

PCB 47

[04-Dec-1992]

STATE OF VERMONT  
PROFESSIONAL CONDUCT BOARD

In re: PCB File 85.32

PUBLIC NOTICE OF DECISION

No. 47

1. At the time this complaint was filed, Respondent was a young associate in a law firm. He assisted a senior partner in the representation of a woman who was involved in an acrimonious divorce from her husband. The husband is the complainant here. At all times material hereto, complainant resided outside of Vermont.

2. Over an eight month period, counsel for the wife filed three contempt petitions against the complainant.

3. At the hearing on the second petition, counsel for complainant claimed there was no basis for contempt, due in part to there being no proof of service of the contempt petition and order upon the complainant. The presiding judge agreed that service of the order was required. Neither counsel for complainant nor the presiding judge ever specifically stated that personal service of notice of the hearing date was required.

4. As a result of the second petition, the court ordered the complainant to pay \$425 to his wife. Complainant refused to pay this sum, which triggered filing of the third petition.

5. A copy of the third contempt petition was filed with the court and mailed to complainant's counsel. Complainant's counsel promptly filed a memorandum in opposition, on the grounds that his client had not received personal notice of the order and petition. A deputy clerk of the court thereafter refused to schedule the contempt hearing on those grounds.

6. About two months later, complainant's wife renewed her petition for contempt. This time the petition and an order were personally served on complainant by a process server. A hearing was scheduled for a date certain, then postponed to a date two days later. The hearing was then canceled due to the senior partner's scheduling conflict.

7. The senior partner was traveling outside the country and directed the respondent to call the court to arrange for a new hearing date. The respondent did so. The court informed respondent that a hearing was scheduled to occur two days later.

8. To confirm the new date, respondent sent a letter to the court clerk. It is this letter, dated the 25th of the month, which forms the basis of the complaint. It states:

Dear [Clerk of the court]:

I have been notified by the court that Defendant's Petition for contempt has been set for hearing at 1:00 P.M. on Wednesday, [the 27th]. I assume the court has also notified Plaintiff of the hearing date, and this letter will do so in any event.

Respondent caused copies of the letter to be sent to opposing counsel and to complainant, with the "cc" so noting on the letter. Respondent knew that complainant was an adverse party, represented by counsel.

9. The next day, respondent spoke with complainant's counsel. Complainant's counsel informed respondent that the court had told him that the hearing on the 27th was to address the wife's motion to alter or amend findings of fact, not the contempt petition, and that he had so notified his client. Respondent then telephoned the clerk and learned that opposing counsel's understanding was correct. The hearing did not require complainant's appearance.

10. The senior partner was the wife's principal attorney on the case. Until he called the court and wrote the letter on the 25th, respondent's involvement was as an associate doing research on some aspects of the case. Until the 25th, his last involvement with the case had been several months before when opposing counsel and the presiding judge had taken the position that personal service of the complainant was required, which requirement was essentially adopted by the scheduling clerk. The senior partner had left respondent no directions about how he should handle the situation if a hearing on the contempt petition was scheduled to occur during the senior partner's absence.

11. The decision to send a copy of the letter of the 25th to the complainant was solely that of respondent. His reason for sending the copy to complainant was to eliminate as an issue any claim by opposing counsel that there was no personal service. Respondent did not believe the letter went to the subject matter of the case. He did not send it with the intent of gaining any advantage over complainant. Respondent did not think it would prejudice the complainant. He believed that the position taken earlier by opposing counsel and the presiding judge, that personal service was required, combined with the court's refusal to schedule the prior contempt hearing due to a lack of personal service, meant that in effect there was an order requiring personal service. Respondent did not believe that service by a sheriff could be reasonably effected on only two days' notice.

12. On the 27th, complainant received a copy of the letter of the 25th. Complainant called his attorney's office and learned that his attorney was out. His attorney's secretary advised him that there was a 1:00 hearing, but had no information about the nature of the hearing. Complainant then canceled his afternoon office appointments. As complainant was about to leave for the court, his attorney called and advised him that his attendance was not required as the hearing was to reconsider evidence. Complainant then called his office and was able to reschedule some but not all of his afternoon appointments.

13. Opposing counsel did not consent to respondent or his firm communicating directly with his client. No provision of law authorized respondent to communicate directly with complainant. Neither opposing counsel, the presiding judge, or the court clerk had taken a position regarding service of the notice of hearing.

CONCLUSIONS OF LAW

14. DR 7-104(A) (1) provides:

(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 a 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.

15. Mailing of the letter regarding the hearing to complainant constituted a communication on the subject of the representation within the contemplation of this disciplinary rule.

16. Therefore, the Board concludes that respondent violated DR 7-104(A) (1). Under the unique circumstances of this case, however, the Board finds the violation to be de minimus and declines to impose any sanction on respondent .

17. In so doing the Board does not, by any means, condone nor recommend service by counsel of notice of hearing on an adverse party, unless there has been express consent by counsel, or express authorization by law or the court.

The facts of this case are unique; under other circumstances such communication would likely merit sanctions .

Dated at Montpelier, Vermont, this 4th day of December, 1992.

PROFESSIONAL CONDUCT BOARD

/s/

\_\_\_\_\_  
J. Eric Anderson, Chairman

/s/

\_\_\_\_\_  
Deborah S. Banse, Esq.

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

/s/

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Anne K. Batten

/s/

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Christopher L. Davis, Esq.

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Donald Marsh

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Hamilton Davis

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/s/

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Edward Zuccaro, Esq.