[20-Dec-2002]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: Norman Blais, Esq.
PRB File No. 2002.108

Decision No. 48

Respondent is charged with neglecting a client's personal injury case in violation of Rule 1.3 of the Vermont Rules of Professional Conduct and with failing to keep his client reasonably informed about the status of her case in violation of Rule 1.4(a) of the Rules.

This matter was heard on October 3, 2002, before Hearing Panel No. 6, consisting of Judith Salamandra Corso, Esq., James C. Gallagher, Esq. and Toby Young. Beth DeBernardi appeared as Disciplinary Counsel. Respondent was present and represented by Paul Jarvis, Esq. A stipulation of facts was filed at the hearing and testimony was taken. Following the close of the hearing, Respondent was given two weeks to file affidavits or depositions and Disciplinary Counsel an additional two weeks to take depositions. Affidavits were filed by Respondent. Disciplinary Counsel declined to offer further evidence.

Based upon the evidence, and in consideration of the aggravating factors present, Respondent is suspended for a period of six months for violation of Rules 1.3 and 1.4(a) of the Vermont Rules of Professional Conduct. Following Respondent's return to the practice of law he shall be placed on probation with mentoring for a period of not less than twelve months, under the terms specified on pages 13-15 below and under the supervision of an attorney acceptable to the Office of Disciplinary Counsel. After twelve months the probation may be terminated in accordance with A.O. 9 Rule 8 (A)(6)(b).

Facts

On November 11, 1998, Thelma Bushey was injured in a fall in a parking garage. At the time of her fall, Thelma Bushey was eighty one years old and living in Winooski. She is now eighty five years old and lives in an assisted living facility in Burlington. Alfred Barcomb is Thelma Bushey's adult son and a resident of Burlington. On February 4, 1999, Alfred Barcomb brought his mother to meet with Respondent concerning a claim for the injuries that Mrs. Bushey suffered in her fall. Respondent met with Mrs. Bushey and Mr. Barcomb, and Mrs. Bushey hired him to handle her claim. Alfred Barcomb assisted his mother throughout the claim process.

From August of 1999 to October of 1999, Respondent made efforts to negotiate a settlement with the insurance carrier for the parking garage owner. Negotiation took place via telephone conversations and letters among Respondent, the insurance adjuster, and Thelma Bushey. At the start of

negotiations, Respondent obtained Mrs. Bushey's permission to make an initial settlement . Thereafter, Respondent informed Mrs. Bushey of every settlement offer and obtained her permission for each reduction in her demand. During this period Alfred Barcomb discussed all of the settlement offers and counteroffers with Thelma Bushey, and they worked together to make decisions concerning settlement.

Respondent's last letter to Thelma Bushey, dated October 29, 1999, informed her that the insurance company would not pay more than $3,500 for her injuries. Respondent suggested that she discuss the matter with her son and call Respondent with instructions as to what she wanted him to do. Shortly after Thelma Bushey received Respondent's October 29, 1999 letter, she discussed the matter with her son and they decided together that the final offer of $3,500 was too low and that Mrs. Bushey should call Respondent to let him know that they wanted him to file suit, rather than accept the offer. The evidence is not clear as to whether or not Mrs. Bushey spoke to Respondent after receipt of the October 29, 1999, letter and the Panel cannot find that she did so.

Respondent did not perform any substantial work on Thelma Bushey's claim after late October or early November of 1999.

In the spring of 2000, Thelma Bushey placed a number of telephone calls to Respondent to discuss the status of her lawsuit. Respondent did not take any of her calls, nor were they returned. Telephone messages taken by Respondent's secretary document four calls. On March 3, 2000, Mrs. Bushey simply stated that she had called and to return her call. The message left on April 19, 2000 included the information that she was "anxious about her case." The message from May 2, 2000 noted that Mrs. Bushey "has to speak with you today." The message from May 3, 2000 noted "please call her ASAP."

