60 PRB

[29-Oct-2003]

STATE OF VERMONT

PROFESSIONAL RESPONSIBILITY BOARD

Decision No. 60

In Re: File No. 2003.202

On August 11, 2003 the parties filed a stipulation of facts as well as joint recommendations on sanctions and conclusions of law. Respondent also waived certain procedural rights including the right to an evidentiary hearing. The Hearing Panel accepts the facts and recommendations and orders that Respondent be admonished by Disciplinary Counsel for his failure to act with diligence, to keep his clients informed of the status of their case and to communicate clearly about his fees in connection with his handling of a collection matter, in violation of Rules 1.3, 1.4(a) and 1.5(b) of the Vermont Rules of Professional Conduct.

Facts

Respondent is an attorney licensed to practice law in the State of Vermont. He was admitted to practice in Vermont in 1974.

In June of 2000, the complainants, a married couple (also referred to as the "clients," and individually as either the "wife" or the "husband."), entered into a contract to purchase a mobile home from a manufactured home dealer (MHD). The clients paid MHD an $8,000 contract deposit.

The contract was contingent on the clients' receiving approval for residence in a certain mobile home park. The clients were found ineligible for residence in the park and requested the return of their contract deposit from MHD.

When MHD failed to return the deposit, the clients hired Respondent to assist them. During their initial meeting with Respondent, the clients asked how much he would charge for his legal services. Respondent responded that the clients should not worry about his fees but rather focus on getting their money back. This is the only fee discussion that ever took place between Respondent and the clients. The clients understood that they should not concern themselves about fees until Respondent recovered money for them, believing that Respondent was charging them a contingent fee based on the eventual recovery. The clients assumed the contingent

fee would be one third, because they understood that to be the usual and customary percentage for contingent fees. Respondent's usual practice is to have a written fee agreement in contingent fee cases. He did not enter into a written fee agreement with the clients, nor has he ever billed them for his services.

Although Respondent did not tell the clients at the outset, or at any other time, that he would represent them pro bono, that was his intention from the beginning. The clients had no idea that their case was being handled on a pro bono basis until April of 2003 when the wife was interviewed in connection with these disciplinary proceedings. Until then, the clients thought that they had not paid attorney's fees simply because Respondent had not yet recovered their money.

Respondent wanted to help the clients and initially he did not think that it would be difficult or time-consuming to obtain their money for them. This opinion based on repeated assurances from MHD that it would provide a full and prompt refund to the clients. Between July 7, 2000 and November 1, 2000, Respondent wrote at least five letters to MHD demanding the return of his clients' money. He also spoke with MHD on the telephone numerous times.

MHD responded often and made numerous promises that the money would be returned, including promises to hand deliver a check to Respondent's office in short order. In reliance on these promises, Respondent delayed the

filing of the collection action.

On November 8, 2000, after four months of failed negotiations, Respondent filed a collection action against MHD. On February 7, 2001, MHD defaulted, but Respondent did not file a Motion for Default Judgment until July 18, 2001, more than five months after the default.

On August 24, 2001, the constable served the default judgment on MHD. At that time the principals of MHD with whom the clients had dealt were still present in Vermont and involved with the MHD corporation. After serving the default judgment, Respondent did no work on the collection matter for the next year.

In August of 2002, the clients were concerned that Respondent was not making progress and spoke with a friend about the matter. That month the husband and the friend went to Respondent's office and met with the Respondent's law partner. The partner reviewed the case and informed them that the next step in the process would be to file for a financial disclosure hearing.

The partner prepared the request for a financial disclosure hearing and filed it with the court on August 22, 2002. The request for a hearing was granted and a hearing was set for October 18, 2002. The partner also made arrangements with the constable for service of the Notice of Hearing on MHD.

In early September, Respondent informed the clients of the hearing and the fact that they would need to attend. He told them he would be in touch prior to the hearing date to discuss the matter further.

Shortly after the Notice of Hearing was served on MHD, Respondent's partner received information from the constable suggesting that MHD was not likely to attend the financial disclosure hearing. He also learned that the person present during the attempted service had refused to acknowledge service. The law partner shared this information with Respondent.

