

[30-Jul-2002]

STATE OF VERMONT  
PROFESSIONAL RESPONSIBILITY BOARD

DECISION NO. 38

In re: PRB File No. 2002.214

On June 6, 2002 the parties filed a stipulation of facts as well as joint recommendations on sanctions and conclusions of law. The Respondent also waived certain procedural rights including the right to an evidentiary hearing.

The panel has accepted the facts and recommendations and the Respondent is privately admonished for sending written solicitations for legal work not identified as advertising material in violation of Rule 7.3 of the Vermont Rules of Professional Conduct.

Facts

Respondent has been a member of the Vermont Bar since 1972, and routinely monitors new lawsuits filed in federal court for the District of Vermont. On five occasions, once in October of 2001 and four times in April of 2002, Respondent communicated with defendants who had been sued in federal court. The letters were sent to two company presidents, a general manager, a company representative and a firm's national coordinating counsel. In no case did Respondent have a family or prior professional relationship with the addressee. Neither the letters nor the accompanying envelopes or fax cover sheets included the words "Advertising Material".

The letters were very similar. In each case the solicitation was on the firm's letterhead, identified the nature of the law suit, included a copy of the complaint and a statement that the Respondent's firm had experience in the area of the suit and suggested that the recipient get in touch with Respondent. (FN1)

None of the persons to whom the letters were sent retained the Respondent. One of the recipients contacted another lawyer in Respondent's firm and retained that lawyer. The Respondent is not involved in the representation. The Respondent self-reported this matter to Disciplinary Counsel. He has no prior disciplinary record, and none of the recipients filed disciplinary complaints.

Conclusions of Law

Rule 7.3(c) of the Vermont Rules of Professional Conduct states that:

[ e ]very written or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words "Advertising Material" on the outside envelope and at the beginning and ending of any recorded communication.

The facts clearly and convincingly establish that the Respondent violated Rule 7.3(c). The written communications were sent to defendants whom Respondent knew to be in need of legal services. The Respondent had no family or prior professional relationships with the prospective clients, and no part of the communications included the words "Advertising Material." Thus Respondent clearly violated Rule 7.3(c) of the Vermont Rules of Professional Conduct.

#### Sanction

This case meets the criteria for private admonition under both A.O.9 of the Vermont Supreme Court and the ABA Standards for Imposing Lawyer Sanctions.

A.O.9 provides that admonition is appropriate only "in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer." A.O. 9, Rule 8(A)(5)(b). The fact that the Respondent sent the letters without properly marking them as advertising material caused little, if any, injury to the recipients, the public, the legal system, or the profession. It may be possible to assume that the recipients of the letters were reasonably sophisticated legal consumers. But for the failure to identify the letters as advertising, they were completely appropriate. (FN2)

Based upon Respondent's prompt self reporting of the violation the panel believes there is little likelihood of repetition.

The ABA Standards for Imposing Lawyer Sanctions contain similar provisions. The Introduction to Standard 7, Violation of Duties Owed as a Professional, states

[w]hile these standards have been developed out of a desire to protect the public, . . . a violation of these standards generally is less likely to cause injury to a client, the public, or the administration of justice than the other standards discussed above. In fact, in the area of advertising, the United States Supreme Court has ruled that lawyer advertising is protected by the First Amendment and has struck down certain ethical prohibitions on advertising.

According to Standard 7.4, an admonition is "generally appropriate when a lawyer engages in an isolated instance of negligence that is a violation of a duty owed as a professional, and causes little or no actual or potential injury to a client, the public or the legal system." A reprimand is only appropriate if a lawyer "causes injury or potential injury." ABA Standards, Section 7.3.

The panel is satisfied that an admonition is appropriate. Although the Respondent sent more than one offending letter, his failure to consider his ethical duty can be viewed as an isolated instance of negligence. Moreover, no injury resulted. Finally, to the extent that a reprimand might even be considered, the many mitigating factors present indicate that an admonition is appropriate. The Respondent has no prior disciplinary record. His failure to label the letters as "advertising materials" did not result from a selfish or dishonest motive, and he made a full and free

self-disclosure to disciplinary authorities. ABA Standards, 9.32(a), 9.32(b), and 9.32(e). The one aggravating factor, Respondent's years of experience in practice, is not enough to tip the scales in favor of public reprimand.

Respondent is hereby PRIVATELY ADMONISHED for violating Rule 7.3 of the Vermont Rules of Professional Conduct.

Dated: July 29, 2002

HEARING PANEL No. 1

/s/

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Barry E. Griffith, Esq. Chair

/s/

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Martha M. Smyrski, Esq.

/s/

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Stephen Anthony Carbine

FILED JULY 30, 2002

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Footnotes

FN1. The following is the text of a letter from Respondent addressed to a firm president. It is representative of all the letters.

Dear Sirs:

Our firm routinely monitors the new lawsuits filed in the federal district court for the District of Vermont. As a courtesy I have attached a copy of a product liability lawsuit that was filed against [company name] on [date].

Our law firm would be pleased to assist your company or its insurer in the defense of this matter. We have substantial experience in product liability defense in general and have handled cases involving [details of complaint] in the past.

Please call or contact me at the address on our letterhead, if we can be of any assistance. My email is [Respondent's email address]. Information on our firm is available at [firm's website].

FN2. It is worth noting that the disciplinary rules on of lawyer advertising have undergone a number of changes in an attempt to balance the attorney's right of free speech with the need to protect the public from

coercive or deceptive advertising practices. In 1986, after the absolute ban on advertising was struck down by the Supreme Court, *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), DR 2-104 of the Vermont Code was amended to allow some direct contact with prospective clients "by means of letters addressed or advertising circulars distributed generally to persons not known to need legal services." That limitation was eliminated from the Code in 1989, allowing letters of this sort to be sent as long as they did not involve coercion, duress or harassment. The present rule, adopted in 1999, continues to permit these letters but adds the requirement that they be labeled as advertising materials.