On or about May 2, 2000, after returning from an out-of-state vacation, Alfred Barcomb met with Thelma Bushey and asked her about the status of the lawsuit. She told him that she did not know the status because she had been unable to reach Respondent on the telephone, and he had not returned her calls. Alfred Barcomb attempted to reach Respondent from his mother's house right then, but Respondent did not take his call, nor did he return the call. Alfred Barcomb recalls two other calls to Respondent in May or June of 2000, none of which were returned. Respondent's telephone logs document a call from Mr. Barcomb on May 8, 2000. Mr. Barcomb remembers at least one more call in May or June of 2000, for which there is no entry in the telephone logs of Respondent.

Even if Respondent did not recall a conversation with Mrs. Bushey in late October or early November of 1999 instructing him how to proceed with her case, the calls from Thelma Bushey and Alfred Barcomb that were made over several months in the spring of 2000 informed Respondent that his client had not decided to ignore her claim.

Because Alfred Barcomb knew that lawsuits take time to proceed through the court system, he was not initially concerned that he and his mother had not heard back from Respondent. Alfred Barcomb assumed that Respondent would let them know when something required their attention. This belief was reinforced by Respondent's letter to Thelma Bushey dated October 1, 1999, which stated that a "lawsuit would take considerable time to wind its way to court. . ." and by Respondent's letter to Thelma Bushey dated

October 29, 1999, which stated that "fil[ing] suit in Superior Court. . . would almost necessarily postpone the payment of any money to you for another year."

On April 2, 2001, the insurance adjuster wrote to Respondent stating that the $3,500 settlement offer was still available and informing him that she would close her file if she did not hear from him within thirty days. Respondent received this letter but took no action in response to the letter.

In October of 2001, Alfred Barcomb learned from a news report that Respondent was the subject of disciplinary proceedings for neglecting other client matters, and he became concerned for the first time that Respondent might also be neglecting his mother's case. Shortly thereafter Alfred Barcomb assisted his mother in hiring another attorney to handle her accident claim. Alfred Barcomb obtained a copy of his mother's file from Respondent on October 18, 2001, and Respondent closed his file on the same date. Through the efforts of attorney Robert Manchester, Thelma Bushey's accident claim was settled by a release signed on November 6, 2001, four days before the statute of limitations would have barred the claim.

Actual and Potential Injury

If Alfred Barcomb had not learned that Respondent was neglecting other client matters from a news report in October of 2001, he would not have sought to change attorneys in October of 2001, and in all likelihood, Thelma Bushey's claim would have been barred by the statute of limitations on November 10, 2001. The potential harm to the client was accordingly great. The actual harm, however, was not great, because Alfred Barcomb saw the news report and helped his mother hire a new attorney. As a result, Mrs. Bushey received compensation for her injuries.

It is unknown what the outcome would have been had Mrs. Bushey pursued her accident claim in Superior Court, but there is no evidence that Mrs. Bushey received less in compensation than she would have received if the claim had been handled diligently and promptly by Respondent. When attorney Robert Manchester took over the case, the insurance company increased its final offer from $3,500 to $3,750, and Mrs. Bushey settled the claim for that amount. Attorney Manchester did not take a fee for the work he performed on the case, and the entire settlement amount was paid to Mrs. Bushey. Thelma Bushey suffered actual injury in that the resolution of her claim was delayed and in that she and Alfred Barcomb were frustrated in their attempts to reach Respondent during the representation.

Respondent was admitted to the practice of law by the State of Vermont in 1976 and is currently licensed to practice law in Vermont. In 1992 Respondent was privately admonished for neglecting a client's matter. PRB File No. 1991.010, PCB Decision No. 25. In 1997 he received a public reprimand for failing to render a trust accounting to a client and conduct prejudicial to the administration of justice. In re Blais, 166 Vt. 621 (1977). In 2002 Respondent admitted to neglecting five separate client matters and making misrepresentations to three of his clients. The Hearing Panel in this matter imposed a five month suspension and a minimum of 18 months probation for theses violations. This sanction is now on appeal. In re Blais, Vermont Supreme Court Docket No. 2002-086.

Conclusions of Law

Rule 1.3

Rule 1.3 of the Rules of Professional Conduct provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."

