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[7-Jul-2003]

STATE OF VERMONT

PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2002.219

Decision No. 57

The parties filed a stipulation of facts and a joint recommendation as to conclusions of law. A hearing was held on May 19, 2003, on the issue of sanctions before Hearing Panel No. 5 consisting of Mark Sperry, Esq., Jane Woodruff, Esq. and Sara Gear Boyd. Beth DeBernardi appeared as Disciplinary Counsel. Respondent was present and represented counsel. Jane Woodruff participated by phone by agreement of the parties. Based upon the stipulation of facts, the evidence and exhibits, the Panel admonishes Respondent and places her on probation for failure to act with reasonable diligence and promptness and for failure to keep her client informed in the handling of a permit issue arising in the context of real estate closing in violation of Rules 1.3 and 1.4(a) of the Vermont Rules of Professional

Conduct.

Facts

In the summer of 2000, complainant engaged Respondent to represent her in the sale of a cottage. An addition had been made to the cottage in 1981, but no one could produce a copy of the necessary town building permit. Despite the missing permit, closing took place on August 25, 2000. One thousand dollars of the money due complainant was placed in escrow, and Respondent agreed to remedy the permit issue after closing. The escrowed funds were held in her client trust account to assure the buyer that the permit work would be done and to make funds available to cover any expenses.

A few days after closing, complainant received a closing statement and a letter from Respondent indicating that she would be working to resolve the permit issue. When she did not hear from Respondent, complainant sent a letter dated November 1, 2000 to Respondent inquiring about the status of the permit and the escrowed funds. Respondent did not respond to the letter. On January 15, 2001, complainant faxed another copy of her November letter to Respondent, along with a note. Again Respondent did not respond. In the spring of 2001, complainant spoke with Respondent on the telephone. They discussed the permit and the escrowed funds, and Respondent indicated that she would resolve the problem. On July 20, 2001, Respondent spoke with the Town Zoning Administrator who informed her that he would deny an

application for a building permit for the addition to the cottage, and that the Zoning Board of Adjustment would then hold a hearing on the issue. He quoted Respondent a $200 fee for the building permit application and a $140 fee for the application to the Zoning Board of Adjustment.

Shortly thereafter Respondent obtained the permit application. The application called for measurements which Respondent did not have. Respondent went to the town clerk's office and made a copy of the survey on file showing the location of the cottages in the development. Respondent also thought it might be helpful to find copies of the old lister cards for the cottage, because they might state the physical dimensions of the addition. She made copies of the current lister cards at the town offices, intending to visit the lister's office on another occasion and use the current lister cards to locate the old lister cards. She contacted the lister who searched for, but could not find, the old cards.

On August 27, 2001, complainant faxed a letter to Respondent, inquiring about the permit and the escrowed funds. She received no response. On August 30, 2001, a realtor contacted Respondent on behalf of complainant. Respondent told her that she was working on the permit issue. Sometime thereafter, Respondent tried to contact the builder who had constructed the 1981 addition. She reached his wife and told her what measurement information she thought she needed for the permit application, hoping that the builder would still have this information. Respondent later received a diagram from the builder, but it was not complete enough

to provide the information Respondent was looking for.

On November 15, 2001, complainant sent a letter to Respondent by certified mail, again inquiring about the permit and the escrowed funds. Respondent recalls receiving the letter, but she did not respond to it. To the best of her recollection, she did not open the letter because she knew it would be a reminder about the permit work.

On December 15, 2001, a Burlington attorney called Respondent, at the request of complainant. Respondent advised the attorney that she was working on the permit issue and hoped to resolve it promptly.

After hearing nothing further from Respondent, on May 10, 2002, complainant filed a complaint with the Office of Disciplinary Counsel about the matter. On June 18, 2002, Respondent filed an answer to the complaint. In July of 2002, she spoke with builder about the matter. At that time, Respondent began to think about trying to establish the existence of an old permit, rather than applying for a new permit. The builder told her that he did not have records pertaining to the old permit.

