PCB 56

[17-Jul-1993]

STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

IN RE: PCB File No. 90.26

William M. McCarty, Jr., Respondent

NOTICE OF DECISION

NO. 56

This matter was heard, pursuant to Rule 8(D) of Administrative Order No. 9, before the full Professional Conduct Board on July 16, 1993. Present at the hearing was Respondent, his counsel Douglas Richards, Esq., and Bar Counsel Shelley A. Hill, Esq. Due consideration was given to the briefs filed by Bar Counsel and Respondent, their oral arguments, and the report from the Hearing Panel consisting of Law Findings of Fact and Conclusions of Law and recommendations regarding the imposition of sanctions. The Board adopted the Panel's Findings and Recommendations with clarifications pursuant to certain uncontested representations made at the 8(D) hearing, and, pursuant to Rule 8(D), hereby makes the following findings of fact and imposes a sanction of public reprimand.

FINDINGS OF FACT AND RECOMMENDATIONS

1. William McCarty, Jr. is an attorney practicing in Brattleboro,

Vermont. He has been licensed in the State of Vermont since 1967. At all material times, he engaged in the general practice of law with a Legal Assistant and up to two Associates under the name McCarty Law Offices.

COUNT I

2. In November 1988, Susan Stemm (now Labrusciano) contacted Respondent's firm for assistance concerning a post-divorce visitation issue. Ms. Labrusciano met with Respondent on November 23, 1988 for an intake interview. She informed Respondent that there was uncertainty regarding her rights under a Wyoming divorce order entered on September 22, 1988, which she wanted clarified in anticipation of an upcoming Christmas visit, as well as a spring visit, and an extended summer visit with her 5 year old son. Her concern over the visits was that her ex-husband had been physically and emotionally abusive to their son, and she wanted to know what she could do to protect her son, particularly in connection with any proposal for overnight visitation. At this meeting, Respondent told Ms. Labrusciano that the order would need judicial clarification and jurisdiction should be in Vermont, not Wyoming. Over the next few weeks, Ms. Labrusciano and Respondents office worked out the terms of the necessary retainer. On December 21, 1988, Ms. Labrusciano met with Respondent and then with Susan Hatheway, Esq., an associate in respondent's firm, who would be working on her case. Ms. Labrusciano paid a $350.00 retainer on December 29, 1988.

3. Shortly after December 21, 1988, Ms. Hatheway left on vacation.

Beginning on December 27, 1988, Attorney Cecelia Cunningham, who represented Ms. Labrusciano's ex-husband in Vermont, began contacting Respondent regarding the visitation issues. Respondent represented Ms. Labrusciano in these discussions at the time. As a result, the father acquiesced to most of Ms. Labrusciano's requests during the Christmas visit and conflict was avoided.

4. In January 1989, Attorney Cunningham wrote two letters to Ms. Hatheway inquiring about her representation of Ms. Labrusciano. Respondent made a notation on the second letter for Ms. Hatheway to handle the inquiry. Ms. Hatheway responded to Attorney Cunningham's inquiries on February 16, 1989. The short delay was inconsequential, inasmuch as no visitation with Ms. Labrusciano's son was scheduled until the spring of 1989.

5. On February 23, 1989, Ms. Hatheway met with Ms. Labrusciano who reiterated her anxiousness to clarify the visitation issues prior to the summer of 1989, as her ex-husband was planning on an extended unsupervised visitation in Wyoming with their son. Extended unsupervised visitation in Wyoming was totally unacceptable to Ms. Labrusciano.

6. On March 9, 1989, Ms. Hatheway met with Ms. Labrusciano and Paul Hoak, a psychologist hired by Ms. Labrusciano to provide expert assistance concerning the best interests of her son. Ms. Labrusciano was to return for an additional consultation on March 24, 1989, but Ms. Hatheway postponed this appointment when she was unable to review the file with the Respondent prior to the meeting.

