

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In Re: PRB File No. 2016-096

Decision No. 195

Respondent is hereby admonished for violation of Rule 1.3 of the Vermont Rules of Professional Conduct. Respondent violated Rule 1.3 by neglecting to administer an estate entrusted to Respondent in a prompt and diligent manner. Hearing Panel No. 7, consisting of Jesse Bugbee, Esq., Chair, Vanessa Kittell, Esq. and Mr. Carl J. Rosenquist, has received and considered Disciplinary Counsel's and Respondent's written submissions. Based upon the parties' submissions, including the Stipulation of Facts, Recommendation as to Conclusions of Law, Sanction Memorandum, and Joint Recommendation for Admonition, the Hearing Panel makes the following findings of fact and conclusions of law.

Findings of Fact

Respondent is an attorney licensed to practice law in the State of Vermont. Respondent was admitted to the practice of law in Vermont in 1993. Respondent works as a sole practitioner in northeastern Vermont. Respondent's practice consists mainly of real estate, probate, and municipal tax sales. This matter arises out of a complaint filed by client "CN."

In 2009, CN and his wife befriended an elderly woman. The woman was estranged from her family, so Respondent asked CN if he would be executor of her estate. CN was reluctant, but he agreed to do it.

The woman executed her Will in 2009, when she was ninety one years old. The Will instructed the executor to pay all her debts, and then divide any remaining assets in equal shares among four friends, including CN and his wife.

The woman (hereinafter the decedent) died on August 15, 2013. Following the decedent's death, CN attempted to handle the estate himself. He determined that the assets of the estate were less than \$5,000, and the debts of the estate were substantial. In particular, the decedent spent years in a nursing home prior to her death, which was paid for by Medicaid. Medicaid has a lien on the estate for the cost of the nursing home care, so any estate assets will go toward paying that debt. CN understood that the beneficiaries of the estate (including himself and his wife) would not be receiving any assets, due to the Medicaid lien. He nevertheless thought it was important to have the estate administered correctly. CN intended to handle the estate himself, but he had questions about the process, and he eventually decided to retain an attorney to do it instead.

On April 18, 2014, eight months after the decedent's death, CN met with Respondent and retained Respondent to handle the estate. During their meeting, Respondent asked CN if he wanted to "wash his hands" of the estate administration and have Respondent handle it, and he said yes. CN left Respondent's office with the understanding that Respondent would take care of the estate, and he would not need to do anything more. Respondent's intention was to ask the probate court to appoint Respondent as administrator of the estate, in place of CN. Respondent would then administer the estate, and pay the net proceeds over to Medicaid. This would allow CN to remove himself from the process, in accordance with his wishes.

Respondent did some preliminary research, but otherwise did not handle the estate in a prompt or diligent manner. Respondent did not file a petition to open the estate with the probate court. Respondent always intended to file the petition and administer the estate, but Respondent was so busy with other client matters that it never got done. Respondent should have either prioritized the case or returned the file to the client, but Respondent continued to believe that

Respondent would get to the matter.

When CN left Respondent's office on April 18, 2014, he did not want to be involved in the estate any further. Accordingly, Respondent never had a reason to call CN, and CN never called Respondent to inquire about the status of the estate.

By the summer of 2015, Respondent recognized that Respondent had too much work to do, and Respondent stopped taking on any new clients. This allowed Respondent to finish many cases, and to close many open files, but the estate was not one of them.

Eventually, eighteen months passed from the time CN had hired Respondent. At that point, Respondent fully realized that Respondent did not have the time or resources to handle the estate, and Respondent contacted CN. On November 11, 2015, Respondent apologized to CN for not getting the estate taken care of, and Respondent returned his file. CN was surprised to learn that Respondent had not completed the estate. He had assumed it was all taken care of, and he was distressed to have the task come back to him.

Respondent's inaction on the estate did not cause monetary harm to the client or to the estate, nor were any critical statutory deadlines missed. CN's distress was the only harm in this matter.

Respondent's delay in handling the estate was the result of several factors, including taking on too much work and the effects of some health issues, discussed below.

With regard to Respondent's workload, Respondent works as a sole practitioner in an under-served region of the State. As a result, Respondent has felt pressured to take on more work than Respondent can promptly handle, because clients in the area have few options for legal services. Respondent typically works between 50 and 60 hours a week, trying to meet the demands of Respondent clients. Respondent recognized a burgeoning workload in the summer

of 2015, and made a decision then not to take on any new clients until Respondent was caught up. Once Respondent did that, Respondent was able to finish many cases and close many open files. Respondent has also made a number of changes in Respondent's office to address the workload issue in the future, including hiring another full time staff member and contracting with a paralegal-abstractor for title work. Respondent has also tried to address the workload issue by hiring an associate attorney, but with no success. Respondent has not been able to find an experienced attorney who wants to relocate to northeastern Vermont, and Respondent has found that recent law school graduates have too much student loan debt to be able to accept an associate position at Respondent's office.