In this matter, Respondent began his representation of Thelma Bushey diligently and promptly, investigating her claim and commencing negotiations with the insurance carrier for the owner of the parking garage where Mrs. Bushey fell. Negotiations were ongoing from August of 1999 through October of 1999, but did not result in a settlement. After late October or early November of 1999, Respondent stopped working diligently and promptly on Mrs. Bushey's case. When Mrs. Bushey did not accept the insurance company's settlement offer of $3,500, Respondent stopped working on her case. He did not accept a settlement offer on Mrs. Bushey's behalf, he did not file suit on her behalf, and he did not communicate further with her or with her son. Notably, he did not return their numerous telephone calls, despite receiving messages that they had called. The evidence is clear that after early November of 1999, Respondent performed no substantial work on Mrs. Bushey's personal injury claim.

The provision in the rule calling for diligence and promptness on the part of a lawyer is not solely dependent on response from or prompting by the client. Even if Mrs. Bushey did not call Respondent in response to his letter of October 29, 1999, he had the duty to take steps to determine Mrs. Bushey's position on the settlement offer. The comments to this rule are clear. "Unless the relationship is terminated . . . a lawyer shall carry through to conclusion all matters undertaken for a client." This he failed to do and his lack of diligence is further exacerbated by the fact that despite numerous calls to his office over a two month period beginning in March of 2000, he took no action on the case. The Panel finds that Respondent has violated Rule 1.3 by failing to act promptly in the resolution of Mrs. Bushey's claim.

Rule 1.4(a).

Rule 1.4(a) of the Rules of Professional Conduct provides that "a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." Respondent complied with this rule until he reached what he thought to be the end of the negotiations with the insurance company in October of 1999 and communicated this fact to Mrs. Bushey in his letter of October 29, 1999. Whether or not Mrs. Bushey actually communicated to Respondent her rejection of the insurance company's offer, the evidence is clear that his client assumed that the matter was proceeding to suit and accepted the delay as a natural consequence of litigation. Respondent was notified by the adjuster in April of 2000 that she would close her file if she did not hear from him within thirty days. At the time he received this letter Respondent had received at least one telephone message from his client and he received another less than a month later. As he had with the telephone calls, Respondent ignored the adjuster's letter and failed to communicate to the client that the status of her case might change. The Panel finds that Respondent's failure to maintain contact with his client and to inform her about the status of her case violates Rule 1.4(a) of the Vermont Rules of Professional Conduct.

Sanctions

In reaching its decision on sanctions in this matter, the Panel has considered the ABA Standards for Imposing Lawyer Discipline (FN1) and previous Vermont case law. The Supreme Court has stated that it is appropriate to apply the ABA Standards to determine the sanction in a disciplinary case. In Re Warren, 167 Vt.. 259,261, 704 A.2d 789,791 (1997); In Re Berk, 157 Vt. 524, 532, 602 A.2d 946,950 (1991) (citing In Re Rosenfeld, 157 Vt. 537,546-47,601 A.2d 972,977 (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. ABA Standards, § 3.0, In Re Warren, supra, 167 Vt. at 261.

The Duty Violated

Respondent violated his duty to act with reasonable diligence and promptness in his handling of Mrs. Bushey case as well as his duty to keep his client reasonably informed about the status of her case.

The Lawyer's Mental State

The ABA Standards require an examination of a Respondent's mental state to determine whether he acted intentionally, knowingly, or negligently. There is no evidence that Respondent intended harm to Mrs. Bushey and the Panel finds he did not. Rather, his fault was one of neglect. While the neglect was greater after the case was brought back to his attention by the letter from the insurance adjuster in April and by at least five calls from Mrs. Bushey and her son from March through May of that year, Respondent's mental state never approached that of an intentional act.