7. The meeting with Ms. Labrusciano was re-scheduled for April 6, 1989, and then to April 13, 1989. On April 4, Ms. Hatheway conferred by telephone with the father's counsel about the arrangements for the spring visitation, but no progress was made. On April 12, Respondent met briefly with Ms. Hatheway and they agreed she should proceed to prepare a motion to be filed in the Windham Superior Court, asking for modification of the Wyoming divorce. On April 13, Ms. Hatheway met with Ms. Labrusciano and proposed this course of action, which was agreed upon. The next day, Ms. Hatheway wrote to the Court Administrator to file the Wyoming decree with the Vermont court system.

8. On April 21, 1989, Ms. Hatheway began drafting the Motion to Modify. The Respondent reviewed and edited her work on April 27, and it was finalized the next day.

9. On May 10, 1989, Ms. Labrusciano spoke with Ms. Hatheway about the status of her case. Ms. Hatheway told her she would need an affidavit form her in support of the Motion to Modify. The next day, Ms. Labrusciano delivered handwritten notes for her affidavit and Ms. Hatheway began the drafting. The affidavit was completed and sent to Ms. Labrusciano on May 15, 1989. However, Respondent never filed the Motion to Modify.

10. Ms. Hatheway left the Respondent's employ shortly after May 15, 1989. This event, coupled with the contemporaneous loss of Respondent's only other associate, left Respondent severely short-handed and overburdened with work during the summer of 1989. Respondent's practice

became one of "crisis management", i.e. he was forced to devote his time and attention only to those matters he deemed most urgent. Nevertheless, no evidence was presented that Respondent took any action to alleviate this situation by obtaining additional help or voluntarily withdrawing from non-critical matters. Indeed, Respondent failed to undertake review of his pending matters to set priorities, but simply reacted to emergencies.

11. On June 8, 1989, Ms. Labrusciano and (her now-husband) Ron met with Respondent. Ms. Labrusciano brought the affidavit, which she had re-edited by hand, to this meeting. Respondent told her to give it to the secretary, which she did. Ms. Labrusciano again expressed her fears and concerns about the approaching summer visitation by her ex-husband. She asked Respondent whether she should seek relief from the Wyoming courts, and he said no, that jurisdiction should be in Vermont. Ms. Labrusciano advised Respondent that she would refuse to allow her ex-husband the summer vacation. Respondent failed to advise Ms. Labrusciano that disregard of the Wyoming decree without prior modification could result in a contempt proceeding in Wyoming. This in fact occurred and resulted in Ms. Labrusciano paying approximately $20,000.00 in attorneys fees in Wyoming. Respondent again told Ms. Labrusciano all the trouble was the result of a very poorly drafted order from the Wyoming court, and suggested she might have a malpractice case against her Wyoming counsel. After the meeting, Respondent prepared a lengthy letter to Ms. Labrusciano's Wyoming counsel, implying that the Wyoming Divorce Order was already the subject of Vermont litigation, and asking for her "comments and insights" about the "obvious clerical and

factual mistakes", and "obvious errors", in the Wyoming Divorce Order, so that "we could resolve this without the necessity of bringing any additional actions in Wyoming."

12. On June 13, 1989, Ms. Labrusciano wrote to her ex-husband and informed him that she would not allow their son to go to Wyoming for visitation. Respondent received a copy of this letter on June 19.

13. On June 20, 1989, Respondent spoke with Ms. Labrusciano's Wyoming counsel, and asked her for a transcript of the Wyoming proceedings.

14. On June 26, 1989, Ms. Labrusciano wrote to Respondent to report that her ex-husband had reacted calmly to her letter refusing a Wyoming visitation, but had said he would be contact ing his Wyoming counsel for advice. She asked for an update and a concrete course of action and expressed her hope for Vermont court action before he ex-husband went to court in Wyoming.

15. There is no evidence of any activity by Respondent with respect to Ms. Labrusciano's case between July 5, 1989 and August 8, 1989, although Ms. Labrusciano called and left several messages for Respondent during this period. Respondent attempted to return the calls on August 8, and left a message. Ms. Labrusciano spoke briefly with Respondent on August 9, and made an appointment for August 25, 1989.