On February 21, 2003, at the suggestion of Deputy Disciplinary Counsel, complainant mailed to Respondent's counsel an invoice that complainant had received from the builder dated September, 24, 1981. The invoice indicated a charge of $15.00 for a building permit for the addition to the cottage. Complainant had mentioned the invoice in her letters to

Respondent in November of 2000 and August of 2001.

Respondent's attorney sent the invoice to the Town Zoning Administrator. He then found a record of a hearing on the original permit application and agreed to issue a Certificate of Occupancy which was signed on or about March 22, 2003. The fee for the certificate was $40.00. Respondent paid this from the escrow account, and returned the balance of the escrowed funds, $960.00, to complainant.

Respondent's counsel filed a copy of the Certificate with the town clerk and sent a copy to the purchaser of the cottage, thus resolving the permit issue.

The following mitigating factors are present in this case; absence of a prior disciplinary record, absence of a dishonest or selfish motive, personal or emotional problems and good character and reputation. Respondent's substantial experience in the practice of law is the only aggravating factor present.

Respondent was admitted to the practice of law in Vermont in the early 1970's. For many years she worked as a trial lawyer. In the last few years Respondent has suffered from chronic and sometimes serious health problems. Respondent testified that as a result of her health problems she no longer does trial work. She also finds it necessary to conserve her strength and is careful in planning her commitments so that she has the

strength and energy to accomplish what needs to be done. She no longer works full time.

She has also been the sole member of her family responsible for the care of two elderly relatives. While these responsibilities have taken her away from Vermont at times, she has always been able to attend to her commitments to her clients and has made arrangements to be available to her clients and other attorneys. Conclusion of Law

Rule 1.3 of the Vermont Rules of Professional Conduct provides that: "A lawyer shall act with reasonable diligence and promptness in representing a client." What constitutes an unreasonable delay depends on the circumstances of the particular case. The Panel finds that a delay of more than two years to resolve the permit issue on the lot violates this rule.

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 failed to keep complainant informed of the status of the permit issue and of her escrowed funds. Respondent also failed to comply with reasonable requests for information from her client. The Panel concludes that Respondent's conduct violates Rule 1.4(a) of the Vermont Rules of Professional Conduct.

Sanction

Disciplinary Counsel argues that the appropriate sanction in this matter is public reprimand, citing us to the ABA Standards for Imposing Lawyer Sanctions. It is well settled that the Panel may be guided by these standards in determining sanctions. The ABA Standards enumerate four factors to be considered. The first of these is the duty violated, and the Panel has concluded that Respondent violated her duty to her client under Rules 1.3 and 1.4(a) of the Vermont Rules of Professional Conduct.

The second factor to be considered is the attorney's mental state; whether the conduct was negligent, knowing or intentional. At least initially Respondent was clearly negligent. She always acknowledged her responsibility to remedy the permit problem and intended to do so. At some point after the reminders from her client, Respondent's failure to communicate became knowing. The panel does not find that Respondent intentionally violated her duties to her client.

The third factor to be considered is whether or not there was injury to the client. Complainant testified that there was no injury. The matter was frustrating to her, and she wanted it behind her. The matter has been resolved at very little cost and the complainant has received the balance of her money, though she did not have the use of it for the period of the delay.

The final issue to consider under the ABA Standards for Imposing Lawyer Sanctions is the existence of aggravating or mitigating factors. The only aggravating circumstance present is Respondent's substantial experience in practice. ABA Standards § 9.22(i) There are a number of mitigating factors which the Panel has also considered. Respondent has no prior disciplinary record. ABA Standards § 9.32(a). She did not act out of a selfish or dishonest motive. ABA Standards § 9.32(b). She was experiencing health and family problems during the time of the representation. ABA Standards § 9.32(h). Respondent has cooperated with the disciplinary process, ABA Standards § 9.32(e), and has a good reputation in the community. ABA Standards § 9.32(g).

