

PCB 68

[20-May-1994]

STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

In re: PCB File No. 93.24

NOTICE OF DECISION

DECISION NO 68

This matter was presented to us for consideration pursuant to Administrative Order 9, Rule 7(A)(5)(a). The parties submitted a joint stipulation as to facts, recommended conclusions of law, and recommended sanctions. We also heard oral argument from bar counsel and respondent. After due consideration, we accepted and adopted as our own the stipulation of facts as presented by the parties.

This case involves Respondent's improper withdrawal from Client's case.

Respondent has represented Client in various matters over the past ten years.

In the instant case, Client was convicted by a jury of a criminal offense.

Respondent filed a motion for acquittal and new trial which was unsuccessful.

Respondent also filed an appeal in the Vermont Supreme Court.

Client owed Respondent approximately \$400 in legal fees at the end of the trial. Respondent told Client that he would need a retainer of an additional \$1,500 for the appeal.

Within a month of Client's conviction, communications between Client and Respondent broke down. Respondent wrote to his client and told him that he no longer wished to represent him. Respondent told Client that he needed to retain the services of another attorney quickly. Respondent wrote that he would retain the file in this matter until his outstanding bill was paid. Respondent received no response from Client.

The Rules of Appellate Procedure state that when an attorney files an appeal, that attorney becomes the attorney of record. All of the Court's correspondence with the party is conducted through the attorney of record. V.R.A.P. 45.1 (a).

Once an attorney has become the attorney of record, he or she may not withdraw without leave of Court, which will not be granted without a showing of good cause and without notice to the party. V.R.A.P. 45.1 (f).

Respondent did not file a motion to withdraw with the Supreme Court because he was not familiar with this rule of appellate procedure. Respondent, therefore, remained attorney of record.

A few months later, Respondent received a copy of an order from the Vermont Supreme Court. The order was entered on November 19 and required Client to appellant's brief by December 2 or risk dismissal of the case. Respondent sent the order to Client on November 24 along with a letter requesting payment of his bill and reminding him to move forward with his appeal.

On December 4, Client telephoned Respondent's office. Respondent was away on vacation. Client left a message that he wanted Respondent to handle the appeal. That same day, Replacement Counsel also called Respondent's office. Replacement Counsel left a message that he was seeking access to Respondent's file regarding Client's appeal.

When Respondent returned from vacation a few days later, he talked with Replacement Counsel about the appeal. Respondent assumed that Replacement Counsel was handling the appeal and expected Replacement Counsel to file a motion to allow him to become substitute counsel. There was apparently some confusion about this, because Replacement Counsel did not file such a motion.

About a week later, the Supreme Court dismissed Client's appeal for failure to file a brief. Respondent forwarded the order to Client.

Sometime after the dismissal, Replacement Counsel again asked Respondent for Client's files. Although Client still owed money to Respondent, Respondent turned the files over. Replacement Counsel then filed a motion to reinstate the appeal due to improper withdrawal by Respondent. The motion was allowed. The matter was subsequently resolved to Client's satisfaction.

Replacement counsel did not charge Client for his appellate services. Client was not injured by Respondent's misconduct.

Disciplinary Rule 2-110(A)(1) mandates that, "If permission for withdrawal from employment is required by rules of the tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission."

Further, an attorney who disregards Supreme Court notices with the result being the dismissal of the case engages in conduct prejudicial to the administration of justice in violation of DR 1-102(A)(5). In the Matter of Tos, 576 A.2d 607 (Del. Super. 1990).

Respondent here violated both of these disciplinary rules. In imposing sanctions, we consider the duty violated, the respondent's mental state, the potential or actual injury, and any aggravating or mitigating factors. Standard 3.0 of the ABA Standards for Imposing Lawyer Sanctions (1991) at 9.

The duty violated here is the one all lawyer's owe to the profession. While important, it is not fundamental; violation of this duty is less likely to cause injury to the client than is a violation of other duties. See Standard 7.0, ABA Standards at 45. The client was not injured in this case because Replacement Counsel did not charge for his services for reinstating the appeal. There was obviously some inconvenience to the Supreme Court in its attempt to manage its cases.

Respondent's state of mind was one of ignorance and neglect, which is aggravated by the fact that he has substantial experience at the bar (nearly 15 years) and two prior sanctions for misconduct, albeit remote in time. In mitigation, we find that respondent cooperated fully with the disciplinary proceedings and has expressed remorse.

Section 7.4 of the ABA Standards for Imposing Lawyer Discipline provides:

Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the lawyer's conduct violates a duty owed to the profession, and causes little or no actual or potential injury to a client, the public, or the legal system.

Respondent here has agreed to not only familiarize himself with the Code of Professional Responsibility, but to successfully pass the Multistate Professional Responsibility Examination within the next six months and to report his score to Bar Counsel.

Based upon all the information presented to us, including Respondent's personal comments to the Board, we find that there is little likelihood of repetition by this lawyer and that this matter involved minor misconduct. Therefore, we feel that a private admonition is the appropriate sanction here. Rule 7 (A)(5).

Dated at Montpelier, Vermont this 20 day of May, 1994.

PROFESSIONAL CONDUCT BOARD

*/s/*

Deborah S. Banse, Chair

*/s/*

Anne K. Batten

*/s/*

Donald Marsh

*/s/*

Joseph F. Cahill, Esq.

Karen Miller, Esq.

*/s/*

Nancy Corsones, Esq.

J. Garvan Murtha, Esq.

Paul S. Ferber, Esq.

Robert F. O'Neill, Esq.

*/s/*

Nancy Foster

Ruth Stokes

*/s/*

Rosalyn L. Hunneman

Jane Woodruff, Esq.

*/s/*

Robert P. Keiner, Esq.

Edward Zuccaro, Esq.