

147.PCB

[14-Apr-2000]

STATE OF VERMONT
PROFESSIONAL CONDUCT BOARD

RE: Docket No. 96.067
Stephen Norman, Esq. - Respondent

NOTICE OF DECISION

Decision No. 147

The Board convened on April 14, 2000, and considered the panel's final report, attached hereto as Appendix 1. The Board adopts, by reference, the panel's report as its own with the following modification at the end of paragraph 15: "Neither Mr. Nuovo nor Mr. Norman can recall the exact words which were spoken and the Board, like the panel, is therefore unable to make a finding thereon."

The Board is concerned about the propriety of one lawyer impugning the integrity of another lawyer's client, a practice which a prudent lawyer should avoid. However, given the lack of clear and convincing evidence on this point, we dismiss this case for the reasons stated in the panel's report.

Dated at Montpelier, Vermont this 14th day of April, 2000.

PROFESSIONAL CONDUCT BOARD

/s/

Robert P. Keiner, Esq. Chair

/s/

/s/

Charles Cummings, Esq.

Michael Filipiak

/s/

/s/

Barry E. Griffith, Esq.

Alan S. Rome, Esq.

/s/

/s/

Mark L. Sperry, Esq.

Ruth Stokes

/s/

/s/

Joan Wing, Esq.

Toby Young

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STATE OF VERMONT
PROFESSIONAL CONDUCT BOARD

In Re: PCB File No. 96.67
Stephen Norman, Esq., Respondent

FINAL REPORT OF HEARING PANEL

Procedural History

The petition of misconduct in this case was filed in March of 1999. The petition was based largely upon the allegations of one Morton Bostock and, to a lesser extent, upon the testimony of Attorney Thomas Nuovo. Upon request of Respondent's counsel, the proceedings were delayed several months. The merits hearing was first scheduled for October 4, 1999, then rescheduled for November 15, 1999 due to the need for an expanded period of discovery.

Respondent deposed Mr. Bostock on October 20, 1999 at which time it became clear to both parties that he was not a credible witness. On November 1, 1999, Bar Counsel filed a recommendation to dismiss the case based upon that witness' lack of credibility. Respondent, appearing pro se, opposed that request to dismiss and filed requests for additional discovery. Numerous memos on the discovery issues were submitted to this panel through December.

On January 3, 2000, the hearing panel entered an order, agreeing to recommend to the full Board that all allegations involving the testimony of Mr. Bostock be dismissed. This rendered the pending discovery requests moot. The panel did not have enough information to conclude that the remaining allegations, based upon the testimony of Attorney Nuovo, also ought to be dismissed. It ordered bar counsel to file additional factual support.

Bar counsel filed additional material on January 17, arguing that the facts offered by Attorney Nuovo would demonstrate a violation of the Code but that the remaining counts ought to be dismissed for reasons found insufficient and inappropriate by the panel. Respondent filed his opposition to Bar Counsel's position, arguing that the facts did not support a violation and that the case ought to be dismissed because there had been no violation.

Given this record, the panel declined to grant the request for dismissal without hearing the evidence from Mr. Nuovo. A hearing was held on March 21 pursuant to the Rules Governing Establishment of the Professional Conduct Board and its Operations, Supreme Court Administrative Order 9 (1989). Deputy Bar Counsel Michael Kennedy, as well as Bar Counsel Jessica Porter appeared as did Respondent and his counsel, William Dorsch, Esq. and Aileen Lachs, Esq.

After considering all of the relevant, credible evidence we make the following findings of fact and recommend that the Board adopt the recommended conclusions of law set forth below.

Findings of Fact

1. The respondent has been a lawyer since 1983 and a member of the Vermont Bar since 1987. Since his admission in Vermont, he has been

employed as a staff attorney by Vermont Legal Aid in Burlington. Respondent has considerable experience in handling landlord/tenant disputes, family law cases and other civil matters on behalf of people with low incomes.

2. Thomas Nuovo, a witness in this case, has been a member of the Vermont Bar since 1993. He worked briefly at a small Burlington firm and then started his own general practice with another attorney. He occasionally worked on cases that were referred to him by the Respondent. Most of these cases involved landlord/tenant issues in which Attorney Nuovo represented tenants. Respondent considered Mr. Nuovo a professional friend. Attorney Nuovo came to view the Respondent as a mentor of sorts.

3. In late 1995, Mr. Nuovo was contacted by one Fran Politi, a person not previously known to him. Ms. Politi had divorced one David Alexander a number of years earlier. Ms. Politi had been represented in this case by three different lawyers. The divorce had been acrimonious and post-divorce matters were heavily contested.

4. Ms. Politi sought representation from Mr. Nuovo because her ex-husband, Mr. Alexander, had obtained a court order allowing him to remove personal property from Ms. Politi's home. The order was to be executed within a few days. Mr. Nuovo agreed to represent her.

5. Mr. Nuovo assisted in making arrangements for the transfer of property between the former spouses. Because he knew his client was anxious about the transfer and because she was a new client, Mr. Nuovo decided to go to Ms. Politi's house on the day of the transfer.