Respondent suffers from several health issues that have impacted Respondent's workload over the past eighteen months. One recurring health issue is multiple sclerosis, which Respondent was diagnosed with fourteen years ago. MS prevents Respondent from feeling well enough to work at various times, and is unpredictable in nature. Respondent's health has also been affected by ulcers and recurring migraines, for which Respondent receives medical treatment. Respondent has also been diagnosed with cancer (complex hyperplasia with atypia), and will be undergoing cancer surgery in February.

As a result of this complaint against Respondent, Respondent has taken a hard look at Respondent's practice and has started being even more determined to turn away work that Respondent does not have time to do. Respondent is no longer attempting to make up for the shortage of probate and real estate attorneys in Respondent's region, and is focusing on taking on work that Respondent knows Respondent can do promptly.

Conclusions of Law

The findings of the Hearing Panel must be established by clear and convincing evidence. A.O. 9, Rule 16(C). Disciplinary Counsel bears the burden of proof when discipline is to be imposed. A.O. 9, Rule 16(D).

Rule 1.3 – Diligence

The Rule 1.3 of the Rules of Professional Conduct provides: “A lawyer shall act with reasonable diligence and promptness in representing a client.” The Comment to Rule 1.3 is instructive:

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. . . .

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances . . . the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

V.R.P.C. Rule 1.3 *Comment* 1 and 3.

Respondent violated Rule 1.3 by failing to attend to a probate matter entrusted to Respondent.

Applicability of the ABA Standards for Imposing Lawyer Sanctions

The Vermont Supreme Court has ruled:

When sanctioning attorney misconduct, we have adopted the ABA Standards for Imposing Lawyer Discipline which requires us to weigh the duty violated, the attorney's mental state, the actual or potential injury caused by the misconduct, and the existence of aggravating or mitigating factors.

In re Andres, 2004 VT 71, ¶ 14, 177 Vt. 511, 513, 857 A.2d 803, 807.

Accordingly, the Hearing Panel employed the ABA Standards as a tool to determine the appropriate sanction to impose in Respondent's case.

A. The Duty Violated

Respondent violated the duty of diligence, V.R.P.C. Rule 1.3, when Respondent neglected a client matter entrusted to Respondent.

Section 4.44 of the ABA Standards provides that a private admonition 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."

In the case at hand, Respondent was negligent and did not act with reasonable diligence in representing client CN with an estate matter. As discussed below, Respondent's lack of diligence caused little actual or potential injury to the client.

C. Lawyer's Mental State

The second factor to be considered under the ABA Standards is the lawyer's mental state. ABA Standards, §3.0. The ABA Standards explain mental states as follows:

The most culpable mental state is that of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result. The next most culpable mental state is knowledge, when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct but without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence.

ABA Standards, *Theoretical Framework* §II, at 6.

Respondent here acted with negligence. Due to the press of Respondent's caseload, Respondent got behind and did not focus on the estate. When Respondent did finally focus on the estate, Respondent quickly realized that Respondent would not be able to complete it, and Respondent returned the file to the client.

D. Injury & Potential Injury

The ABA Standards next take into consideration the level of injury or potential injury associated with the attorney's conduct. Here, Respondent's lack of promptness and diligence caused little injury to the client, nor was there much potential for injury. As set forth in the Stipulation of Facts, the assets of the estate were minimal, and were substantially exceeded by the Medicaid recovery lien on the estate. Although the client was a named beneficiary in the Will, it was expected that all of the assets of the estate would go towards satisfying the Medicaid lien. The harm to the client was that the client's reasonable expectation of timely handling the probate matter was not met. Client was upset by Respondent's lack of diligence. No evidence was presented to show that the State – the holder of the Medicaid lien – suffered any injury as a result of Respondent's failure to act with due diligence.

E. Presumptive Sanction under the ABA Standards

As set forth above, a private admonition is the presumptive sanction for Respondent's conduct here. Under the ABA Standards, after arriving at the presumptive sanction, the sanctioning authority should consider whether any aggravating or mitigating factors apply to alter the presumptive sanction. In this case, there is one aggravating factor and several mitigating factors to consider.

1. Aggravating Factors

Section 9.22 of the ABA Standards sets forth a list of aggravating factors that a hearing panel should consider. One of the aggravating factors listed in §9.22 is present in this case. Respondent has substantial (22 years') experience in the practice of law. ABA Standards § 9.22(i).

2. Mitigating Factors

Section 9.32 of the ABA Standards sets forth a list of mitigating factors that a sanctioning authority should consider in determining the appropriate sanction. The parties have stipulated to the following mitigating factors.

Respondent has no prior disciplinary record during Respondent's 22 years of practice. ABA Standards §9.32(a). Respondent had no dishonest or selfish motive. ABA Standards §9.32(b). Respondent's genuine desire to help people in an underserved part of Vermont contributed to Respondent taking on more work than Respondent could reasonably attend to. Respondent cooperated with Disciplinary Counsel, fully and freely disclosing information Disciplinary Counsel needed to address this matter. ABA Standards §9.32(e).