Injury and Potential Injury

The ABA Standards consider both actual injury and potential injury. In this case the potential for injury was considerable. Respondent had neglected the matter for so long that the statute of limitations was about to run in which case her claim would have been barred. The irony of the situation is that Mrs. Bushey was saved from actual harm by the fact that her son read a newspaper account of previous disciplinary cases involving Respondent's neglect of other clients' cases and became suspicious that his mother's case was also being neglected. The potential for serious harm was thus avoided by the client's actions and by her new attorney, not by any act of Respondent. The actual injury here is the worry and frustration suffered by Mrs. Bushey by Respondent's failure to conclude her case.

Provisional Sanction

Section 4.42 of the ABA Standards squarely fits the circumstances in this case.

4.42 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.

Respondent's neglect of Mrs. Bushey was not a single instance of failure to respond to a client but one that continued despite her efforts to get in touch with him, and there was the potential for injury. This behavior is also part of larger pattern of neglect discussed of other client matters discussed below.

Aggravating and Mitigating Factors

Having considered a provisional discipline it is necessary to consider the aggravating and mitigating factors; those circumstances which can be considered in justifying either an increase or decrease of the degree of discipline to be imposed by the Panel. ABA Standards §9.1-§9.3.

Of the aggravating factors present, it is Respondent's history of repeated neglect of his client's affairs resulting in several disciplinary proceedings which causes greatest concern to the Panel. ABA Standards §9.22(a), §9.22(c). Respondent was first disciplined in 1991 when he received a private admonition for neglecting a client matter. PRB File No. 1991.010, PCB Decision No. 25. In his second case he received a public reprimand arising from a 1992 complaint of failure to render an accounting. PCB Decision No. 118; In re Blais, 166 Vt. 621 (1997).

In 2002 Respondent was sanctioned for neglecting five separate client matters and for making misrepresentations to three of his clients. These complaints were made during the period 1998 through 2000 for events that happened between 1989 and 1996. In this final matter the Hearing Panel imposed a five month suspension followed by a minimum of 18 months probation. PRB Decision No. 31. The issue of sanctions is now on appeal. In re Blais, Vermont Supreme Court Docket No. 2002-086.

It is clear from his history that Respondent has a problem with neglecting certain of his clients. It is also clear from the affidavits that Respondent submitted, that he does a good job for his clients when he pays attention to their matters. It is his failure to monitor and attend to his entire case load that is the serious problem. The Panel is also troubled by the fact that these complaints span almost a ten year period and Respondent has not yet taken steps to prevent recurrence of the type of neglect that Mrs. Bushey suffered. Respondent argues that because his previous 2002 case is so close in time to the instant case that the Panel should treat the two of them together and that any discipline imposed in this case should be merged with that imposed in the previous cases. We are not persuaded by that argument. Respondent was neglecting Mrs. Bushey's case during the period when the other matters were pending before the Professional Responsibility Board, yet Respondent apparently did nothing to change his procedures for handling cases and the Bushey case was neglected. Thus the Panel does not see this case as part of a continuum with the other cases but rather additional evidence of the fact that Respondent has a serious problem with case management.

Other aggravating factors include Respondent's substantial experience in the practice of law and the vulnerability of his victim. ABA Standards §9.22(h), §9.22(i).

There are mitigating factors present as well. Respondent had no dishonest or selfish motive, ABA Standards §9.23(b). He has cooperated with disciplinary counsel, ABA Standards §9.23(e), and has expressed remorse. ABA Standards §9.23(l). These factors do not, however, weigh as heavily with the Panel as do the aggravating factors.

Vermont Cases

There are several Vermont cases which, when read in conjunction with the criteria set forth in the ABA Standards, lend support to the imposition of a six month suspension in this matter. Respondent argues that the facts of Respondent's case are much less severe than other cases in which public reprimand was imposed and that when compared with the facts of the present case, additional discipline is not warranted. What Respondent has failed to do and what the Panel finds critical is to weigh not only the actions of the lawyer in the specific case which generated the complaint but to also view it in the wider context of the attorney's previous practice and experience and the attorney's response to the complaint.

