STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2013.089

Decision No. 164

The parties have filed two Stipulations of Facts, Proposed Conclusions of Law and a Recommendation for Sanctions. The Respondent has 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 violation of Rules 1.3 and 1.4 of the Vermont Rules of Professional Conduct. Respondent was assigned as conflict counsel in a serious felony case. He failed to act with reasonable diligence, failed to keep his client reasonably informed and failed to comply with the client's requests for information.

Facts

Respondent is licensed to practice in Vermont, having been admitted to the bar in 1990. He began representing defendants in criminal cases in January of 1991 and in 2001 began acting as conflict counsel in one county. In 2007 he took on an additional contract as conflict counsel in adjacent county. Conflict counsel is appointed to represent a criminal defendant if the county public defender's office has a conflict. The second county in which Respondent was appointed as conflict counsel has a larger case load and there are several conflict counsel. The compensation and caseload are based upon whether the attorney is the first, second or third conflict counsel. When the public defender has a conflict, the case goes to the first conflict counsel and then if he or she has

a conflict to the second conflict counsel, etc. During 2011, Respondent moved up the conflict counsel "ladder" in the second county, and as a result his caseload and his compensation approximately doubled.

This change required an adjustment to Respondent's law practice. Instead of having time off every week, he began to work some nights and weekends.

During this time Respondent was assigned to represent the Complainant who, in December of 2011, had been charged with seven felonies including multiple counts of lewd and lascivious conduct with a child, sexual assault and aggravated sexual assault on a victim less than ten years of age. The charges carry a potential life sentence. Complainant failed to post $100,000 bail and has been incarcerated ever since awaiting trial.

Respondent was assigned to represent Complainant on December 28, 2011 and shortly thereafter he wrote to Complainant informing him of the representation. During his representation of Complainant, Respondent engaged in some discussions with the state's attorney's office about a possible plea agreement but did not engage in any discovery or trial preparation. He did not meet with his client, though he spoke with him on the phone five times between February and July of 2012. Complainant sent nine letters to Respondent during the period of representation.

Work that could have been done on Complainant's behalf includes, deposing the alleged victim and the law enforcement officers to whom the complainant allegedly made incriminating statements, investigating the existence of other witnesses and the filing of any suppression or other appropriate pre-trial motions.

In October of 2012, after his client filed an ethics complaint against him,

Respondent filed a motion for leave to withdraw. The motion was granted and another attorney assigned to represent Complainant. The new attorney engaged in discovery, began to prepare the case for trial and filed motions to suppress, to sever the multiple offenses and to stay an order to submit to DNA evidence.

As a result of this PRB proceeding, Respondent has inquired about the Defender General's caseload relief program. He has learned that the Defender General's Serious Felony Unit may make itself available to take cases involving major felonies in the event that conflict counsel is overburdened. In addition, Respondent learned that the Defender General just recently hired an experienced, full-time attorney who is now available to consult with public defenders and conflict counsel on behalf of clients charged with felonies.

Respondent regrets that he failed to devote sufficient attention to Complainant's case. He now recognizes that he should have explored the possibility of asking the Serious Felony Unit to take over Complainant's case or other appropriate cases, so that he could better manage his workload. He also knows that he can now obtain assistance from the new staff attorney at the Defender Generals Office for assistance with trial strategy, trial preparation and litigation support, and he intends to avail himself of this assistance if in the future he finds himself in a situation in which he feels he cannot zealously represent the interest of any client.

Complainant was injured by Respondent's lack of diligence and failure to communicate to the extent that those factors caused stress, anxiety and frustration. Complainant has new counsel now, and there is no evidence that the delay or lack of communication had any adverse effect on the merits of the case.

The following mitigating factors are present: Respondent has no prior disciplinary record, he has cooperated with the disciplinary proceedings, he had no selfish or dishonest motive and he has expressed remorse.

Conclusions of Law

The parties join to recommend that we find a violation of Rules 1.3 and 1.4 of the Vermont Rules of Professional Conduct.

Rule 1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." Respondent acknowledges, and we concur, that he did not act with reasonable diligence in this case. Complainant was charged with a number of serious felonies. In the stipulated facts, Respondent acknowledged certain steps that he could, and perhaps should, have taken. His failure to do any discovery or to engage in any pre-trial motions violates this rule.

Rule 1.4 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 wrote one letter to Complainant and made five phone calls during the eleven months of representation. He did not visit the Complainant in jail, nor did he respond to requests for information. Since Respondent had done no discovery nor filed any pretrial motions there was little information to report, but even information about this lack of progress would have been helpful to Complainant who possibly could have sought new counsel earlier and saved some of the frustration and anxiety he was feeling during this period. We find that Respondent's failure to communicate with his client violates Rule 1.4.

Sanction

The first stipulation of facts filed by the parties did not contain the background information about Respondent's history with the conflict counsel program, specifically the abrupt change in his workload when he moved up the "ladder," which occurred at about the same time as his assignment to represent Complainant. Also absent was the information about the assistance available through the Defender General's office.

