

PCB 6

[05-Apr-1991]

STATE OF VERMONT
PROFESSIONAL CONDUCT BOARD

In re: PCB File No. 89.44

NOTICE OF DECISION

PCB NO. 6

Procedural History

This matter was first brought to the Professional Conduct Board's attention by a trial court judge.

Bar Counsel investigated this matter and, as a result of that investigation, entered into a stipulation of facts with the Respondent. Respondent waived all rights to an independent review by a hearing panel of that stipulation. Respondent further waived all procedural rights to which he was entitled under Administrative Order No. 9.

The Professional Conduct Board reviewed the stipulation of facts, conclusions of law, recommendation to the Professional Conduct Board, and waiver of procedural rights.

The Professional Conduct Board accepted that stipulation on December 7, 1990. Based upon that stipulation, the Board hereby issues this notice of decision.

Facts

1. Respondent is an attorney licensed to practice in the state of Vermont since 1982.
2. On or about October 1989, Respondent was assigned to represent Defendant on a charge of custodial interference.
3. During the nine to ten months Respondent served as Defendant's attorney, Respondent had substantial contact with defendant.
4. Defendant would contact Respondent on the average of two to three times per week whenever he was in the state of Vermont. There were periods when defendant would come to Respondent's office on a daily basis.
5. Defendant lived with his brother's ex-wife. The two children who were the subject of the custodial interference charge were believed to be his brother's children. Subsequent evidence indicated that defendant was, in fact, the father of one of the children.
6. Defendant took the children from the lawful custody of their mother and took them outside the state of Vermont. His articulated purpose for so doing was to protect them from their mother.

7. While the custodial interference charge was pending, various settlement offers from the prosecutor were communicated by Respondent to defendant. Defendant objected to all of them. As a precondition of settlement, defendant made certain demands that were irrelevant to the criminal charge. Even when these were met, defendant would refuse to select an available option.

8. In short, Respondent refused to accept any offer or proceed to trial. It became apparent to Respondent that defendant was using the criminal charge as a forum to gain attention.

9. On July 5, 1989, Respondent appeared at court. At that time, defendant was to be arraigned on new charges of sexual assault and simple assault. In addition, a motion to revoke his bail was to be heard.

10. Immediately prior to his scheduled arraignment the prosecutor offered the following plea bargain: a nolo contendere plea to a simple assault charge with a deferred sentence; a nolo contendere plea to disorderly conduct charge with the prosecutor arguing for 15 days in jail and the defense free to argue for anything.

11. Respondent saw his client outside the court house and went outside to convey the offer to him. When Respondent conveyed the offer to defendant, his response was that the witnesses were lying. Rather than focus on the offer, which if rejected would result in his being arraigned on a felony punishable by up to 20 years imprisonment, defendant focused on

the allegations concerning the motion to revoke bail.

12. At that point, Respondent, frustrated by his client's inability to focus on the decision at hand, struck defendant on the side of the head with an open hand.

13. A court officer observed the incident. She saw that Respondent was becoming increasingly agitated and seemingly angry toward his client. She saw Respondent in an angry state or demeanor take one step toward defendant so that he was inches from his face. At the same time, Respondent raised his right hand and with an open palm, struck defendant on the left side of his head. Respondent then stormed off past some onlookers while defendant remained on the sidewalk for a few minutes. The amount of force used by Respondent was minimal. In fact, defendant's head never swayed or moved depreciablely to the right during the assault.

14. Immediately after this incident, Respondent went to the prosecutor and described what had happened with his client. Shortly thereafter, the case was called and the incident described above was placed on the court record.

15. Shortly after this incident, Respondent was called to the bench by one of the trial court judges and admonished for his conduct. This admonition by the judge had a significant impact upon Respondent.

16. Respondent acknowledges that he should have dealt with his frustration in a different manner. Given the serious nature of the charge

against his client and the threat of a much more serious charge being filed, Respondent should have asked the court for a continuance for the purpose of sitting down in an appropriate setting and discussing the alternatives with his client. That would have enabled Respondent to discuss at length in an appropriate environment, the ramifications of the prosecutor's threat to charge the defendant with sexual assault.

Conclusions of Law

Respondent's conduct here violated DR 7-106(C) (6): "In appearing in his professional capacity before a tribunal, a lawyer shall not engage in undignified or discourteous conduct which is degrading to a tribunal." The fact that this conduct occurred immediately outside the court house rather than inside a court room is of no consequence. Respondent's undignified conduct was degrading to the court as well as to the Respondent and his profession. While the defendant suffered no physical injury, he did suffer the embarrassment and indignity of being slapped by his counsel in a public place.

Obviously this is not the type of conduct which can be tolerated by the profession and this Board. However, there are a number of mitigating circumstances in this case.

First, Respondent did not act with any dishonest or selfish motive. He genuinely cared for his client's best interest. Moreover, there is no evidence of a pattern indicative of Respondent's inability to interact with his clients in an appropriate fashion. This singular incident appears to be

aberrational.

Second, Respondent has demonstrated remorse and has accepted full responsibility for his inappropriate conduct. Immediately after it occurred, he advised both opposing counsel and the court of his conduct. We consider this a timely good faith effort to rectify consequences of misconduct.

Third, other penalties or sanctions have already been imposed by the court. The judge who admonished Respondent for his conduct imposed an appropriate and meaningful sanction which may have far more effect on Respondent than anything this Board might do.

Fourth, Respondent has demonstrated sincere regret and remorse over this incident and has been extremely cooperative in his attitude toward these proceedings. The Board notes that Respondent has no prior disciplinary record at all.

Based upon these litigating factors, the Professional Conduct Board has adopted the joint recommendation of both Respondent and Bar Counsel that Respondent be privately admonished by the Professional Conduct Board for this violation of DR 7-106(C) (6). A letter of private admonishment will issue.

Dated at Montpelier this 5th day of April, 1991.

/s/

/s/

Eric Anderson, Chairman

Hamilton Davis

/s/

/s/

Anne K. Batten

Rosalyn Hunneman

/s/

Leslie G. Black, Esq.

Donald Marsh (dissenting)

/s/

/s/

Richard L. Brock, Esq.

Deborah S. McCoy, Esq.

/s/

/s/

Joseph F. Cahill, Jr., Esq.

Karen Miller, Esq.

/s/

Nancy Corsones, Esq.

Joel W. Page, Esq.

/s/

Christopher L. Davis, Esq.

Edith Patenaude

/s/

Edward Zuccaro, Esq.