Attorney Bucknam received a public reprimand for misrepresenting the status of a complainant's case, for attempting to change a plea agreement and for negligent failure to provide her client's with an accounting. In re Bucknam, 160 Vt. 355 (1993). Accepting for purposes of argument that Attorney Bucknam's conduct was more egregious than that of Respondent, when viewed in context, it does not support Respondent's argument for no further discipline. Attorney Bucknam had no previous disciplinary record and though there were multiple offenses they were confined to one client, and there was no claim that she had provided inadequate representation. The Supreme Court found as a mitigating factor the fact that she had instituted new office procedures for billing and retainer agreements. Like Attorney Bucknam, Respondent has acknowledged his wrongdoing, but she took remedial steps after disciplinary charges were brought against her. There is no evidence that Respondent has yet addressed the reasons for his ten year history of periodically neglecting his clients.

Our analysis of In re Cummings, 164 Vt. 615 (1995), and In re Wenk, 165 Vt. 562 (1996), lead us to a similar conclusion. In both of these cases the conduct was more severe than that of Respondent. Both attorneys neglected their clients, made misrepresentations to them and the clients suffered substantial harm, and in both cases the attorney received a public reprimand. Again it is the analysis of the surrounding circumstances that justify more serious sanctions in the present case. Attorney Wenk's misconduct occurred after he suffered an unexpected medical problem which led to a long period of debilitation. While there were multiple offenses, only one client was involved. In addition he had one prior admonition. In the Cummings case, there was no prior discipline and Attorney Cummings had made substantial restitution to the client prior to the involvement of disciplinary counsel. In the Wenk case there is the fact of his medical problems triggering the misconduct, and only one prior admonition. Attorney Cummings addressed his clients loss prior to the beginning of the disciplinary process. Like Bucknam and Cummings, Respondent has acknowledged his misconduct, but unlike them he has failed to tackle his underlying problem. Had Respondent addressed his pattern of neglect after the first complaints, he would not be before the Panel at this time.

It is not the relative severity of the present case that is persuasive to the Panel. It is the fact that it is one in a long series of complaints

of neglect coupled with the fact that the existence of these prior cases has not prompted Respondent to change the way he practices law.

In imposing a suspension of six months the Panel is aware that Respondent must go through the Reinstatement process provided in A.O. 9 Rule 22 (D). The Panel believes that this process will be helpful to Respondent in rethinking his method of practice and will serve as a protection to the public. The Panel is aware that the issue of sanctions in PRB Decision No. 31, PRB File Nos. 1998.033; 1999.043; 2000.042, is currently before the Supreme Court. To the extent that any suspension is imposed in that matter during the period of suspension in the instant case, the suspension herein shall be concurrent with such other suspension.

In addition, the Panel wishes to insure that Respondent's future clients are not neglected, and for this reason imposes a period of probation with mentoring of not less than one year which will commence upon Respondent's return to the practice of law. The terms of the probation shall be as follows.

Probation

1. Respondent shall be placed on probation as provided in Administrative Order No. 9, Rule 8A(6).

2. At the commencement of probation, Respondent shall undergo a Risk Management Audit at his expense, conducted by a professional risk management auditor, encompassing at least calendar management, caseload management, client communications, and general law office management practices. Respondent shall obtain a written report from the risk management auditor and shall promptly review the report with his probation monitor. The Risk Management Audit shall be completed no later than fourteen (14) days after the commencement of probation and may take place prior to the commencement of probation. The probation monitor shall send the Office of Disciplinary Counsel a copy of the risk management auditor's report along with the date on which Respondent and the probation monitor met to review the report.

3. Prior to his return to the practice of law Respondent shall engage a probation monitor acceptable to Disciplinary Counsel, and Respondent shall forward to the probation monitor a copy of this decision no later than seven (7) days prior to the commencement of probation.

4. Respondent shall meet with his probation monitor at least two weeks prior to the date on which his license is reinstated, in order to begin implementing the recommendations of the risk management auditor and of the probation monitor.

