90 PRB

[Filed 17-Mar-2006]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No 2005.191

Decision No. 90

The parties filed a stipulation of facts and recommended conclusions of law. Respondent waived certain procedural rights including the right to an evidentiary hearing. The Panel accepts the stipulation and recommendation and orders that Respondent be admonished by Disciplinary Counsel for failure to attend to and complete discovery in a timely manner in violation of Rule 1.3 of the Vermont Rules of Professional Conduct.

Facts

In July of 2000 KC, a Vermont resident, was injured in a slip and fall accident in a Massachusetts store. Shortly thereafter she retained Respondent to represent her in the claim. Respondent handled most aspects of the case promptly and diligently over a four year period, both prior to and after filing suit. He kept in touch with the client on a regular basis and monitored her medical progress and damages. He communicated with the defendant's insurance company, researched premises liability and hired an economic expert to analyze and document his client's lost wages.

In May of 2003 Respondent made a settlement demand on defendant's insurance carrier. Defendant rejected the settlement proposal, and Respondent engaged an attorney in Massachusetts to file suit there in federal court. Suit was filed in July of 2003, and the Massachusetts attorney acted as counsel until Respondent was admitted pro hac vice three months later.

It was at this point that Respondent failed to act with reasonable diligence. On August 12, 2003, the court sent a Notice of Scheduling Conference to Massachusetts counsel which he faxed to Respondent the next day. The Scheduling conference was set for September 13, 2003, and the court notified the parties that they were to confer about a discovery schedule prior to that date. Shortly thereafter the defendant's attorney circulated a proposed discovery schedule with a deadline of February 27, 2004, for written discovery and depositions.

At the Scheduling Conference the court issued an order with a deadline of June 21, 2004, for written discovery and depositions, much longer than that proposed by the defendant. The schedule was sent to Massachusetts counsel who was still attorney of record. He sent a copy to Respondent, but Respondent did not receive it. Respondent did know that the court had held the scheduling conference, but he took no steps to determine whether any scheduling order had been issued.

In October of 2003 Massachusetts counsel moved the court for admission

of Respondent pro hac vice. The court granted the motion on October 21, 2003, with a notation that a notice of appearance be filed within ten days. Massachusetts counsel sent Respondent a copy of the order and suggested that Respondent take over the handling of the case. Respondent received the letter but failed to notice the requirement for filing a notice of appearance and thus did not file one.

Respondent sent his first round of written discovery to defendant in January of 2004. The number of written interrogatories included exceeded the limit under the court's rules and defendant declined to answer. Respondent corrected this deficiency and reserved his interrogatories on April 20, 2004. Defendant provided answers. Despite requests from his client, Respondent failed to depose the store employees by the discovery deadline.

In August of 2004, Respondent served a second set of interrogatories on defendant. Defendant objected that they were untimely. Respondent filed a motion to compel. The court denied the motion on the grounds that Respondent had missed the June deadline in the Scheduling Order. In November of 2004, Respondent noticed the deposition of one of defendant's employees. Defendant informed Respondent that he would again object as untimely, and Respondent cancelled the deposition.

Respondent did not have a copy of the actual discovery order issued by the court, but was instead referring to the proposed discovery schedule provided by defendant in August of 2003. That schedule had a shorter deadline than the one imposed by the court, and because defendant extended his discovery beyond his proposed date, Respondent mistakenly assumed that discovery deadlines were not strictly enforced and that he too could seek discovery beyond the deadline.

The court held a status conference in October of 2004. Respondent did not receive notice, since he had not filed an appearance. Massachusetts counsel attended the conference and thus there was no harm to the client. Respondent filed an appearance immediately after the conference.

The case went to mediation in December of 2004. Defendant's offer of settlement was not within the range that Respondent's client had anticipated, because there was insufficient evidence of liability. It was this evidence that Respondent had hoped to develop in his second set of interrogatories and the deposition of the store manager. The client settled the case during mediation but later told Respondent that she was disappointed in the settlement. After mediation, but before the release was signed, Respondent located the store manager, and found that he did not have any information that would be useful in establishing liability. Respondent and his client decided that she should proceed with signing the release and concluding the settlement.

Several months later KC filed a complaint with the Office of Disciplinary Counsel. She later contacted an attorney about a malpractice claim against Respondent. Respondent cooperated in that process, and KC received additional money from Respondent and his carrier.

Respondent's lack of diligence caused injury to KC in that she was frustrated in her desire to have the store manager deposed and thus her confidence in the mediation process was undermined. There is no evidence that full discovery would have resulted in stronger proof of defendant's

liability, and thus we cannot find that KC suffered actual financial injury in accepting the settlement.

Respondent was admitted to practice in Vermont in 1978. Mitigating factors include the lack of prior discipline, the absence of a dishonest or selfish motive, a good faith effort to make restitution, cooperation in the disciplinary process and remorse. The only aggravating factor is Respondent's substantial experience in the practice of law.

Conclusion of Law

Rule 1.3 of the Vermont Rules of Professional Conduct requires that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." Respondent handled KC's case appropriately until he failed to file a notice of appearance within the ten days required by the court on the granting of his motion to appear pro hac vice. Had he done so he would have received the Scheduling Order directly from the court. Similarly, he failed to attend the status conference because he did not receive notice from the court. From this one instance of lack of diligence, flowed all of Respondent's problems in completing discovery in a timely manner and complying with his client's wishes for depositions. In In re PRB File No. 2005.202, the Hearing Panel declined to find a violation of Rule 1.3 in a case where Respondent missed a hearing due to a calendaring error. In that case there were only 15 days between the date of the notice and the date of the missed hearing. Here, Respondent knew that the court had set a date for a scheduling conference, and that a discovery order would be issued, but he took no steps to discover if that had indeed happened or to obtain a copy of the order. Unlike the attorney in PRB File No. 2005.202, Respondent should have anticipated the issuance of the order and had ample time to discover its contents before the expiration of the discovery period. We find that this failure violated Rule 1.3 of the Vermont Rules of Professional Conduct.

Sanction

The Hearing Panel accepts the parties' recommendation for admonition. Admonition is appropriate only when the misconduct is minor, little or no injury results, and there is little likelihood of repetition. A.O. 9, Rule 8(A)(5). There is no evidence of actual financial injury and, while there were a number of lapses in Respondent's handling of KC's case, they all stemmed from one instance of lack of diligence. There is no evidence of any pattern of neglect by Respondent of his client's cases and no other complaints during some 28 years of practice, and thus we believe that there is little likelihood of recurrence. While lack of attention to federal court orders is never insignificant, the Hearing Panel believes that, taking all of the factors into consideration, this case falls within the bounds of A.O. 9, Rule 8(A)(5), and that admonition is the appropriate sanction.

Admonition is also consistent with the ABA Standards for Imposing Lawyer Sanctions. Section 4.44 provides that "[a]dmonition is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or not actual or potential injury to a client." Though there was the potential for financial injury, there is no evidence of actual injury other than the frustration suffered by the client. In addition there are a number of mitigating factors which also suggest that admonition is appropriate.

Order

For the foregoing reasons the Hearing Panel orders that Respondent be admonished by Disciplinary Counsel for violation of Rule 1.3 of the Vermont Rules of Professional Conduct.

Dated March 17, 2006
FILED 3/17/06

Hearing Panel No. 10

/s/
_____
Lon T. McClintock, Esq.

/s/
_____
Kristina Pollard, Esq.

/s/
_____
Bob Bergman