STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2011.046

Decision No. 144

The parties have filed a Stipulation of Facts, proposed Conclusions of Law and a Recommendation for Sanctions. The Respondent waived certain procedural rights including the right to an evidentiary hearing. The panel accepts the stipulated facts and recommendations and orders that Respondent be admonished by Disciplinary Counsel for preparing documents that indicated that they had been created and executed at the time of the transactions rather than some years later, in violation of Rule 8.4(c) of the Vermont Rules of Professional Conduct.

Facts

A.S. engaged Respondent to represent him after being informed that the Internal Revenue Service intended to audit the A.S. Retirement Trust (hereinafter "the Trust") of which A.S. was the sole beneficiary.

A.S. told Respondent that, in 2003 and 2004, while acting as the Trust's sole beneficiary, he had entered into three transactions with D.M. which had not been reduced to writing. A.S. decided to speak to a lawyer about documenting the transactions after learning of the audit.

In the first two transactions, which took place in June of 2003, A.S. and D.M. entered into an oral agreement for D.M. to build a house on each of two lots owned by the trust. The third transaction was in March of 2004, in which A.S. and D.M. entered

into an oral agreement for the Trust to loan $190,000 to D.M. secured by a mortgage on property in Vermont owned by D.M. and his wife.

A.S. told Respondent that the Trust and D.M. had a basic written agreement with respect to the first two transactions but that he did not have a copy. A.S. told Respondent that D.M. agreed that additional documentation was appropriate, and D.M. sent the existing documentation to Respondent.

Respondent agreed to document the transactions. For the first two transactions, Respondent modified his standard building contract to include the parties' terms. For the third transaction, Respondent drafted a standard note and mortgage using the dates and terms provided by A.S. All of the documents were prepared and executed in November of 2006. Since the transactions had all occurred and all funds had been advanced, Respondent felt that it was appropriate to use the original transaction dates. Respondent admits, however, that the actual date that the documents were signed should have been indicated and that he failed to do so. Respondent billed A.S. $670.00 for the work that he performed.

A.S. and D.M. are now involved in litigation over the claim by the Trust of negligent construction by D.M. In the course of discovery, the lawyers representing the parties learned that Respondent had created the documentation for the transactions in 2006 and notified Disciplinary Counsel. Since then, the lawyers have confirmed to Disciplinary Counsel that the documents created by Respondent accurately reflect the oral agreements reached by the parties in 2003 and 2004, and that the documents are not expected to have any bearing on the resolution of the litigation.

Respondent was admitted to practice in Vermont in 1985, having been admitted to

the Connecticut bar in 1979. No sanction has ever been imposed against Respondent's license in either state. Respondent did not intend to deceive anyone nor did he intend to misrepresent the agreements that A.S. and D.M. had reached. He was, however, negligent in deciding not to indicate that the documents were created and signed years after the agreements were actually reached.

Disciplinary Counsel and Respondent agree that this was an isolated instance of negligence, that no injury resulted, and that there is no reasonable expectation that Respondent will ever engage in conduct that is similar to the conduct at issue in this case.

Respondent did not garner significant financial gain by virtue of the work performed for A.S. He has been open and forthcoming with Disciplinary Counsel and has cooperated fully with the investigation. Respondent has a history of community service.

Conclusion of Law

Rule 8.4(c) of the Vermont Rules of Professional Conduct states that "[i]t is professional misconduct for an attorney to engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

The Supreme Court recently clarified the scope of what level of conduct will result in a violation of Rule 8.4(c):

> [W]e are not prepared to believe that *any* dishonesty, such as giving a false reason for breaking a dinner engagement, would be actionable under the rules. Rather, Rule 8.4(c) prohibits conduct "involving dishonesty, fraud, deceit or misrepresentation" that reflects on an attorney's fitness to practice law, whether that conduct occurs in an attorney's personal or professional life." *In re PRB Docket Nos. 2007-046 and 2007-047*, 2009 VT 115 (2009) ¶ 12 (emphasis in original).

In the case cited above, the attorneys were charged with violations of Rule 4.1

(knowingly making a false statement of material fact to a third person) as well as 8.4(c) for telling a witness during a telephone interview that they were not taping the conversation when in fact they were. The Court did not find a violation of Rule 8.4(c) in this case.

Since that decision, one other Hearing Panel has considered the case of an attorney charged with a violation of both Rules 4.1 and 8.4(c). *In re PRB Decision No. 140* (June 2011). In that case the attorney made modifications to an expert witness's *curriculum vitae* without so indicating in his cover letter to opposing counsel. The changes made indicated information that the attorney believed to be true but, had he investigated, he would have learned was not. The Panel found a violation of Rule 4.1since his failure to indicate the changes that he made amounted to a false statement, but did not find that the conduct reflected adversely on the attorney's fitness to practice law and dismissed the charge of violation of Rule 8.4(c).