The day before the hearing, the wife and Respondent spoke on the telephone. Respondent informed her that there was no need to go to court, because the defendant was not expected to appear at the hearing. Accordingly, the clients did not attend the hearing and, as expected, MHD failed to appear. Respondent did not call the clients after the hearing to let them know that MHD did not in fact attend, or to discuss with them what would happen next in their case.

Respondent has not communicated with the clients since the wife called him the day before the financial disclosure hearing, and he has not performed any substantive work on the collection matter since that date. Respondent has failed to make timely and diligent efforts to obtain and to attempt to collect the clients' judgment against MHD.

At times during the representation, Respondent would fail to return the clients' telephone calls promptly. Sometimes it would take him a week or more to return their calls. As a result, the clients would stop by Respondent's office without an appointment to find out the status of their case.

At the outset of the representation, Respondent had informed the clients that their chances of recovering their money were good. As time went on, however, his assessment of the case changed for a number of reasons. MHD had not made good on its promises to pay; it had become necessary to file suit; MHD had closed its place of business, and the principals were rumored to have moved to Florida. Respondent discussed these and other facts with the clients, but he never specifically informed them that the likelihood of collection had been substantially reduced. Instead, he assumed that they would infer this from their discussion. The clients, however, did not understand this. For example, the clients discussed with Respondent the fact that the principals of MHD might have left Vermont, and he informed them that there were ways of finding people now on the Internet. Thus, the clients remained sanguine about collection and were not reasonably informed by Respondent that the likelihood of success had severely declined.

Respondent had good intentions in undertaking the representation of the complainants pro bono and was hopeful that he could recover their money for them quickly. Later, however, when the matter became difficult and

protracted, Respondent did not devote the time and attention to the clients' case that it required, and he did not keep them reasonably informed of the status of the case.

It is not known whether the complainants could have collected their money from MHD had the matter been pursued more expeditiously. Many judgments against small businesses are not collected. The odds of collecting the money, however, have decreased over time, in part because MHD has changed owners, directors, and officers since the collection matter began. The principals with whom the complainants originally dealt were still present in the state at the time the judgment was served, but they were gone well before Respondent's office requested a financial disclosure hearing fourteen months later.

Respondent has indicated his willingness to continue to represent the complainants in this matter after the disciplinary matter is resolved. He does not know whether he can collect their money, but there may be other collection techniques that he could try. If there are no other reasonable techniques that he can try, he is then willing to speak with the clients again to debrief them as to the status of their case and their remaining options, if any.

The following aggravating factors are present in this matter: prior disciplinary offenses and substantial experience in the practice of law. The following mitigating factors are present in this matter: absence of a

dishonest or selfish motive, full and free disclosure to Disciplinary Counsel and a cooperative attitude towards the proceedings, remorse and the remoteness of the prior disciplinary offenses.

Conclusions of Law

Rule 1.3

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. Respondent failed to act promptly in both obtaining the judgment, and taking steps to attempt to collect it. The issue is not whether he was successful in collecting the judgment. It may in fact have been uncollectible from the outset. Rather, the issue is Respondent's failure to promptly pursue the matter on behalf of his clients. Respondent's failure to return telephone calls to his clients in a timely fashion is further evidence of his lack of diligence and promptness.

Rule 1.4(a)

Rule 1.4(a) of the Vermont 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's initial assessment that collection would be easy was

reasonable based on information known at the beginning of the representation. As the months went by, however, new information came to light which indicated that it was much less likely that the clients' money could be collected. Respondent discussed with the clients the fact that MHD had not returned the money as promised and that its place of business appeared to be abandoned, but he did not specifically inform the clients that these facts substantially diminished the likelihood of collection. Respondent thought this was obvious from his discussions with his clients, but it was not obvious to the clients. The clients heard Respondent telling them that there were collection avenues open to them, and that it was possible to find defendants via the Internet. They did not understand that the possibility of collecting their money had gone from likely to poor. Though Respondent was speaking with his clients about the case, he was not doing it in such a way that kept them reasonably informed about the status of the matter.

