

PCB 73

[15-Jul-1994]

STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

In re: PCB File No. 93.27

NOTICE OF DECISION

DECISION NO. 73

This matter was presented to the Board by stipulated facts. It involves an incident of lack of candor in violation of DR 1-102(A)(4).

At the time of this incident, Respondent had been a member of the bar for a little more than five years. He was representing a client in a criminal case when he telephoned an expert witness retained by opposing counsel in order to interview him and discuss his testimony. The Respondent recorded the telephone conversation without informing the witness that he was doing so.

Respondent often records telephone interviews with witnesses, especially if it is a lengthy discussion about a subject matter of which he has little

knowledge, so that it may be transcribed for later reference. We do not know whether it is his practice to do so without the knowledge or consent of the other party.

There was initially an allegation that Respondent told the witness that he had obtained the permission of opposing counsel to speak with this witness directly when, according to opposing counsel, such permission was never granted. We have dismissed that portion of the complaint because there appears to have been a misunderstanding between the two attorneys as to exactly what consent was given.

However, we find the act of tape recording a telephone conversation - without informing the other party of that act - is conduct involving lack of candor and honesty in violation of DR 1-102(A)(4). We have privately admonished other attorneys for similar conduct in the past. PCB File 80.61. We feel that an attorney should give the opportunity to the other party to consent to the tape recording prior to doing so. If the party objects and a formal record is necessary, the attorney can depose the witness.

Respondent has cooperated fully with these disciplinary proceedings. He has no prior sanctions, he is relatively inexperienced, and we find little likelihood of his repeating this misconduct. We, therefore, direct the Chair to issue a private letter of admonition to Respondent.

Dated at Montpelier this 15 day of July, 1994.

PROFESSIONAL CONDUCT BOARD

/s/

Deborah S. Banse, Chair

/s/

Donald Marsh

/s/

Karen Miller, Esq.

/s/

Nancy Corsones, Esq.

J. Garvan Murtha, Esq.

Paul S. Ferber, Esq.

Robert F. O'Neill, Esq.

/s/

Nancy Foster

/s/

Ruth Stokes

/s/

Rosalyn L. Hunneman

Jane Woodruff, Esq.

/s/

Robert P. Keiner, Esq.

/s/

Edward Zuccaro, Esq.

DISSENT

Our Supreme Court has not ruled on this issue. However, a recent opinion of the Oklahoma Bar Association Legal Ethics Committee, Opinion 307, 2/18/93, refused to follow the ABA Formal Opinion 337 on this issue. In 1974, the ABA

issued Formal Opinion 337 which stated that "no lawyer should record any conversation ... without the consent or prior knowledge of all parties to the conversation." The opinion was based on DR 1-102(A)(4) as well as upon Canon 9 (avoiding the appearance of impropriety).

Following the reasoning of the Oklahoma opinion, I agree that tape recording one's own conversation with another, without that other person's consent, is not per se deceptive. Attorneys document conversations routinely.

Recordation is merely a technological convenience, providing a more accurate means of documenting rather than relying on one's memory or notes. The use or threat of use of such a tape recording by an attorney could certainly present a case which would constitute a violation of our conduct rules.

However, the facts in this case do not, and I would dismiss this complaint.

/s/

Joseph F. Cahill, Esq.