13. Respondent failed to react to Ms. Labrusciano's letter of June

26th, until August 10, 1989. Ms. Labrusciano was surprised and concerned by his response, as he was asking for information she believed she had already provided.

14. On August 21, 1989, Respondent canceled his appointment with Ms. Labrusciano for August 25, because of a court appearance, and asked her to call and re-schedule.

15. On August 24, 1989, Ms. Labrusciano called and spoke with Respondent's Legal Assistant, saying she was upset that nothing had been accomplished despite a "huge bill" and asking that Respondent do nothing more until they talked. Upon receiving the message, Respondent dictated a letter to Ms. Labrusciano, insisting that his efforts had been effective and blaming the unsatisfactory Wyoming court order for the situation.

16. The next day, Ms. Labrusciano called and rescheduled her appointment to September 25, saying this was her only available day. She again complained about the bill, indicated that she was considering other counsel, and wanted to know whether a Vermont lawyer could sue her Wyoming counsel.

17. The September 25, 1989, appointment was eventually rescheduled to October 13. Respondent and Ms. Labrusciano met on October 13, 1989. The meeting lasted a very short time and was very unpleasant. Ms. Labrusciano expressed anger over the perceived lack of action and attention to her matter. Respondent reacted by terminating their relationship, and adding $235.00 to his bill for reviewing the file and

meeting with her. In his termination letter, Respondent acknowledged that he didn't have the time for Ms. Labrusciano's case, but falsely implied that the delay had been caused by her failure to provide the necessary affidavit.

18. Ms. Labrasciano's ex-husband eventually initiated contempt of court proceedings in Wyoming, and Ms. Labrusciano returned there to re-litigate the visitation provisions of the Wyoming Divorce Order. She estimates her costs of doing so at $20,000.00.

COUNT II

19. In October 1988 Richard Wysanski, a friend of Ms. Hatheway, Respondent's Associate, contacted her to prepare mutual wills for him and Todd Mandell. Ms. Hatheway informed Mr. Wysanski that she had no experience in will drafting, but would discuss the request with Respondent. Ms. Hatheway informed Respondent of the request and was told that the charge for the two wills, if they were simple, would be $130.00. The arrangement was to be that Ms. Hatheway would do the intake interview and Respondent would draft the documents.

20. Ms. Hatheway met with Mr. Wysanski and Mr. Mandell in November 1988 for the intake interview. The primary goal of the wills was to ensure that a recently-purchased home would pass to one party upon the death of the other. Ms. Hatheway informed them that they should assemble all information concerning any financial accounts and obligations and decide if they wanted to make any specific bequests. They paid the

required retainer of $130.00 to the firm. Mr. Wysanski and Mr. Mandell pondered the issue of specific bequests for some months and did not get back in touch with Ms. Hatheway until May 2, 1989. On May 12, 1989, the firm prepared a promissory note and an amortization schedule for the parties for the benefit of Mr. Mandell's parents. The note was to ensure that Mr. Mandell's parents would be recompensed moneys they lent to the parties for the purchase of their home. This service was separate from the wills.

21. When Mr. Wysanski finally got back to Ms. Hatheway with their final decisions regarding the wills in May, 1989, Ms. Hatheway told him that she was leaving the firm. Mr. Wysanski instructed Ms. Hatheway to have the wills prepared by Respondent with the information she had.