6. When he arrived there, he encountered Respondent. Respondent is a long time friend of Ms. Politi's ex-husband, David Alexander. Respondent became acquainted with Fran Politi when she married David Alexander. He also became acquainted with Fran Politi's eldest child and with a second child she had during her marriage to David Alexander. Respondent was well acquainted with the overall course of the Alexander/Politi divorce. He had a very positive opinion of David Alexander's fitness as a parent. Respondent had a very poor opinion of Ms. Politi's character. He considered her dishonest and manipulative.

7. Respondent appeared at the Politi home that day at the behest of his friend, Mr. Alexander, who, like Ms. Politi, was also anxious about the event. He was also there to lend assistance in physically moving the property. He was not there as Mr. Alexander's legal counsel.

8. At this time, Respondent and Mr. Nuovo had a friendly and cordial discussion. Respondent was aware that Ms. Politi had previously fired several other attorneys, leaving at least one with substantial bills unpaid. He realized that Mr. Nuovo had only recently been retained by Ms. Politi. In a light-hearted manner, Respondent said to Mr. Nuovo that he should get a big retainer up front. Respondent was concerned that Mr. Nuovo might lose financially by representing Ms. Politi. Mr. Nuovo, well aware that his client had failed to pay her prior attorneys, was not disturbed or offended by the comment. Mr. Nuovo was aware that Respondent had been a witness on behalf of Mr. Alexander in the Politi/Alexander suit and would likely be a witness on Mr. Alexander's behalf in the continuing litigation. The property transfer concluded without incident.

9. Mr. Nuovo began to become concerned about Respondent's role in this matter a few weeks later. At his home number, Mr. Nuovo received a telephone message from Respondent, asking him to call him about the Politi/Alexander matter. In his message, the Respondent said something to the effect, "For you this is work, but for me it is real life."

10. Respondent left that message because he had learned that Mr. Nuovo had assisted Ms. Politi in obtaining a temporary restraining order, on an ex parte basis, precluding conversation ended.

11. Respondent believed that not only were the allegations fabricated by a vengeful mother attempting to punish the father over a property dispute, but that the effect of these allegations and the ex parte order of no contact would be particularly devastating for the younger child and his relationship with his father.

12. It is not clear if Mr. Nuovo understood the depth of Respondent's personal involvement with the Politi/Alexander family at this time. He returned the call, leaving a message at Respondent's office. Later that day, the Respondent called Attorney Nuovo.

13. At this point, the two had a conversation. The conversation raised in Mr. Nuovo's mind questions about the propriety of Respondent's professional conduct. Mr. Nuovo was sufficiently concerned about the conversation that the next day he made detailed notes of what was said, thinking it quite possible that a Professional Conduct Board inquiry might eventually result.

14. Respondent asked Attorney Nuovo questions about the case and talked about the case. He was emotional, and his tone was confrontational. Respondent asked Attorney Nuovo if he had talked to Ms. Politi's previous attorneys. Respondent told Mr. Nuovo that Ms. Politi would fire him if she did not like what Attorney Nuovo did. Respondent suggested that Attorney Nuovo get his money from her up front. He also said that Ms. Politi was manipulative and would do anything to win the case and prevent Mr. Alexander from seeing the children.

15. After making statements about the financial risks of representing Ms. Politi, statements which could be construed as an attempt to discourage Mr. Nuovo from going forward with his representation of her, Respondent made statements which Mr. Nuovo felt were offensive. Respondent started to talk about how Attorney Nuovo could represent Ms. Politi "without needing to get into all of this." He said something like, "There are ways to represent people like her without doing too much" or "without doing so much." Mr. Nuovo does not have an exact recollection of the words and offered testimony phrasing the statement both of those ways. Mr. Nuovo asked Respondent what he meant by those words, but Respondent refused to elaborate on what he meant.

16. Attorney Nuovo understood that Respondent was telling him to slow down and thoroughly investigate his case before proceeding. He also felt that, by these statements, Respondent was attempting to convince him not to represent his client zealously, contrary to the Code of Professional Responsibility. He felt that Respondent was suggesting that Mr. Nuovo represent "Ms. Politi in a manner that would secretly help Mr. Alexander and possibly sabotage Ms. Politi's case." (FN1) He was offended that an experienced lawyer would provide such counsel to a person who had only been a lawyer for two and a half years.

17. The conversation continued and the Respondent offered to come to Attorney Nuovo's office and give him more facts about the case. He expressed an opinion that Ms. Politi was destroying the children and that she would continue to hurt them emotionally if she had them in her home. Shortly, thereafter, the conversation ended.

18. Respondent did not go to Mr. Nuovo's office to provide him more evidence. There is conflicting evidence as to whether this was due to Mr. Nuovo's failure to contact Respondent or Respondent's failure to contact Mr. Nuovo. We draw no conclusions about this.

19. As a result of this phone conversation, Mr. Nuovo was left with the impression that Respondent was biased and could not look at the facts objectively. Mr. Nuovo became more determined to represent his client thoroughly and zealously, which he did.