Rule 1.5(b)

Rule 1.5(b) provides that "[w]hen the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation." Respondent had never represented these clients before. When the clients first met with Respondent they specifically asked him about the fee arrangement. The Respondent told them not to worry about it and to focus instead on collecting their money. The

clients assumed that Respondent was referring to a contingent fee, whereas Respondent actually intended to represent them pro bono.

Even though the matter was intended to be pro bono, Respondent violated Rule 1.5(b) by failing to communicate the basis of the fee to the client. Telling the client "not to worry" is insufficient. Moreover, the clients have expressed concern that they might have felt more comfortable hiring an attorney who was working on a contingent fee basis, because they believe that such an attorney might have worked more diligently for them. This underscores why it is important to communicate the basis of the fee to the client, even if the fee is pro bono.

Sanction

It is well settled that it is appropriate to apply the ABA Standards for Imposing Lawyer Sanctions in determining the appropriate sanction in a particular case. Four factors are to be considered in determining sanctions.

1. The duty violated. By his failure to pursue collection of his client's default judgment for a year and by his failure to continue work on the case after the financial disclosure hearing, Respondent failed in his duty to act with reasonable diligence and promptness in handling his client's case, ABA Standards for Imposing Lawyer Sanctions, §4.4.

2. The Lawyer's Mental State. Respondent's mental state was one of negligence. It is clear that Respondent did not intend to mislead his clients about the deterioration of their case, nor did he intend to be misleading about his fee arrangements. The lesson of this case is that at times it is not enough to lay out facts assuming that the client will draw the appropriate conclusions or to give a client nonspecific assurances about fees. A critical component of client communication is making sure that the client understands what is being said. The amount of effort required to do this will obviously vary with the client, but it is the responsibility of the lawyer to insure that he or she is fully understood by the client. Written fee agreements, direct communication and full discussion of the critical facts of a client's case can all help to avoid this type of situation.

3. Injury. There is no evidence of actual injury to the clients. While they were unsuccessful in collecting their judgment, circumstances suggest that even if Respondent had acted promptly to obtain judgment and attempt collection, success was doubtful.

4. Aggravating and Mitigating Factors. In aggravation, Respondent has substantial experience in the practice of law, ABA Standards for Imposing Lawyer Sanctions, § 9.22(i), and a prior disciplinary record, ABA Standards, § 9.22(a). In 1974, the year he was admitted to practice, Respondent, together with another more experienced attorney, was publicly reprimanded for charging an unreasonable fee. In 1994, Respondent was

privately admonished for neglecting an estate. In that matter, the neglect occurred because the client moved out of state and Respondent did not have his new address. Once the client filed a complaint with the Professional Conduct Board, Respondent got his client's new address and wrapped the matter up promptly. There was no injury.

There are four mitigating factors present. Respondent had no dishonest or selfish motive, ABA Standards for Imposing Lawyer Sanctions, § 9.32(b), he has made full and free disclosure to the Office of Disciplinary Counsel and has exhibited a cooperative attitude toward this proceeding. ABA Standards, § 9.32(e). Finally Respondent has expressed his remorse for neglecting this matter and is sorry that he did so. ABA Standards, § 9.32(l). The prior discipline mentioned above is quite remote in time. The reprimand was imposed almost thirty years ago, and the admonition in 1994.

Having considered the facts of this case and the factors enumerated in the ABA Standards for Imposing Lawyer Sanctions, the Panel finds that admonition is appropriate under ABA Standards for Imposing Lawyer Sanctions, § 4.44. which calls for admonition "when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client."

Conclusion

Based on the foregoing, the Hearing Panel orders that Respondent be admonished by Disciplinary Counsel for violation of Rules 1.3, 1.4(a), and 1.5(b) of the Vermont Rules of Professional Conduct.

FILED: 10/28/03

Hearing Panel No. 6

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Judith Salamandra Corso

/s/

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James Gallagher, Esq.

/s/

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Toby Young