22. Throughout the summer of 1989 both Mr. Wysanski and Mr. Mandell called Respondent~s office at least 5 or 6 times, to inquire about the status of their wills. At no time did Mr. Wysanski get through to Respondent, or receive a return telephone call. On one occasion, when Mr. Mandell called concerning the wills, and with a question about the bill for the work on the promissory note, he spoke to Respondent. The firm had in its account the retainer on the wills, which had not yet been prepared. Mr. Mandell told Respondent that the bill for services provided would not be paid until the services, which had already been paid for, were also provided. Respondent told Mr. Mandell to ignore the bill for the time being. On another occasion, Mr. Mandell reached Respondent by phone. As a result of miscommunication between Respondent and Mr. Mandell's respective offices, Mr. Mandell began the conversation by

asking Respondent why he called the police. In fact, Respondent had not called the police, but, instead of resolving the misunderstanding amicably, Respondent became rude and sarcastic, called Mandell paranoid, and suggested he move on to another attorney.

23. In September 1989, Mr. Wysanski and Mr. Mandell contacted Ms. Hatheway at her new firm and asked what could be done to get their wills prepared. In response, Ms. Hatheway prepared a letter to Respondent, sent it to the parties for their review and mailed it to Respondent.

24. Despite the repeated telephone calls by Mr. Wysanski and Mr. Mandell, Respondent did not pull their file until he received Ms. Hatheway's letter of September 1989. Upon review of the file, he concluded that their requests constituted more than "simple will," and the amount of the retainer was insufficient.

25. On September 25, 1989, Respondent answered Ms. Hatheway's letter in a rude and inappropriate manner, confirming that he had been too busy in court for the last 8 to 10 weeks, and essentially telling her to mind her own business. Respondent copied Mr. Wizansky and Mr. Mandell and enclosed a refund check of $130.00.

CONCLUSIONS OF LAW

1. Bar Counsel has charged Respondent with neglecting legal matters entrusted to him, charging a clearly excessive fee, and engaging in conduct adversely reflecting on his fitness to practice law. The burden

is upon Bar Counsel to prove these charges by clear and convincing evidence.

2. To establish a violation of DR 6-101(A)(3), the Board believes the evidence must show that Respondent consistently failed to attend to the matters of one or more clients through willful disregard, or indifference, or lack of diligence. This is distinguished from intentionally failing to seek the lawful objectives of a client (DR 7-101 (A)(1), and intentionally failing to carry out a contract of employment (DR 7-101(A)(2), which imply a conscious decision not to represent the client zealously.

3. The facts support a conclusion that during the spring of 1989, the Respondent lost his only two associates during a matter of a few weeks, and, as a result, during the summer of 1989, he was unable to adequately attend to all the client matters in which he had accepted employment. He responded by engaging in what he termed "crisis management," i.e. he devoted his available time and attention to those matters he deemed most urgent or worthwhile, and ignored, or gave only minimum attention to, his other matters. Although there is no clear and convincing evidence that Respondent failed to work diligently at his practice, neither is there any evidence that he took any actions to obtain the help of other lawyers or to voluntarily withdraw from employment in those matters to which he could not give adequate attention. As a result, in at least the two cases before the Hearing Panel, client matters were unduly prolonged contrary to the clients' expressed desires for prompt attention, causing the clients unnecessary anxiety, aggravation

and expense. The Board concludes that a violation of DR 6-101(A)(3) has been shown by the requisite degree of proof.

4. To establish a violation of DR 2-106(A), the Board believes the evidence must show clearly and convincingly that Respondent charged a clearly excessive fee. Whether a fee is clearly excessive depends upon a review of a multitude of factors, some of which are set out in DR 2-106(B). Very little evidence was presented to the Panel on any of the enumerated factors. The Respondent's final charge of $235.00 to Ms. Labrusciano would not have been charged had there been an amicable parting. On the other hand, there was no evidence that the number of hours spent by Respondent in dealing with the termination of the matter or the hourly rate were per se unreasonable. The Board concludes that no violation of DR 2-106 has been established by the requisite degree of proof.

