

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2014.063

Decision No. 182

The parties have filed a Stipulation 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 Rule 1.3 of the Vermont Rules of Professional Conduct for failure to comply with the court's discovery schedule and failure to respond to a motion, which resulted in the dismissal of the complainant's Petition for Post-Conviction Relief.

Facts

Since 2008, Respondent has practiced primarily in the areas of criminal defense and juvenile law with a limited practice in civil court. Prior to this, he spent more than 25 years as a prosecutor.

In early 2012, Respondent filed a Petition for Post-Conviction Relief on behalf of the complainant. The Petition alleged ineffective assistance of counsel at a hearing in 2009 on a violation of probation that resulted in the complainant's probation being revoked and his incarceration to serve a two to five year prison term on the underlying criminal convictions.

On April 25, 2012, the court issued a scheduling order, which included the following language: "Failure to abide by this order may result in default or dismissal on the Court's own motion without further notice."

On September 20, 2012, Respondent filed a response to the scheduling order, providing requested information and asking for a three-month enlargement of time for depositions. Respondent also requested an additional month for filing proposed findings of facts, memoranda of law or a motion for summary judgment. The court granted an additional sixty days for depositions and 90 days for filing pleadings.

On October 1, 2012, the court issued another discovery order containing the language, "This matter will likely be dismissed if the deadlines are not adhered to."

On December 19, 2012, the State moved for a dismissal due to failure to prosecute. Respondent did not reply to this motion because he expected to see a motion reaction form (as is the practice in criminal court) advising him of his time to respond. The court granted the State's motion to dismiss on January 11, 2013.

In May of 2013, complainant filed a *pro se* Motion for Relief from Judgment and/or Order, which was granted in August of 2013.

Respondent missed the discovery deadline because he expected to receive a motion reaction form advising him of the filing deadline, a practice he was accustomed to in criminal court and which he erroneously assumed would also be the practice in civil court. In addition, at the time that the motion response was due, Respondent's paralegal was absent for a month due to family health issues. Respondent was also having difficulty securing an expert witness and procuring the funds from complainant to pay for fees and expenses. These factors contributed to Respondent's failure to respond to the State's motions.

The complainant suffered injury in the form of stress and anxiety when Respondent failed to answer and the petition was dismissed. This was compounded by

the fact that he is incarcerated outside of Vermont on the violation of probation for which he is seeking post-conviction relief.

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

Conclusion of Law

Rule 1.3 of the Vermont Rules of Professional Conduct states that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.”

Respondent’s failure to respond to the State’s motion to dismiss violated Rule 1.3.

Respondent had been warned twice by the court that the case could be dismissed if the discovery order was not complied with. The fact that Respondent was unfamiliar with the court’s practice of not issuing a motion reaction form does not excuse his failure to meet the deadline.

Sanction

We concur with the recommendation of the parties that the appropriate sanction in this matter is admonition by Disciplinary Counsel. It is consistent with both the ABA Standards for Imposing Lawyer Sanctions and prior hearing panel decisions.

Section 4.44 of the ABA Standards provides that “[a]monition 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.”

Respondent was negligent in his failure to respond to the State’s motion. Since the complainant was able to reinstate his petition, the only injury was the stress and anxiety he suffered as a result of the delay.

In applying the ABA Standards, we look also to aggravating and mitigating factors. There are a number of mitigating factors present that support our decision for admonition. Respondent has no prior disciplinary record, *ABA Standards*, § 9.32(a), he had no selfish or dishonest motive, *ABA Standards*, § 9.32(b), he had personal problems in the absence of his paralegal due to her family health issues, *ABA Standards*, § 9.32(c), he has cooperated with the proceedings, *ABA Standards*, § 9.32(e), and has expressed remorse over the way he handled this matter, *ABA Standards*, § 9.32(l). We do not give much weight to the one aggravating factor, Respondent's substantial practice experience, *ABA Standards*, §9.22(i), since he had little experience in civil court.

Admonition is also consistent with prior hearing panel decisions in which attorneys were admonished for neglect, which resulted in delay and anxiety to the client but no substantial harm.

Several of these cases arise in the context of litigation. In *In re PRB Decision No. 81* (2005), the attorney failed to notify her client of a child support hearing due to a calendaring error. As here, the client suffered stress and anxiety but was granted a continuance to obtain new counsel.

In *In re PRB Decision No. 164* (2013), a criminal defense attorney failed to engage in discovery on behalf of a client charged with felonies carrying a possible life sentence. After the professional conduct complaint was filed, the attorney withdrew and another attorney was appointed and did the necessary discovery.

In a workers' compensation case, the attorney failed to file the claim for a period of three years. *In re PRB Decision No. 158* (2013). The delay in this case was substantial, but the panel found admonition with probation to be appropriate since the

attorney was winding down his practice and had few remaining clients. In *In re PRB Decision No. 153* (2013), the attorney did not conclude the probate of an estate in a timely manner. In addition to the fact that there was no financial injury, there were substantial mitigating factors that influenced the decision for admonition.

There are also several cases in which the attorney was admonished for failure to conclude a real estate transaction in a timely manner. In *In re PRB Decision No. 125* (2009), the attorney failed to resolve a property tax adjustment. In *In re PRB Decision No. 107* (2008), the attorney failed to promptly obtain a mortgage discharge.


Based upon the foregoing, we find that admonition by Disciplinary Counsel is the appropriate sanction in this matter.

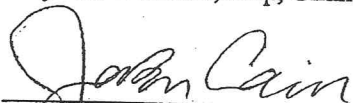
Order


Disciplinary Counsel shall admonish Respondent for violation of Rule 1.3 of the Vermont Rules of Professional Conduct.

Dated: 1/23/15

Hearing Panel No. 6


Caryn E. Waxman, Esq., Chair


John P. Cain, Esq.


William Schubart