In accepting the stipulation in this matter, it falls to us to distinguish the facts here from the two preceding cases. The recent Supreme Court decisions, *In re PRB Docket Nos. 2007-046 and 2007-047*, 2009 VT 115(2009), and *In re Strouse*, 2011 VT 77, do not provide guidance as to the components of "fitness to practice law."

We also have a number of cases decided under a prior provision of the Vermont Rules of Professional Conduct which was deleted in the amendments taking effect in September of 2009. Before the revision, Rule 8.4(h) provided that it was professional misconduct to "engage in any other conduct which adversely reflects on the lawyers fitness to practice law." Violations of this rule were found often in cases involving illegal behavior. *In re Lane*, PRB Decision No. 108, (April 2008), approved by Supreme Court

Entry Order, Docket No 2008-153, (May 2008) (misappropriation of campaign funds); *In re Heald*, PRB Decision No. 67 (2004) (failure to file state income tax returns for three years and making false statements on his attorney licensing statement); *In re McGinn*, PRB Decision No 77 (2005), Supreme Court Entry Order 2005 VT 71 (misappropriation of client funds); *In re Andres*, PRB Decision No. 52 (2003), Supreme Court Entry Order 2003-171 (conviction of assault on man in wheelchair.)

There is, however, more to fitness to practice law than refraining from engaging in illegal activity. Rule 22(D) of A.O.9 sets forth the necessary elements that a suspended or disbarred attorney must prove in order to be reinstated. The attorney must show "that he or she has the moral qualifications, competency and learning required for admission to the bar. . ." These would seem to be the necessary components of fitness to practice law, and it is in the area of competency and learning that Respondent falls short.

These issues were addressed in the case of *In re PRB Decision No 91* (2006). There the attorney revealed confidential juvenile information in the course of a divorce hearing. In finding a violation, the Panel stated "There is no evidence that Respondent intentionally or knowingly violated the confidentiality provision of the juvenile statute. The disclosure resulted from his failure to remember that the report was subject the to the confidentiality provisions during a personally stressful time. Respondent has experience in family court and is responsible for knowing the law pertaining to evidence he offers. His failure to do so reflects adversely on his fitness to practice law."

The parties have stipulated that Respondent did not intend to deceive anyone nor did he intend to misrepresent the agreements that A.S. and D.M. signed. Nonetheless, he intentionally documented transactions that were a number of years old without indicating

on the face of the documents that they were created after the fact. The creation of these documents was not peripheral to the representation,; instead, it was the sole purpose of Respondent's engagement by A.S. and the transactions that they documented were significant. The two contracts for house construction were each in the neighborhood of $250,000 and the mortgage was for $190,000. The impetus for the creation of the documents was an upcoming IRS audit.

We are not presented with any evidence as to whether the date of execution of the documents had any effect on the IRS audit. However, the date of execution of documents can and often does affect their validity and or their interpretation. Despite Respondent's lack of intent to misrepresent the facts, the documents on their face did indeed misrepresent a critical fact. We cannot speculate as to what the consequences might or could have been, but when Respondent accepted the task of documenting the transactions, it was incumbent on him to consider the purpose of the documents and the questions that could be raised about them. We do not know what questions were raised by the IRS, but dates can be critical in tax matters. We do know that the contracts for the houses resulted in litigation, something not uncommon in the building construction business. It appears that the dates of the documents are not an issue in the litigation but there again, they could have been. In engaging to do this work Respondent was charged with not just documentation but with a reasonable knowledge of the use to which the documents might be put. Respondent is responsible for knowing the law pertaining to documents he prepares for his clients. His failure to do so reflects on his fitness to practice law.

Sanction

We accept the recommendation for admonition by Disciplinary Counsel. It is consistent with the discipline imposed in *In re PRB Decision No 91 (2006)* and is consistent with Rule 8 of Supreme Court Administrative Order 9. There was no injury, this was an isolated act, and there is no reasonable probability that the conduct will be repeated.

Order

For the foregoing reasons we hereby Order that Respondent be admonished by Disciplinary Counsel for violation of Rule 8.4(c) of the Vermont Rules of Professional Conduct.

Dated: October 14. 2011

Hearing Panel No. 5

Robert Keiner, Esq., Chair

Elizabeth H. Miller, Esq.

Diane Drake