5. To establish a violation of DR 1-102(7), the evidence must clearly establish that the Respondent engaged in conduct, not specifically violative of a Disciplinary Rule, which adversely reflects upon his fitness to practice law. Read in context with the "good moral character" requirement for admission to the practice of law, and the admonition of Ethical Consideration 1-5 that lawyers should maintain high standards of professional conduct, and be temperate and dignified, this Rule is violated when a lawyer engages in any conduct which tends to lessen public confidence in the legal profession. The Board concludes that clear and convincing evidence was presented that on at least one occasion, Respondent reacted in an undignified manner in response to complaints from

clients about his services and fees, and engaged in a consistent pattern of neglect on a continuing basis toward the three clients involved in this matter. This conduct adversely reflects on his fitness to practice law, and is therefore a violation of DRl-102(7).

6. In aggravation, Respondent engaged in a pattern of misconduct and multiple offenses. He has refused to acknowledge the wrongful nature of his conduct blaming his client, his associate, everybody else and his busy schedule for the mistreatment of his clients;

Respondent has substantial experience in the general practice of law; and

Respondent has previously received an admonition in PCB file 86.34A.

7. In mitigation, Respondent did not act with a consciously dishonest or selfish motive. There is no clear evidence that an attempt to transfer jurisdiction over Ms. Labrusciano's custody case would have been successful, would have saved her any money, or would have had any different ultimate outcome. There is no evidence that Messrs. Wizansky and Mandell suffered any legal prejudice from Respondent~s neglect of their matter. There is no evidence that Respondent profited financially from his misconduct. Although not excusing his misconduct, the Board finds that Respondent was operating under a great deal of stress during the relevant period because of his work overload, and this may have contributed to his intemperate and undignified behavior and poor decision-making. These disciplinary proceedings have spanned a two-year period.

On balance, the Board recommends that Respondent be publicly reprimanded.

Dated at Montpelier, Vermont, this 17 day of July, 1993.

PROFESSIONAL CONDUCT BOARD

/s/

Deborah S. Banse, Chair

/s/

Anne K. Batten

Nancy Foster

/s/

Joseph F. Cahill, Esq.

Donald Marsh

/s/

Nancy Corsones, Esq.

Karen Miller, Esq.

/s/

Paul S. Ferber, Esq.

Ruth Stokes

/s/

/s/

Rosalyn Hunneman

Jane Wooddruff, Esq.

/s/

Robert Keiner, Esq.

Edward Zuccaro, Esq.

ENTRY ORDER

SUPREME COURT DOCKET NO. 93-372

MAY TERM

In re William M. McCarty, Jr. } APPEALED FROM:

}

} Professional Conduct Board

}

}

} DOCKET NO. 90-026

}

In the above entitled cause the Clerk will enter:

William M. McCarty, Jr., is hereby publicly reprimanded for violation of DR 6-101(A)(3).

BY THE COURT:

/s/

_____

Frederic W. Allen, Chief Justice

/s/

_____

Ernest W. Gibson, III, Associate

/s/

_____

James L. Morse, Associate Justice

/s/

_____

Denise R. Johnson, Associate Justice

APPENDIX TO NOTICE OF DECISION NO. 56

NOTICE: This opinion is subject to motions for reargument under V.R.A.P. 40 as well as formal revision before publication in the Vermont Reports. Readers are requested to notify the Reporter of Decisions, Vermont Supreme Court, 109 State Street, Montpelier, Vermont 05609-0801 of any errors in order that corrections may be made before this opinion goes to press.

No. 93-372

In re William M. McCarty, Jr. Supreme Court

On Appeal from

Professional Conduct Board

May Term, 1994

Shelley A. Hill, Bar Counsel, Montpelier, for petitioner-appellee

Douglas Richards and Sheilla C. Files (On the Brief) of Douglas Richards, P.C., Springfield, for respondent-appellant

PRESENT: Allen, C.J., Gibson, Morse and Johnson, JJ.

