provide relief for the injured client.

In summary, while lawyers are rightly held to a high standard of conduct, a single act of negligence does not breach the rules of professional conduct absent some compounding factor such as failure to communicate with client, or to take remedial action.

Order

For the above reasons the within complaint is hereby DISMISSED.

Dated: \_\_\_\_\_  
FILED 7/13/06

Hearing Panel No. 1

/s/

\_\_\_\_\_  
Lawrence Miller, Esq.

/s/

\_\_\_\_\_  
Susan P. Ritter, Esq.

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Concurring Opinion of Lawrence Miller, Esq.

Perhaps it is somewhat unusual for a member of the majority to write separately as well, but it is not without precedent. See *Losordo v. Department of Employment Sec.* 141 Vt. 391, 394, 449 A.2d 941, 942 (Vt., 1982) where Justice Peck authored the majority opinion and wrote a separate concurring opinion in addition. I concur in the result reached by the majority of Panel Number 1 that the complaint should be dismissed and write separately to dispel the concerns held by the dissent and to emphasize my firm conviction that this record does not contain clear and convincing evidence that respondent committed the ethical violation with which he is charged. Absent this threshold criterion, the complaint must be dismissed. "[M]ost decisions and official ABA policy insist that a single instance of

"ordinary negligence" is usually not a disciplinary violation. See generally C.W. WOLFRAM, MODERN LEGAL ETHICS at 190 n. 36 (1986) (citing ABA Informal Op. 1273 (1973) (DR 6-101(A)(3)) ("Neglect usually involves more than a single act or omission." Matter of Myers, 164 Ariz. 558, 561, 795 P.2d 201, 204 (Ariz., 1990).

"Negligence" and "unethical conduct" are not convertible terms. Care must be undertaken to avoid confusion of the two concepts. Proof of one does not automatically equate with proof of the other. And because the concepts are not interchangeable it therefore follows that proof of simple negligence by clear and convincing evidence does not automatically morph into proof of unethical conduct by clear and convincing evidence. A single isolated act of negligence, unaccompanied by other circumstances falls short of establishing an ethical violation by clear and convincing evidence. See *In re Gygi*, 273 Or. 443, 450-451, 541 P.2d 1392, 1396 (Or. 1975) ("Although negligence may be a sufficient basis for civil liability under Rule 10b--5 in a federal securities suit, we are not prepared to hold that isolated instances of ordinary negligence are alone sufficient to warrant disciplinary action. "); *Broome v. Mississippi Bar*, 603 So.2d 349 (1992), 353 -354 (Miss., 1992) ("We agree with James Robertshaw's notation that Broome's conduct was not unethical; it was only negligent. There is no indication that Broome's actions which prejudiced his client's cause were intentional or deliberate."). See also *Nagy v. Beckley*, 218 Ill.App.3d 875, 879, 578 N.E.2d 1134, 1136, 161 Ill. Dec. 488, 490 (Ill.App. 1 Dist., 1991) ("defendant's behavior may have been unethical, we do not think that it equates to legal malpractice."); *Hizey v. Carpenter*, 119 Wash.2d 251, 262, 830 P.2d 646, 652 - 653 (Wash., 1992) ("There are several significant differences between a civil malpractice action and a disciplinary proceeding. \*\*\* [A] rule promulgated for discipline is inappropriate as a principle of law or standard for defining proper civil conduct.").

The goals of professional discipline for offending attorneys are deterrence of future misconduct, protection of the public, and vindication of the profession. *People v. Abelman*, 804 P.2d 859, 863 (Colo., 1991) ("the primary purpose of attorney discipline is the protection of the public, *People v. Grenemyer*, 745 P.2d 1027, 1029 (Colo.1987)").