Disciplinary Counsel argues that balancing the aggravating and mitigating factors makes this a case of public reprimand rather than suspension. We disagree and believe that weighing all of the factors, admonition is the appropriate sanction.

The Panel is aware of the provisions of Rule 8(A)(5) of A.O. (9) which provide:

> Only in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and where there is little likelihood of repetition by the lawyer, should an admonition be imposed.

In classifying Respondent's conduct as minor, the Panel is persuaded that it is much less severe than the conduct in several recent cases in which a public reprimand was imposed. Disciplinary Counsel cites us to In re DiPalma, PRB Decision No. 44 (2002). In this case, the neglect of the client's matter was much more serious. As a result of the attorney's neglect and failure to keep his client informed, both the client's petition and appeal were dismissed and the client suffered loss of claimed trademark rights. In re Capriola, PRB Decision No. 51 (2003), is also more serious. Here the attorney borrowed money from two clients without informing them of their differing rights, and both clients had to engage attorneys to obtain repayment of the debt. In both DiPalma and Capriola the conduct was more serious and so were the consequences for the client. Thus we find Respondent's conduct to be minor when compared to these recent cases.

Disciplinary Counsel argues, with perhaps more justification, that admonition is not appropriate because there is no assurance that this behavior will not recur. Respondent testified that the burden of elderly relatives has diminished considerably. Also, it was clear to the Panel that Respondent is aware of her physical limitations and has structured her practice and other commitments to accommodate them. In her pre-hearing filings Disciplinary Counsel recommended to the Panel that it impose a term of probation in conjunction with other discipline. Both Respondent and her attorney have indicated that they have no objection to probation, and the Panel imposes a three year term of probation. We believe that this, combined with Respondent' personal limitations on her practice will insure

that there is little likelihood of repetition of the problems faced by complainant.

Order

Respondent is admonished for violation of Rules 1.3 and 1.4(a) of the Vermont Rules of Professional Conduct. She shall be placed on disciplinary probation under the following conditions.

1. The probation shall be for a period of at least three years, commencing on the date upon which the decision in this matter becomes final.

2. Respondent shall associate with another experienced attorney who will agree to mentor her during the course of her probation. Respondent's choice of a mentor shall be approved by Disciplinary Counsel.

3. During the first year Respondent shall meet with her mentoring attorney at least once every four weeks to discuss issues related to Respondent's health, family, and caseload. Thereafter they shall meet every six weeks. Meetings shall be by phone or in person at the discretion of the mentoring attorney.

4. Respondent shall accept and implement all reasonable suggestions offered by her mentor.

5. If she misses a scheduled meeting without notifying her mentor in advance, or if she goes more than eight weeks without meeting with her mentor, the mentor shall report this fact to Disciplinary Counsel.

6. Respondent shall permit and authorize her mentor to respond to Disciplinary Counsel's requests for information relating to Respondent's compliance with the mentoring arrangement and her probation.

7. Respondent shall secure from her mentor a brief report summarizing each meeting, including any recommendations made pursuant to paragraph 4 hereof, and Respondent shall file a copy of the report with Disciplinary Counsel within three weeks of the meeting her mentor.

8. Respondent shall bear the costs and expenses related to her compliance with the probation and mentoring.

9. In the event that the agreed upon mentor is unable to continue to serve, Respondent shall immediately notify Disciplinary Counsel and, as soon as possible, find a replacement mentor. Respondent's choice of a replacement mentor must be approved by Disciplinary Counsel. If Respondent is not able to secure a new mentor within eight weeks of the departure of her mentor, Respondent shall be considered in violation of her probation.

10. Respondent's probation shall be renewed or terminated after

three years as provided in A.O. 9, Rule 8(A)(6).

Dated: JULY 7, 2003

Hearing Panel No. 5

/s/

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Mark Sperry, Esq.

/s/

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Jane Woodruff, Esq.

/s/

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Sara Gear Boyd