PER CURIAM. William McCarty, a lawyer licensed in Vermont since 1967, appeals the Professional Conduct Board's (the Board) decision that he violated DR 6-101(A)(3) (neglecting a matter entrusted to him) and DR 1-102(A)(7) (engaging in conduct that adversely reflects on his fitness to practice law). He claims that (1) the Board lost its authority by the hearing panel's failure to comply with the requirement to issue a decision within sixty days of hearing; (2) evidence adduced at the hearing did not support the Board's findings of fact; and (3) his conduct did not violate DR 6-101(A)(3) or DR 1-102(A)(7). We agree that Respondent should not be disciplined for a violation of DR 1-102(A)(7). The hearing panel's recommendation of public reprimand is approved for violation of DR 6-101(A)(3).

The Board found a single violation of DR 6-101(A)(3) (neglect) and a single violation of DR 1-102(A)(7) (unfitness) following a hearing before a panel convened to consider bar counsel's petition alleging two counts of neglect and two counts of unfitness. Bar counsel charged respondent with two code violations for his representation of a client in a post-divorce visitation dispute and two code violations for his representation of two people who had requested wills. The Board concluded that respondent's representation of all these clients was "unduly prolonged contrary to the clients' expressed desire for prompt attention, causing the clients unnecessary anxiety, aggravation and expense." This conclusion formed the basis of the neglect violation. The Board also concluded that that neglect

plus respondent's treatment of the will clients in an undignified manner on at least one occasion constituted the unfitness violation. No issues are raised on appeal over the Board's consolidation of four counts into two counts.

I.

A.

The first complainant, Susan Stemm, retained respondent in November 1988 to resolve visitation disputes following a Wyoming divorce giving her custody of the parties' 5-year-old son and visitation to her ex-husband. Stemm sought to limit her ex-husband's visitation because, she claimed, he had abused the boy. In February 1989, Stemm expressed her sense of urgency because the father had planned a month-long summer visitation at his home in Wyoming. The child was experiencing such anxiety over visitation that he required weekly counselling. Respondent advised Stemm that he would seek relief in Vermont on the issue of visitation.

Respondent's associate, Susan Hatheway, initially worked on Stemm's case. In April 1989, she prepared a motion to modify the Wyoming decree to be filed in Windham Superior Court. Shortly after May 15, Hatheway and another associate left the firm, leaving respondent as the firm's only attorney.

On June 8, 1989, Stemm expressed impatience with respondent because respondent had not yet filed the motion. Informing respondent that she did not intend to allow the summer visitation, Stemm asked whether she should

seek relief in Wyoming instead of Vermont. Respondent told her that jurisdiction should be in Vermont, but did not advise her that simply disregarding the Wyoming divorce judgment could result in proceedings against her in Wyoming.

At no time during the summer of 1989 did respondent file the motion to modify in any court. He did nothing further in Stemm's behalf. After respondent failed to return Stemm's phone calls, he finally met with her in October 1989, at which time the relationship terminated. Stemm refused to allow her son to visit his father in Wyoming that summer. The father responded by instituting contempt proceedings in Wyoming. She defended by hiring a Wyoming attorney, which cost Stemm approximately $20,000 in attorney fees. As a result of this incident, she notified the Professional Conduct Board of respondent's behavior.

B.

The second complainant, Richard Wysanski, contacted respondent's associate, Susan Hatheway, in October 1988, to have wills prepared for himself and a friend. Respondent instructed Hatheway to conduct the intake interview and charge $130 for the two simple wills, which he would draft himself. Hatheway met with the clients in November.

In May 1989, the clients provided estate planning information to Hatheway, at which time she informed Wysanski that she would be leaving the firm. She indicated she would ask respondent to draft the wills. Between May and September 1989, both clients called respondent's office numerous

times to find out why their wills had not yet been prepared. Respondent did not return these calls, and when contact was finally made, respondent became rude and sarcastic and suggested they hire another attorney.

The clients then contacted Hatheway to intervene on their behalf. She wrote to respondent. Rather than prepare the wills, respondent returned the $130 retainer to the clients at the end of September, claiming that he had been too busy to prepare them.

II.