Respondent's health problems were a factor in Respondent's inability to meet Respondent's duties. *See* ABA Standards §9.32(h). Respondent suffered from several health issues in the past few years that affected Respondent's ability to practice law. Respondent suffers from several chronic health conditions, one of which Respondent has had for over a decade. The onset of symptoms from these medical conditions has been unpredictable. At times, the symptoms have been so severe that Respondent has not been well enough to work. Most recently, Respondent has been diagnosed with serious medical condition that requires surgery. Respondent is planning to take a leave of absence from the practice of law to recover from Respondent's surgery.

Respondent is genuinely remorseful for not completing the work on the estate in a timely manner. ABA Standards §9.32(1). Respondent expressed a sincere apology to the client when Respondent returned the client's file to the client. Respondent freely reiterated the apology to Disciplinary Counsel.

Mitigating Factors Outweigh Aggravating Factors

The Hearing Panel agrees with Disciplinary Counsel and finds that the mitigating factors outweigh the aggravating factors for purposes of determining the appropriate sanction. Private admonition is the appropriate sanction in this case.

The Professional Responsibility Program has disciplined many attorneys over the years for violation of Rule 1.3. Although no two cases are the same, private admonition has often been the appropriate sanction imposed the first time an attorney is found in violation of Rule 1.3, imposing the duty of diligence. If an attorney develops a pattern of neglect, or other factors are present, a public reprimand may be the appropriate sanction.

One recent case of an attorney being privately admonished for neglect is *In re PRB File No. 2014-063*, PRB Decision No. 182 (Jan. 23, 2015). In that case, the attorney neglected to reply to a motion and neglected to comply with a court's discovery schedule, resulting in the dismissal of his client's post-conviction relief case. The attorney's neglect caused his client anxiety and stress, but no other significant injury, as the court reinstated the client's case. PRB Decision No. 182 has very similar mitigating factors to the instant case, including no prior discipline, no dishonest or selfish motive, some personal problems, full cooperation with Disciplinary Counsel, and remorse. As such, *In re PRB File No. 2014-063* is instructive on the appropriate sanction in Respondent's case. *Id.*

In *In re PRB File No. 2013-089*, the attorney was privately admonished for failing to act with reasonable diligence while representing a client in a serious felony case. PRB Decision No. 164 (Oct. 18, 2013). As in the instant case, the client in Decision No. 164 suffered stress and anxiety when the case was not handled promptly, but the client was able to secure new counsel and his case was able to proceed with no other harm. Given the severity of the criminal charges

against the client, there was the potential for serious harm to the client. The Hearing Panel began its analysis by applying the ABA Standards. The hearing panel found the presumptive sanction was public reprimand, and then considered aggravating and mitigating factors. The hearing panel reduced the sanction to a private admonition, in light of the following mitigating factors: (a) no prior disciplinary history; full cooperation with Disciplinary Counsel; (b) lack of a dishonest or selfish motive; and (c) remorse.

In *In re PRB File No. 2010-143*, the attorney neglected to provide his client with a written title opinion in a timely manner and failed to return a number of telephone calls to the client. PRB Decision No. 131 (May 17, 2010). The hearing panel noted that the attorney's mental state was one of neglect, and further noted that the injury was limited to stress and anxiety for the client. Given the low level of injury, the hearing panel held that the presumptive sanction was a private admonition. The hearing panel considered both aggravating and mitigating factors, and concluded that private admonition was the appropriate sanction. The mitigating factors present PRB Decision 131 are similar to the mitigating factors present in Respondent's case.

In *In re PRB File No. 2007-242*, the attorney delayed (almost seven years) to obtain a mortgage discharge following a real estate closing. PRB Decision No. 107 (Feb. 26, 2008). The hearing panel noted that the client's only injury was one of frustration with the attorney. The hearing panel concluded that the presumptive sanction under the ABA Standards was a private admonition. The panel noted that, even if the injury were sufficient to warrant a public reprimand, the mitigating factors (similar to the ones here, in Respondent's case) would still reduce that presumptive sanction to a private admonition.

The facts of Respondent's case, and legal precedent, fully support the parties' joint recommendation for a private admonition. The Hearing Panel concludes that facts, including the mitigating factors, support the sanction of private admonition in this case.

Order

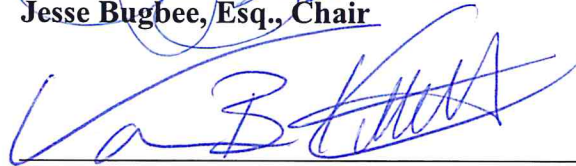
BASED UPON the foregoing findings of fact and conclusions of law, Respondent is admonished for violation of Rule 1.3 of the Vermont Rules of Professional Conduct.

Dated: March 29, 2016

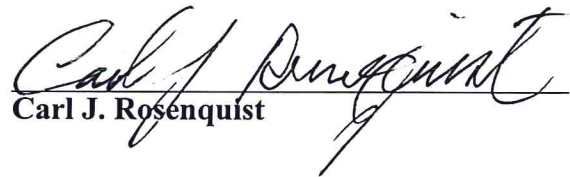
Hearing Panel No: 7



Jesse Bugbee, Esq., Chair



Vanessa Kittell, Esq.



Carl J. Rosenquist