20. Respondent testified that he did not intend to suggest to Mr. Nuovo that he should represent his client less than zealously. He felt that Ms. Politi had lied to obtain the temporary restraining order and was concerned that Mr. Nuovo assisted her in doing so without thoroughly analyzing all of the facts. What he was trying to convey is that a lawyer can represent difficult clients without doing everything that the client wants. It is ultimately the lawyer's call as to whether the claim is justifiable. Respondent testified that he was hoping by his remarks to effect more informed representation. He testified that he would not tell a young lawyer to offer anything but zealous representation, and it did not occur to him that his remarks would be so construed by Mr. Nuovo. As for his refusal to elaborate on what his comments about "not doing so much" or "not doing too much" meant, Respondent is not at all certain what his exact words had been. However, he would not have elaborated on them because it would have required him to get into legal strategy or legal advice and that would have been inappropriate, given his friendship with Mr. Alexander.

21. Within 20 days of this conversation, Ms. Politi filed a complaint with the Professional Conduct Board and reported this conversation. This complaint eventually led to the filing of these charges.

Conclusions of Law

Bar counsel has charged that it is a violation of DR 1-102(A) (5) (engaging in conduct that is prejudicial to the administration of justice) and DR 1-102(A) (7) (engaging in conduct that adversely reflects on the lawyer's fitness to practice law) for one lawyer to dissuade another lawyer from representing his client zealously.

We agree. A lawyer should not attempt to convince a fellow attorney not to do his best for a client. Indeed, besides bribing a juror, bribing a judge, or knowingly submitting false evidence, it is difficult to imagine anything more repugnant than one lawyer soliciting another to simply go through the motions of representing a client without any intent to advance or protect the client's interests.

The Professional Conduct Board has concluded that far less damaging conduct violates DR 1-102(A) (5). See, e.g., *In Re Bailey*, 1 V.P.C.R. 23 (1991) (failing repeatedly to answer a request for information from bar

counsel), PCB Decision No. 45, 1 V.P.C.R. 77 (1992) (filing a publicly available pleading that discloses that a confidential disciplinary investigation against another attorney is pending), and PCB Decision No. 67, 1 V.P.C.R. 120 (1994) (dissuading a person from filing an ethics complaint, no matter how frivolous the complaint might be). Certainly, dissuading a lawyer from zealously representing a client comes within the meaning of this disciplinary rule. We also conclude that an attorney who engages in such conduct demonstrates a lack of fitness for the practice of law in violation of DR 1-102(A)(7). Lawyers "should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise." Code of Professional Responsibility, EC 1-5.

Disciplinary violations must be proven by clear and convincing evidence. A.O. 9, Rule 13(C) (1989). This burden of proof is somewhat more than a preponderance of the evidence, somewhat less than proof beyond a reasonable doubt. It is a difficult burden to meet when there are only two witnesses to the events, and there is no corroborating evidence other than circumstantial evidence. It is particularly difficult to meet when the charged misconduct consists of words passed over a telephone line, rather than face to face.

We have no doubt as to the sincerity of Mr. Nuovo's views that he felt Respondent was suggesting that he violate his ethical responsibility to provide zealous representation. Given the multiple references to his own financial exposure, the poor character of his client, and the suggestion that a client can be represented without the lawyer doing "too much" or "so much," it is easy to understand why Mr. Nuovo became suspicious as to Respondent's intentions. Respondent's failure to explain himself when challenged only heightened Mr. Nuovo's concerns. However, given Respondent's testimony as to what he intended to convey, given the lack of specificity as to whether Respondent said "too much" or "so much," and given the ambiguous meaning of those very words, we conclude that there is no clear and convincing evidence that Respondent, indeed, attempted to dissuade Mr. Nuovo from offering zealous representation.

There is clearly a double meaning to the words which Mr. Nuovo heard. He demonstrated that himself at the hearing when he testified, in response to a question as to what he thought Respondent meant by his remarks:

A. I guess I felt like he was saying that since she was not an individual who was trustworthy which had been the thrust of most of his conversation and that these accusations, the timing of the accusations by the oldest son RP are kind of in question, that I should be basically examining my client more thoroughly and not necessarily believing her and in doing that, not necessarily take certain steps to push this case forward so fast.

This, of course, would be a permissible statement for Respondent to make. Mr. Nuovo went on to testify as to how he felt that Respondent was trying to convey a more sinister message than this. However, the words are too vague and too susceptible to different shades of meaning for us to conclude by clear and convincing evidence that a more sinister meaning was intended. At best, the record demonstrates a misunderstanding between the two lawyers, one that does not support a violation of the Code.

For the above reasons, we recommend that the case be dismissed.

/s/	3/29/00
Jane Woodruff, Esq. - Chair	Date
/s/	3/29/00
Joan Wing, Esq.	Date
/s/	3/29/00
Ruth Stokes	Date

Footnotes

FN1. Affidavit of Thomas Nuovo, Esq. dated January 13, 2000, paragraph 18.