

124.PCB

[6-Feb-1998]

STATE OF VERMONT  
PROFESSIONAL CONDUCT BOARD

In re: PCB File No. 94.19

DECISION NO. 124

This case involves unprofessional conduct in a lawyer's refusal to release a file to a client. It is before us on stipulated facts which we adopt by reference as our own.

Client operated a business which was involved in several refinancing plans from 1985 to 1990. He consulted with Respondent in the fall of 1990 before signing a promissory note to a bank. Client then failed to make any payments or comply with the conditions of the note. The bank filed a foreclosure complaint.

Client asked Respondent to represent him in this litigation and gave him \$500.00 as a retainer.

Respondent filed an answer to the complaint as well as a counterclaim based upon fraudulent inducement. When the bank filed a motion for summary judgement, Respondent filed a memorandum in response.

In April of 1991, Respondent sent Client copies of all the documents in the case, provided further legal advice, and enclosed a statement of his time spent on Client's case. Client owed Respondent an additional \$635.00. Respondent asked for a second payment of \$500.00.

In May 1991, Respondent appeared at the hearing on the summary judgement motion, although he arrived late due to excusable circumstances. Judgement was entered against Client but without prejudice to the counterclaim.

Client blamed Respondent for the adverse ruling, citing Respondent's lateness at arriving at the hearing. In fact, Respondent's tardiness was irrelevant to the results. The summary judgement was entered because Client had failed to pay the mortgage.

Respondent wrote to Client on two occasions in June of 1991, informing him of the events in the case, providing copies of pleadings and the decision, and providing additional legal advice. He also advised his client that he could not continue the representation unless he received an additional \$500.00 toward the outstanding bill. In the second letter, he warned his client that without such payment by July 1, he would move to withdraw from the case.

Client did not pay the bill then and has never paid the bill since. Respondent did not file for leave to withdraw from the counterclaim still pending in court. Respondent continued to bill Client on a monthly basis.

In June of 1992, shortly after Client was evicted from his property, Client called Respondent's office a number of times, asking for his file. Presumably, Client felt he needed the file in order to continue the litigation. Respondent wrote to Client on July 3, 1992:

I received several messages that you had called asking for your file. I attempted to reach you several times, but I got no answer and you don't have an answering machine.

I would be happy to release your file as soon as this bill is paid in full.

In fact, Respondent's file contained nothing of value to Client. Respondent had previously provided to Client copies of all the documents contained therein. The retained file did not contain any additional documents or information of importance to Client, although Respondent never so advised Client.

Another year passed. In August of 1993, Client sent the following letter to Respondent:

[A]s you know, this is my second but final demand for my personal file on [Client's Business], Inc. and personal records.

Please note I don't need any of the work you completed, but my personal bank documents and records [which] I demand you return to me without further delay.

Please note you have held me from doing any further litigation and I want my records returned within 10 days of this date above.

The file did not contain any personal or business records or any bank documents. Respondent did not so advise Client or even answer the letter.

Thereafter, Client filed a complaint with the Professional Conduct Board. After Bar Counsel began investigating this matter, Respondent released the file to Client in January of 1994.

Client did nothing further about the case until October of 1995, when he asked the court to schedule a status conference on the pending counterclaim. The court notified Respondent, who was still the attorney of record. Respondent then filed a motion to withdraw, which was promptly granted.

A few days later, the bank filed a motion to dismiss the matter for failure to prosecute the counterclaim. The motion was promptly granted.

#### Conclusions of Law

Respondent violated Disciplinary Rule 2-110(A)(1) of the Code of Professional Responsibility states, in pertinent part, "...[A] lawyer shall not withdraw from employment in a proceeding before [a] tribunal without its permission." Respondent should have sought leave of the court to withdraw in July of 1991, rather than unilaterally dropping the case. This conduct also violated DR 7-101(A)(2) which states, in pertinent part, "A lawyer shall not intentionally ...[f]ail to carry out a contract of

employment entered into with a client for professional services [unless withdrawal rules are followed]."