Before receiving this information, the panel was concerned that admonition was not appropriate considering the provisions of Vermont Supreme Court Administrative Order 9 Rule (8)(A)(5)(b) which provides that admonition is appropriate "[o]nly in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer."

The panel was concerned about both the likelihood of repetition and the potential for additional complainants. The panel rejected the first stipulation and invited the parties to file additional stipulated facts stating that "[t]he Panel is particularly interested in the underlying factors that contributed to Respondent's negligence and whether these factors have the potential for on-going concern about Respondent's ability to practice with diligence and promptness in the future."

The panel believes that the additional facts provided adequately address the panel's concerns about repetition.

We now turn to whether admonition is appropriate in this case. In determining the appropriate sanction we look to both the ABA Standards for Imposing Lawyer Sanctions and prior Vermont case law.

The Vermont Supreme Court has long approved the uses of the ABA Standards

for Imposing Lawyer Sanctions in determining the appropriate sanction. *In re Andres*, 177 Vt. 511, 857 A2d 803, (2004).

The ABA Standards require us first to weigh the duty violated, the attorney's mental state and the actual or potential injury caused by the misconduct to arrive at a presumptive sanction, and then to look to the presence of aggravating or mitigating factors to determine whether that sanction should be increased or decreased.

Respondent violated his duty to his client to act with diligence and to keep him informed. Respondent's mental state was one of negligence; he did not neglect his client's case intentionally.

The parties have stipulated that the injury in this case was minor. The Complainant was stressed, anxious and frustrated by the lack of progress and the lack of communication, but there is no evidence that this caused any substantive harm to the client's case which is now being handled by another attorney.

Section 4.43 of the ABA Standards provides that: "[r]eprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client." 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 no actual or potential injury to a client."

Under the ABA Standards, the difference between public reprimand and private admonition is the degree of actual or potential injury. This distinction is of substantial concern to the Panel. While we concede that there appears to be little actual injury, there was the potential for serious injury. Complainant was charged with numerous serious

felonies with the potential for a life sentence. While we know nothing about the strengths of the State's case, the potential for actual injury is certainly present where there is a substantial delay in discovery in a case with multiple charges and a sexual assault victim under the age of ten. Because of this the panel believes that reprimand should be the presumptive sanction.

We now look to the mitigating factors. Respondent has no prior disciplinary record, *ABA Standards §9.32 (a),* he has cooperated with the disciplinary proceedings, *ABA Standards §9.32 (e),* he had no selfish or dishonest motive, *ABA Standards §9.32 (b),* and he has expressed remorse for his conduct. *ABA Standards §9.32 (l).* We also welcome the fact that Respondent explored and intends to make use of the services that the Defender General provides to public defenders in Respondent's situation who can easily become overwhelmed by a large caseload. We believe these mitigating factors are sufficient reason to reduce the presumptive sanction from public reprimand to private admonition.

Admonition is also consistent with prior Vermont hearing panel decisions. In *In re PRB Decision No 131 (2010),* the hearing panel considered both reprimand and admonition for failure to provide a title opinion in a timely manner and for failure to communicate with clients. As in the present case, the presence of mitigating factors was such that admonition was imposed. Similar neglect resulted in private admonition in *In re PRB Decision No. 149 (2012)* (failure to handle an estate properly, *In re PRB Decision No. 137 (2011)* (failure to handle a bankruptcy promptly) and *In re PRB Decision No 125 (2009*) (failure to deal promptly with a property tax adjustment in the context of a real estate closing).

Reprimand was imposed in the case of *In re MaGill, PRB Decision No. 148 (2010)*. MaGill neglected an estate for a period of more than four years and failed to communicate with both the client and with the probate court. The panel felt that reprimand was appropriate given the length of the delay, the fact that no work was done and that there were no mitigating factors.

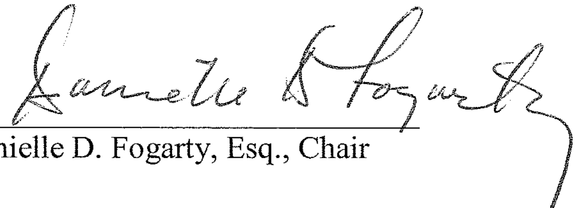
Based upon the foregoing we find that private admonition is consistent with both the ABA Standards and prior Vermont cases and we approve the stipulation of the parties.

Order

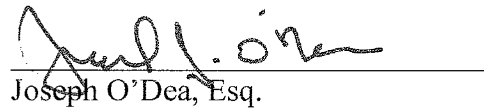
Respondent shall be admonished by Disciplinary Counsel for violation of Rules 1.3 and 1.4 of the Vermont Rules of Professional Conduct.

Dated: October 18. 2013

Hearing Panel No. 10



Danielle D. Fogarty, Esq., Chair



Joseph O'Dea, Esq.

Roger Preuss