Respondent first argues that the Board's decision should be reversed because the panel submitted its report to the Board beyond the time set forth in A.O. 9 Rule 8(C), which states in part:

> The Hearing Panel shall in every case submit a report containing its findings and recommendations . . . to the Board within 60 days after the conclusion of its hearing.

The panel submitted its report to the Board about ninety days after the conclusion of the hearing.

Failure to comply with a statutory deadline does not necessarily require a sanction unless the statute creating the limit expressly specifies a consequence for failure to meet it. In re J.R., 153 Vt. 85, 92, 570 A.2d 154, 157, (1989) (court will not imply a consequence in

absence of one specified by legislature); see also In re Mullestein, 148 Vt. 170, 173-74, 531 A.2d 890, 892 (1987) (statutory deadline not mandatory unless consequence for failure to comply specified). Failure to meet a rule deadline should stand on no different footing, especially when no prejudice by the late filing is apparent.

Next, respondent claims that the evidence is insufficient to support certain findings of fact by clear and convincing evidence. This Court must accept the Board's findings of fact unless they are clearly erroneous. A.O. 9 Rule 8(E). As long as the Board applies the correct standard of proof, the Board's findings will be upheld if they are clearly and reasonably supported by the evidence. In re Karpin, No. 92-570 slip op. at 2 (Vt. Mar. 1993).

The essential finding that respondent took on cases which he failed to reasonably pursue is fully supported. Respondent does not so much challenge the finding of his neglect, but rather attacks tangential details not essential to that conclusion. For instance, he claims that the Board's finding that Hatheway finalized the motion to modify the Wyoming decree in April is clearly erroneous because he testified that he edited the motion in June. The important issue, however, is not the day on which the motion was ready to be filed, but that respondent never filed any motion, developed any plan, or devised any strategy to address his client's legal needs.

Nevertheless, his assertion that the evidence was insufficient to support the Board's findings is without merit. Hatheway testified that the

motion was in final form and ready to go when she last worked on it. Respondent's records show that her last billing on the account was April 28, 1989. Based on this evidence, the Board could reasonably conclude that the motion to modify was complete on April 28, 1989.

Respondent's attacks on the accuracy of other findings also concern unessential details. He questions the formation date of his and Stemm's representation agreement, maintaining that they did not agree that he would represent her in the custody case until a short time after their first meeting in November 1988. Respondent states that the Board incorrectly attributed Stemm's concern about the summer 1989 visitation to their first meeting. Although the Board may have been mistaken about the timing of certain communications, these facts were not essential to the outcome. Respondent makes no argument as to how these errors regarding the timing of communications relate to his overall conduct under the code.

Respondent maintains that it was Hatheway who controlled Stemm's file and that he should not be responsible for her neglect. Hatheway did a conscientious and thorough job, however, and it was not until she left respondent's employ in May 1989 that the Stemm matter became neglected. Respondent never followed up in any meaningful way on his associate's work. The evidence was abundant that respondent held himself out as ultimately responsible for all files.

Next, respondent claims that the following finding is irrelevant and immaterial:

10. Ms. Hatheway left the Respondent's employ shortly after May 15, 1989. This event, coupled with the contemporaneous loss of Respondent's only other associate, left Respondent severely short-handed and over burdened with work during the summer of 1989. Respondent's practice became one of "crisis management", i.e. he was forced to devote his time and attention only to those matters he deemed most urgent. Nevertheless, no evidence was presented that Respondent took any action to alleviate this situation by obtaining additional help or voluntarily withdrawing from non-critical matters. Indeed, Respondent failed to undertake a review of his pending matters to set priorities, but simply reacted to emergencies.

This finding was actually helpful to respondent. If the Board had found that he purposely failed to attend to Stemm's legal needs the infraction would have been more serious. Respondent submits that no evidence was submitted that he "failed to undertake a review of his pending matters to set priorities." The evidence, however, was overwhelming that respondent did not adequately respond to Stemm's communications and allowed her case to remain idle. Simply put, the Board could infer respondent did not manage his work.