"Neglect involves indifference and a consistent failure to carry out the obligations which the lawyer has assumed to his client or a conscious disregard for the responsibility owed to the client. The concept of ordinary negligence is different. Neglect usually involves more than a single act or omission. \* \* \* Professional discipline for one isolated incident of simple negligence serves none of these purposes. One imprudent act indicates neither a propensity for future carelessness nor an imminent risk of disservice to future clients; one unmindful oversight brings the profession into disrepute only in the eyes of those who have forgotten that lawyers, too, are human and prone to err. No act of negligence should be condoned. But in the absence of a continuing pattern of neglect or some other aggravating circumstance such as an attempt to cover up the error, professional discipline is neither necessary nor appropriate." *Broome v. Mississippi Bar*, 603 So.2d 349, 356 (Miss., 1992) (McRae, Justice, dissenting joined by Dan M. Lee, P.J., and Banks, J.).

Moreover, an isolated prior ethical violation involving a negligent act in 1995 is too attenuated in time and scope to create a "pattern of conduct" worthy of cognizance in this proceeding which concerns the untimely filing of a notice of appeal in 2000. The passage of five years

without incident destroys any clear and sufficient temporal nexus between those isolated instances of negligence to establish a pattern of conduct, a recurring incident, or a general or continuing condition. Any comparison of the incident that occurred in 1995 to the one in 2000 that is now under consideration is far too attenuated and removed to satisfy the proximate relation necessary for a pattern of conduct to exist. Generally, a "pattern" has been defined as "a regular, mainly unvarying way of acting or doing." See *State v. Gorman*, 546 N.W.2d 5, 9 (Minn., 1996) ("In *State v. Robinson*, 539 N.W.2d 231 (Minn.1995), this court held that a pattern was "a regular, mainly unvarying way of acting or doing." *Id.* at 237; see also *State v. Grube*, 531 N.W.2d 484 (Minn.1995).").

There is no clear and convincing evidence of any conduct or plan of consistent, characteristic form, style or method involving the event in 1995 and the complaint now under consideration. The only evidence in this matter is that of a simple negligent act in failing to file, in a timely fashion, the notice of appeal that the respondent had prepared in accordance with his client's wishes. Without more an ethical violation is not proved. See *Florida Bar v. Neale*, 384 So.2d 1264, 1265 (Fla.1980) ("There is a fine line between simple negligence by an attorney and violation [of Code] that should lead to discipline. The rights of clients should be zealously guarded by the bar, but care should be taken to avoid the use of disciplinary action ... as a substitute for what is essentially a malpractice action.").

Simply stated, there is no clear and convincing evidence that the respondent's mere failure to file the notice of appeal within the time specified by the rule constitutes an ethical violation for which discipline is necessary or appropriate. Therefore, I concur that the complaint must be dismissed. I am authorized to say that Sue Ritter joins in the views expressed in this concurrence.

/s/

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Lawrence Miller, Esquire

Dated: \_\_\_\_\_

FILED 7/13/06

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Dissenting Opinion

I disagree with the majority's analysis of Decisions Numbered 81 and 90. In Decision No. 81, the attorney's "calendar error" was a case of negligence in office administration and is the single act that led to the charge of misconduct. In Decision No. 90, there was again a single error, the attorney's failure to file his application to appear pro hac vice. Because of this failure, discovery deadlines were missed and the case compromised. The Hearing Panel in that case found a violation of Rule 1.3 because, while the attorney did not receive the discovery order because of his negligence, he knew that a scheduling conference had been set and that a discovery order would issue. It was the attorney's failure to anticipate the order and discover the contents that moved the case from one of mere



negligence to one of misconduct. The circumstances in this case seem markedly similar. The attorney was asked to file an appeal and prepared the notice of appeal but failed to obtain the income and expense affidavit in order to file within the appeal period. He knew the necessity of filing within the period prescribed by the rules and should have monitored the process in the same way that the attorney in Decision No. 90 should have anticipated the issuance of a discovery order.

As the majority has pointed out, attorneys are and should be held to a high standard of conduct. Missing the deadline for filing a criminal appeal is more serious than a calendaring error and is in my opinion misconduct, and for that reason I dissent from the opinion of the majority.

Dated: \_\_\_\_\_  
FILED 7/13/06

/s/

\_\_\_\_\_  
Diane Drake