

PCB 67

[01-Apr-1994]

STATE OF VERMONT
PROFESSIONAL CONDUCT BOARD

In Re: PCB File 9I.41

NOTICE OF DECISION

DECISION NO. 67

This matter came before the Board by way of a stipulation entered into by Bar Counsel and Respondent. We accepted the stipulated facts and hereby summarize our decision in this matter.

FACTS

Attorney A brought suit against an ex-client to collect money owed for legal services rendered in a divorce action. Attorney A received a summary judgment of approximately \$4,000.00 against his ex-client.

The ex-client did not pay the judgment. Attorney A then filed an action to enforce the out of state judgment. The ex-client failed to answer. Attorney A moved for a default judgment.

At this point, the ex-client retained counsel, Attorney B, who filed an appearance, answer and counterclaim on behalf of the ex-client. The counterclaim generally alleged a malpractice claim against Attorney A arising out of his representation of the ex-client in the divorce action.

Respondent undertook representation of Attorney A. At this point, Respondent had been a member of the Vermont bar for less than one year.

Initially, Attorney B represented that the ex-client would pay Attorney A \$2,500.00 of the amount that she owed him in full satisfaction of Attorney A's claim, would dismiss her counterclaim against Attorney A, and would sign a general release. This proposed settlement was fair and reasonable.

However, Attorney B said that the ex-client unwilling to settle the matter until she received certain monies that were apparently owed to her by her ex-husband as a result of the divorce action. In order to provide the ex-client with sufficient time to obtain the money, and in the interest of resolving the claim amicably, Respondent and Attorney B executed a stipulation staying all proceedings involving Attorney A's claim against the ex-client and the ex-client's counterclaim.

Several months passed. Finally, Attorney B told Respondent that the ex-client still wished to settle the matter as previously proposed. Respondent drafted a standard general release and sent it to Attorney B for the ex-client to sign. Respondent also asked that the \$2,500.00 be forwarded.

The ex-client refused to execute a general release before Attorney A did.

Therefore, Attorney A signed a standard general release and forwarded it to

Attorney B. Respondent wanted the signed release from Attorney A to be held in escrow by Attorney B until the ex-client reciprocated.

The ex-client did not sign the release or forward the \$2,500. Respondent and Attorney A then became quite concerned with the status of the settlement.

About three months later, the court held a status conference. At that time, Respondent learned that the ex-client was reluctant to sign a release because she wanted to bring Attorney A before the Professional Conduct Board.

Attorney B informed Respondent that his client wanted to dismiss the malpractice claim, pay a portion of the attorney's fees but not sign a release so that she could go before the Professional Conduct Board.

Attorney B informed Respondent that if the ex-client received a favorable ruling from the Board, she intended to attempt to recommence her malpractice claim.

Attorney A became concerned that what he believed to be a frivolous claim would continue with a complaint to the Board causing him more time, expense and embarrassment. Respondent and Attorney A were both concerned that the ex-client would obtain the executed release, bring the matter before the Board and then also pursue the malpractice claim anyway.

Respondent concluded that Attorney A did not commit malpractice when he represented the ex-client. A number of factors supported this conclusion. Most compelling was the fact that Attorney B was unable to articulate any facts constituting malpractice by Attorney A. Moreover, Attorney B had not retained any expert witness to testify to any malpractice. Respondent

reviewed the underlying divorce file and decision in the divorce action (which was favorable to the ex-client) and found no evidence of malpractice. Respondent had also been told by Attorney A that the presiding judge in the underlying divorce case was willing to testify on his behalf as to Attorney A's professional competence.

It became clear that the ex-client was not stable. The ex-client changed her mind on various issues periodically and without warning. Attorney B was unable to control his client who wrote a haranguing letter to him and sent a copy to Respondent.

A few weeks after the status conference, Attorney B extended a new offer to Respondent which was identical in all respects to the previous settlement agreement of the parties except that the ex-client would now only pay \$1,000.00 of Attorney A's fees.

Respondent was justifiably reluctant to enter into a settlement in which Attorney A would voluntarily drastically reduce his existing judgment for attorney's fees without obtaining a full release and dismissal from the ex-client. Respondent and Attorney A decided that Respondent would ask Attorney B whether the ex-client would be willing to sign a general release that stated that she would not report Attorney A to the Professional Conduct Board. Respondent did so; Respondent's motive was to protect Attorney A from having to defend against a frivolous malpractice claim and a meritless complaint to the Board.

At some point, Attorney B told Respondent that his client had indicated that

she would sign the requested release. Respondent sent a letter to Attorney B confirming their oral agreement that a release would be executed which included a release of any claims to the Professional Conduct Board.

About three months later, the ex-client filed a complaint with the Professional Conduct Board against Attorney A, claiming that she was being forced to sign a release which included a release of any claim of professional misconduct she might have against Attorney A arising out of his representation of her during her divorce. As a result of that complaint, the Board investigated this matter.

Eventually, the ex-client moved to dismiss the counterclaim against Attorney A and paid to him all the attorney's fees for which he had obtained the original judgment.

CONCLUSIONS

The Vermont Supreme Court is the sole entity vested with attorney discipline. Vt. Const. Ch. II, Section 30. As such, only the Supreme Court and its arm, the Professional Conduct Board, have or should have the authority to decide what attorney conduct violates the Code of Professional Responsibility.

By asking the ex-client (through counsel) to forbear reporting her concerns to the Professional Conduct Board, Respondent violated DR 1-102(A)(5)(conduct prejudicial to the administration of justice.) "Members of the bar should not discourage persons from reporting matters to the

Professional Conduct Board." In re: PCB File 91.42, PCB Decision No. 44 (December 4, 1992). Although Respondent was motivated by a desire to "complete closure to the malpractice claim", it was not appropriate to ask the ex-client to "release" her right to report her concerns to the Professional Conduct Board - no matter how frivolous those concerns might be.

Respondent was quite inexperienced when this misconduct occurred, has no prior disciplinary record, no dishonest or selfish motive, and caused no injury or prejudice to the Complainant. Respondent was cooperative toward the disciplinary proceedings which took some time to complete. There are no aggravating factors present.

The Board issued a private admonition in December 1992 to Attorney A in PCB File No. 91.42 for his role in attempting to prevent a complaint from being filed with the Board. We believe that the same sanction is appropriate here.

Dated at Montpelier, Vermont this 1st day of April, 1994.

PROFESSIONAL CONDUCT BOARD

/s/

Deborah S. Banse, Chair

/s/

/s/

Anne K. Batten

Donald Marsh

/s/

/s/

Joseph F. Cahill, Esq.

Karen Miller, Esq.

/s/

Nancy Corsones, Esq.

J. Garvan Murtha, Esq.

Paul Ferber, Esq.

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/s/

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