Respondent submits that there was no real emergency regarding

visitation during the summer of 1989 because the father was not pushing for it. Respondent bases this on the fact that Stemm had indicated to her ex-husband she was not going to allow visitation and he was calm about her position. According to respondent, Stemm was handling the matter on her own, and the motion to modify visitation did not need to be made.

We disagree because Stemm hired respondent to advise her on how to solve the visitation problem. Respondent outlined his preferred course of action beginning with the filing of a motion to modify, a strategy with which Stemm agreed. Respondent did not follow through and never changed his advice. He merely abandoned the plan for legal action. What respondent characterizes as a non-emergency caused his client to litigate the dispute in Wyoming contrary to respondent's preferred strategy. Respondent had even written opposing counsel in Wyoming in early June 1989, clearly stating that he represented Stemm, and specifically mentioning his plan to modify the divorce order.

Respondent's real challenge is based on his view that, while he may have been somewhat remiss in supervising the work being done by his associate, his conduct does not rise to the level of neglect sufficient to warrant public reprimand. We disagree.

This was not a close case on the facts. The Board found on uncontroverted evidence that respondent maintained control of Stemm's file. Respondent testified that he was responsible for every file in his office. Respondent did not adequately supervise his associate, whom he knew had little experience with divorce issues. He did not devote any appreciable

time to the custody case even after Hatheway left his employ. Stemm expected respondent to resolve the issue of visitation. Respondent procrastinated until Stemm could no longer tolerate the situation. Respondent also admitted that he failed to prepare the wills for the other clients. The evidence amply supported the violation of DR 6-101(A)(2). Finally, respondent claims that his conduct did not rise to a level sufficient to adversely reflect upon his fitness to practice law as required by DR 1-102(A)(7). The violation of DR 1-102(A)(7) was based on the Board's finding that respondent acted in an undignified manner during a telephone conversation with a client together with its finding that respondent neglected matters entrusted to him. This Court has upheld violations of DR 1-102(A)(7) for embezzlement, In re Mitiguy, No. 93-464 (Vt. Feb. 1994), disparaging another attorney, In re Illuzzi, ___ Vt. ___, 632 A.2d 346, 349 (1993), failing to provide an expense accounting and falsely asserting an oral agreement between attorney and client, In re Bucknam, ___ Vt. ___, 628 A.2d 932, 935 (1993), and attempting to purchase cocaine, In re Berk, 157 Vt. 524, 526, 602 A.2d 946, 947 (1991). A violation of DR 6-101(A)(3) (neglecting a matter entrusted to an attorney) by itself, however, does not per se adversely reflect upon an attorney's fitness to practice law. See In re Billewicz, No. 94-019, slip op. at 1 (Vt. Mar. 1994) (no DR 1-102(A)(7) violation for failure to file a lawsuit or prepare a case until two weeks before tolling of statute of limitations, then withdrawing representation).

In this case, the neglect occurred when respondent lost both his associates simultaneously. Although he should have taken steps to adapt to the situation, his neglect under these circumstances is better addressed

solely under DR 6-101(A)(3). Respondent's rudeness to his client on the telephone, alone, does not rise to such a level as to adversely reflect upon his fitness to practice law. Therefore, we do not agree that respondent violated DR 1-102(A)(7).

We conclude that the violation of DR 6-101(A)(3) alone is sufficient to warrant a public reprimand. "Reprimand is generally appropriate when a lawyer . . . does not act with reasonable diligence in representing a client." ABA Standards for Imposing Lawyer Sanctions, Standard 4.43 (1991). See In re Billewicz, slip op. at 2 (violation of DR 6-101(A)(3) warrants public reprimand).

William M. McCarty, Jr. is hereby publicly reprimanded for violation of DR 6-101(A)(3).

BY THE COURT:

/s/

_____

Frederic W. Allen, Chief Justice

/s/

_____

Ernest W. Gibson III, Associate Justice

/s/

_____

James L. Morse, Associate Justice

/s/

_____

Denise R. Johnson, Associate Justice