5. Respondent and his probation monitor shall implement office management and case management procedures and safeguards to ensure the proper handling of all client

matters. These procedures and safeguards shall include recommendations from the Risk Management Audit, recommendations from his probation monitor, and the following:

a. Respondent and/or his agent or employee shall create and maintain a log book of all incoming telephone calls, indicating the dates of such calls, the identity of the caller, and the date on which Respondent successfully returned the call (meaning reached the caller or left a message for the caller). The log book shall be reviewed with the mentor at the monthly meetings.

b. Respondent and his probation monitor shall create and maintain a master list of Respondent's open cases, including identifying information for each case, the date the case was most recently worked on, and setting forth the statutes of limitations, as applicable. The list of open cases shall be reviewed with the probation monitor at the monthly meetings.

c. Respondent shall prepare a plan of action for each of his open client files, which plan shall be reviewed with the probation monitor at the monthly meetings for appropriateness and timely implementation.

d. Respondent and his probation monitor shall create and maintain a main calendaring system and a backup calendaring system for all deadlines related to Respondent's practice. The calendars shall be reviewed his probation monitor at the monthly meetings.

e. Respondent shall not accept new cases or clients if, in the judgment of his probation monitor, his caseload is such that additional cases or clients would pose a risk of jeopardizing Respondent's current cases and clients.

6. Throughout the probationary period, Respondent shall meet once a month with his probation monitor to review case management and office management issues, including without limitation the following issues: client needs, client expectations, client communications, status and progress of pending matters, deadlines, schedules, and statutes of limitation, billing and payment issues, and any other issues that, in the mentor's judgment, would benefit from review. Respondent and his probation monitor shall meet more often than once a month if, in his probation monitor's judgment, it is necessary or beneficial to do so.

7. During the meetings with his probation monitor if his probation monitor or Respondent believe it would be helpful, then the probation monitor and Respondent shall also discuss any issues of a personal nature which might impact upon Respondent's practice.

8. Within three weeks of each monthly meeting, the probation monitor shall submit a written report to the Office of Disciplinary Counsel discussing Respondent's progress under and compliance with the terms of his probation. In the event that Respondent and his probation monitor meet more often than once a month, it shall not be necessary to submit interim reports, but the monthly report shall include all important information not previously reported.

9. Respondent shall permit the Office of Disciplinary Counsel and his probation monitor to communicate with each other at all reasonable times as to Respondent's compliance with and progress under the terms of his probation, and as to the probation monitor's recommendation for any extensions of the term of the probation beyond the initial twelve month period. The probation monitor shall provide all pertinent information to the Office of Disciplinary Counsel and report to the Office of Disciplinary Counsel any violations of the Rules of Professional Conduct that come to the attention of the probation monitor, as required by Rule 8.3 of the Rules of Professional Conduct.

10. Respondent shall promptly and fully respond to requests from the Office of Disciplinary Counsel that relate to his compliance, or lack thereof, with the terms of his probation.

11. Respondent's probation shall be for a minimum period of twelve (12) months and may be terminated after that time in accordance with A.O. 9, Rule 8(A)(6)(b).

12. The costs of probation are hereby assessed against Respondent.

13. In the event that the probation monitor is unable to continue, he or she shall give notice to Respondent and to the Office of Disciplinary Counsel as soon as practicable, to allow Respondent sufficient time to find a substitute mentor. The choice of substitute probation monitor shall be submitted to the Office of Disciplinary Counsel for approval.

Order

For the foregoing reasons, Respondent is SUSPENDED from the practice of law for a period of six months commencing January 20, 2003, such suspension to be concurrent with any suspension imposed in PRB Decision 31 as discussed above.

Following his return to practice, Respondent shall be on probation for

a period of not less than one year. Probation shall be in accordance with the above conditions. The probation shall be supervised by an attorney acceptable to disciplinary counsel and may be terminated after one year in accordance with A.O. 9 Rule 8 (A)(6)(b).

Respondent shall promptly comply with the provisions of A.O.9 Rule 23.

Dated: December 20, 2002

FILED DECEMBER 30, 2002

Hearing Panel No. 6

/s/
_____
Judith Salamandra Corso, Esq.

/s/
_____
James Gallagher, Esq.

/s/
_____
Toby Young

Footnotes

FN1. All citations to the 1991 edition of the ABA Standards, as amended by the ABA House of Delegates in February 1992.