

69 PRB

[26-Jul-2004]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2004.206

Decision No. 69

On May 14, 2004, the parties filed a stipulation of facts as well as conclusions of law and recommendations on sanctions. Respondent also waived certain procedural rights including the right to an evidentiary hearing. The panel accepts the facts and recommendations and orders that Respondent be admonished by Disciplinary Counsel for having an ex parte conversation with an acting judge on the subject of a pending matter in violation of Rule 3.5(b)(1) of the Vermont Rules of Professional Conduct.

Facts

Respondent is licensed to practice law in Vermont and has been admitted to the Vermont Bar for more than 10 years. In March of 2004,

Respondent appeared on behalf of a criminal defendant at an arraignment. A friend of Respondent's, whom Respondent had known for many years, presided over the arraignment as acting judge. During the arraignment, the State argued that the defendant's conditions of release should include a condition prohibiting the consumption of alcohol. Respondent offered a spirited argument against imposition of the condition but was unsuccessful, and the condition was imposed.

Respondent was disturbed by his treatment by the acting judge during the arraignment, and that night Respondent called the acting judge at his home. The two had a brief conversation in which Respondent indicated that his feelings had been hurt by the way he perceived the acting judge to have treated him during the arraignment. The two did not discuss the merits of the criminal case. There is no evidence that the acting judge acted inappropriately during the arraignment.

Respondent moved the court to reconsider the acting judge's decision and, upon reconsideration, the presiding judge of the District Court agreed with Respondent and removed the condition.

After the hearing, the presiding judge summoned Respondent to chambers, and, in the presence of the State's Attorney, admonished him for calling the acting judge. Respondent apologized, promised not to do it again, and explained that he had only telephoned the acting judge because he did not think it was the same as contacting a "sitting" judge.

Respondent's call to the acting judge did not affect the criminal case.

Respondent has no disciplinary history. He has expressed remorse for his conduct and made a full and free disclosure to disciplinary counsel upon learning that a complaint had been filed.

Conclusions of Law

Rule 3.5(b)(1) of the Vermont Rules of Professional Conduct provides that "[a] lawyer shall not . . . communicate ex parte with a judge or other person acting in a judicial or quasi-judicial capacity in a pending adversary proceeding, except as permitted by law or the Code of Judicial Conduct." Respondent violated this rule by calling the acting judge to discuss the conduct of the arraignment. The fact that the judge was an acting judge whose connection with the matter discussed may have ended does not affect our decision. The provisions are designed to insure against improper communications and apply to acting judges in the same manner as the sitting judges. V.R.P.C. Rule 3.5(b)(1).

Sanction

An admonition is appropriate in this case under both Administrative Order 9 and the ABA Standards For Imposing Lawyer Sanctions. Under A.O. 9 admonition is appropriate only when the misconduct is minor, little or no injury results and there is little likelihood that the lawyer will make the

same mistake again. A.O. 9, Rule 8(A)(5). Viewed in context, the Respondent's misconduct was relatively minor. Little or no injury occurred. It is hoped that this incident has served to educate the Respondent, and that there is little likelihood that the situation will recur.

Admonition is also indicated under the ABA Standards for Imposing Lawyer Sanctions. Section 6.34 states that "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 causes little or no actual or potential interference with the outcome of the legal proceeding."

Respondent's call to the acting judge was an isolated instance of negligence. Although Respondent should have known not to initiate an ex parte communication with the acting judge, little, if any, injury resulted. The conversation did not interfere with the criminal case and did not unfairly prejudice the prosecution. There are a number of mitigating factors present. Respondent has no prior disciplinary record. ABA Standards, Section 9.32(a). The phone call in question did not result from a dishonest motive. ABA Standards, Section 9.32(b). Respondent made a full and free disclosure to disciplinary counsel, ABA Standards, Section 9.32(e), and has expressed remorse for his conduct. ABA Standards, Section 9.32(l). The one aggravating factor present, Respondent's substantial experience in the practice of law, ABA Standards, Section 9.22(i), is not

of sufficient weight to change the sanction.

Conclusion

For the above reasons the Hearing Panel orders that Respondent be admonished by Disciplinary Counsel for violation of Rule 3.5(b)(1) of the Vermont Rules of Professional Conduct.

Dated: July 26, 2004

Hearing Panel No. 6

/s/

Judith Salamandra Corso

/s/

James Gallagher, Esq.

/s/

Toby Young