Our main focus of concern, however, is Respondent's conduct after he stopped working on Client's case. Disciplinary Rule 2-110(A)(2) states, in pertinent part,

...[A] lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

Respondent did not deliver to Client papers to which Client was entitled or advise Client that the withheld file did not contain the documents which Client felt he needed to pursue his case. Instead, Respondent used the stick of the withheld file to attempt to force payment of his fees.

Respondent's attempt to obtain payment of his fees in this fashion, particularly where it was coupled with a lack of candor as to the value of the retained material to the client, violated DR 2-110(A)(2). Respondent violated his duty of loyalty and candor to Client. Respondent possessed the file because of the fiduciary relationship with Client. Respondent cannot misuse the fiduciary relationship with the client to further Respondent's own interests in receiving compensation. By withholding the file, ignoring Client's requests, and failing to explain the contents of the file, Respondent knowingly acted to the detriment of Client. Such misconduct extinguished any right Respondent may have had to assert the equitable relief of a retaining lien. See *Academy of California Optometrists, Inc. v. Superior Court*, 124 Cal. Rpt. 668, 672 (Ct. App. 1975) (lien is void where subject matter of lien is of no economic value and lien is used solely to extort disputed fees from client) cited in *In re Bucknam*, 160 Vt. 355, 364-365 (1993).

This conclusion does not negate Respondent's right to be paid for the value of his work. His right to compensation is a significant one:

The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them.

EC 2-16.

When a lawyer relinquishes a file to a client who has not paid reasonable fees, the lawyer does not relinquish the right be paid for the lawyer's services. There are other lawful and ethical means available for securing legitimately earned fees. However, when a client seeks return of a file, the lawyer should accede to that request.

#### Sanction

Respondent violated the duty of diligence and candor to his client, acted knowingly, and was an attorney of substantial experience in the practice of law at the time of this misconduct. But for several mitigating

factors present here, this is a case where we would normally recommend a public sanction. See Section 4.42, 4.43, 4.62 and 4.63 of the ABA Standards for Imposing Lawyer Sanctions.

In mitigation we find that there is an absence of actual harm caused by Respondent's conduct. While there was a delay of four years before Client's counterclaim was finally dismissed, neither that delay nor the dismissal is due entirely to Respondent's misconduct.

There is a lack of any significant effort on the part of Client to mitigate damages by addressing the problem of the outstanding debt, obtaining new counsel, or pursuing the counterclaim pro se. Even when he finally obtained the file, Client did nothing about his pending suit for another year and a half.

Respondent candidly advised Client of his intent to withdraw from the case and of his decision to stop furthering his client's interests. This is not a case where the client was abandoned or ignored by his lawyer or where there was any dispute as to the reasonableness of the fees. Compare *In re Bucknam*, supra, and *In re Blais* 166 Vt. , 696 A.2d 1231 (1997).

We also note that Respondent has no disciplinary history over a law career which has spanned nearly 20 years.

Respondent should have released the file when Client asked for it in June of 1992, or he should have told his client that there was nothing in the file of any use to Client. Withholding an essentially worthless file was not the appropriate way to secure payment to which he was entitled. However, no injury resulted. We expect that Respondent now understands his obligation to comply with Client's requests for files, even in the face of an unpaid bill for services rendered.

Under all of these circumstances, we will issue a private admonition.

Dated at Montpelier, Vermont this 6th day of February, 1998.

PROFESSIONAL CONDUCT BOARD

/s/

\_\_\_\_\_  
Robert P. Keiner, Esq. Chair

/s/

\_\_\_\_\_  
John Barbour

/s/

\_\_\_\_\_  
Joseph F. Cahill, Jr., Esq.

/s/

\_\_\_\_\_  
Charles Cummings, Esq.

\_\_\_\_\_  
Paul S. Ferber, Esq.

\_\_\_\_\_  
Michael Filipiak

\_\_\_\_\_  
Nancy Foster

---

Rosalyn L. Hunneman

/s/

---

Jessica Porter, Esq.

/s/

---

Mark L. Sperry, Esq.

/s/

---

Jane Woodruff, Esq.

/usr3/dal/9419.op2.doc  
??

---

Robert F. O'Neill, Esq.

/s/

---

Alan Rome, Esq.

/s/

---

Ruth Stokes