

PCB 1

[03-Aug-1990]

STATE OF VERMONT
PROFESSIONAL CONDUCT BOARD

In re: PCB File No. 89.34

NOTICE OF DECISION

PCB 1

Procedural History

A complaint was filed with the Professional Conduct Board by an attorney who alleged that Respondent, a member of the Vermont Bar, had improperly communicated with a represented party of adverse interest.

Bar Counsel investigated this matter and, as a result of the investigation, entered into a stipulation of facts with Respondent. A duly impaneled hearing panel reviewed the stipulation pursuant to Administrative Order 9, Rule 8, and determined that there was probable cause to believe that a violation had occurred. A petition alleging a violation of DR 7-104(A)(I) subsequently issued.

Respondent did not contest the allegations of the petition. A hearing panel appointed pursuant to Rule 8C reviewed the stipulation and concluded that Respondent had, in fact, violated DR 7-104(A)(I) and recommended that a sanction of private admonition be imposed.

The Professional Conduct Board reviewed the recommendations of the hearing panel and accepted them. Set forth below are the Board's findings of fact and conclusions of law.

Facts

1. On April 30, 1987, Client purchased a piece of property in Vermont. Respondent represented Client in connection with this purchase.
2. In searching the title to this property, Respondent failed to identify a right of first option deeded by the seller to a third party. This right of first option had been given on June 16, 1978 and was recorded in the town Land Records.
3. On or about December 17, 1987, Client entered into a purchase and sale agreement with Buyer whereby Client was to sell the property to Buyer.
4. Buyer's attorney, conducted a title search and discovered the right of first option. Because of that defect in title, the sale fell through.
5. Upon learning of the right of first option, Respondent attempted to negotiate a settlement with the third party who held the option. Although this third party initially indicated that he had no interest in exercising this option, he subsequently changed his mind and brought suit in Superior Court to enforce his rights under the option.
6. Upon notice of the suit, Respondent recognized the existence of a conflict of interest with clients and withdrew from further representation of Client.
7. Client then retained another attorney to represent him. That attorney is hereinafter referred to as the Complainant.
8. The action with the third party was settled by Client paying to that third party \$3,750 in exchange for clear title to the property.
9. On or about June 28, 1988, Client finally sold the property in

question. By that time he had incurred \$6,977.07 in damages due to the payout to the third party, interest payment on loans, town clerk's fees, advertising, taxes, lawyer fees, house insurance, repairs and maintenance. Because the selling price in June 1988 was \$4,000 more than the original contract entered into with the first buyer, Client's out-of-pocket expenses totalled \$2,977.07.

10. Client sought reimbursement of these expenses from Respondent.

11. Respondent denied liability, asserting that the original sellers were also responsible for failing to identify the right of first option to the Client.

12. Complainant, on behalf of Client, made numerous demands to both Respondent and Respondent's insurance carrier for payment of Client's damages due to Respondent's negligence.

13. In January 1989, a representative of Respondent's malpractice insurance carrier called Respondent and told Respondent that Client intended to file suit. The insurance company suggested the claim be settled out of court.

14. Respondent refused to settle the case.

15. Respondent then wrote a letter directly to Client. In this letter, Respondent acknowledges that Client's attorney, Complainant, had advised Respondent's insurance carrier of Client's intent to sue Respondent. Respondent advised Client of the reasons for refusing to settle and tried to persuade Client not to bring suit.

16. At the time Respondent wrote this letter to Client, Client was represented by counsel, Complainant. Respondent was without counsel at this time and was handling the dispute pro se.

The Code of Professional Responsibility contains the following
Disciplinary Rule:

DR 7-104 Communicating with One of Adverse Interest.

(A) During the course of his representation of a client a
lawyer shall not:

(1) Communicate or cause another to communicate on the
subject of the representation with the party he knows to be
represented by a lawyer in that matter unless he has the prior
consent of the lawyer representing such other party or is
authorized by law to do so.

In this case, Respondent communicated directly with a person of adverse
interest who was represented by counsel. Respondent made this direct contact
on behalf of herself, not in behalf of another client. Nevertheless, we find
that the noncommunication rules applies to lawyers representing themselves as
well as to lawyers representing other clients.

Support for this conclusion is found in an ethics opinion issued by the
Michigan State Bar on August 2, 1988 Opinion CI-1206. That opinion states as
follows:

The rationale for the rule against communicating with an opposing
party without the consent of that party's counsel is that the
opponent may make unwise voluntary statements. Another reason is
that the lawyer may use presumably more refine negotiating skills
to the disadvantage of the non-lawyer. Furthermore, one hires a
lawyer in part to negotiate on one's behalf, and thereby insulate
one's self from the legal process.

In the situation in which a lawyer is acting in his own behalf the rationale supporting the rules do not change. The lawyer who contacts the represented party may use superior negotiating and interrogating skills to the disadvantage of the non-lawyer. Therefore, pursuant to either DR 7-104(A)(1) or Rule 4.2, a lawyer representing himself may not contact another party who is represented without first obtaining the permission of the other lawyer or being otherwise authorized by law to do so.

(emphasis supplied).

In imposing sanctions this Board considers, among other factors, the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factor.

The Board finds that, in this case, a sanction of private admonition is appropriate. See ABA Standards for Imposing Lawyer Sanction, Section 6.34 (admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in improperly communicating with an individual in the legal system, and causes little or no actual or potential injury to a party, or little or no actual or potential interference with the outcome of the legal proceeding).

Dated at Montpelier, Vermont, this 3 day of August, 1990.

PROFESSIONAL CONDUCT BOARD

/s/

J. Eric Anderson, Chair

/s/

/s/

Donald Marsh

Richard Brock

/s/

/s/

Nancy Corsones

Leslie G. Black

/s/

Christopher Davis

/s/

Edward Zuccaro

/s/

Edith L. Patenaude

/s/

Rosalyn L. Hunneman

Robert P. Keiner, Esq.

Edward Zuccaro, Esq.