

PCB 82

[03-Feb-1995]

STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

IN RE: PCB File No. 91.46

PROFESSIONAL CONDUCT BOARD REPORT AND RECOMMENDATIONS

DECISION NO. 82

This matter came on for hearing before the Professional Conduct Board on a Rule 8(D) hearing on January 6, 1995. Board members were present as noted below. Respondent was present and was represented by his attorney, Doug Richards. Special Bar Counsel Robert Gensburg was also present. Based upon the argument of counsel, and upon the pleadings and papers on file herein, the Board hereby makes the following findings of fact, conclusions of law, and recommended sanctions.

FINDINGS OF FACT

The Board adopts the findings of the hearing panel in all respects except as noted below. The Board declines to adopt the hearing panel's determination

that Respondent's failure to turn over the entire divorce file does not constitute a violation of D.R. 9-102(B)(4). The Board concludes that whenever a client requests their counsel to turn over a file to new counsel, the attorney's responsibility is to comply with the client's request. The attorney cannot selectively pick and choose which parts of the file to send; nor can the attorney absolve him or herself of the responsibility to turn over the file by copying the client with all material during the course of the representation. The client has no duty to maintain those materials that the attorney may send to the client as a "file."

Therefore, we conclude that Respondent's failure to send the entire file to complainant constitutes a violation. Our recommended sanction remains a private admonition, however, due to substantial mitigating factors, which include Respondent's prompt transfer of relevant parts of the file to complainant's new attorney (who in fact had worked on this very file while employed at Respondent's office). Although there was some delay in filing the docketing statement, there was no prejudice to complainant in the context of the appeal, which was dismissed a short time later.

VIOLATION OF D.R. 1-102(A)(7)

Charging Improper Fee

The Board agrees with the Hearing Panel's analysis in this respect, and determines that Respondent did not engage in conduct which adversely reflects on his fitness to practice.

## VIOLATION OF D.R. 6-102(A)

### Attempt to Exonerate Himself from Liability

The Board agrees with the Hearing Panel's analysis in this respect. What makes this case unique from any of the cases cited by Bar Counsel or Respondent is the stipulation that Respondent did an excellent job in the divorce case, and achieved an excellent result for Complainant. Whether in foresight or hindsight, it is difficult to see how Respondent could be attempting to exonerate himself from liability where there is absolutely no specter of liability. However, D.R. 6-102(A) is absolute in its language, and this Board cannot alter or amend that language to fit the facts of this case. We therefore agree that Bar Counsel proved, by clear and convincing evidence, that Respondent violated D.R. 6-102(A). Our recommended sanction remains the same.

### RECOMMENDED SANCTIONS

While the Board has concluded that there are two violations in this matter (failure to deliver the file and attempt to exonerate liability) we nonetheless recommend a private admonition. With respect to the failure to deliver the file, the substantial mitigating factors clearly show that Respondent was trying to balance several factors in sending the parts of the file that Complainant's new lawyer specifically requested, instead of the entire file, which took up over one file cabinet drawer. No punishment greater than a private admonition is warranted under all of the

circumstances. Additionally, even when this violation is combined with the violation regarding the attempted release, this Board concludes that a private admonition remains the appropriate sanction, for the reasons articulated by the hearing panel.

Dated this     day of February, 1995.

PROFESSIONAL CONDUCT BOARD

/s/

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Deborah S. Banse, Chair

/s/

/s/

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George Crosby

Donald Marsh

/s/

/s/

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Joseph F. Cahill, Esq.

Karen Miller, Esq.

/s/

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Robert Keiner, Esq

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J. Garvan Murtha, Esq.

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Paul S. Ferber, Esq.

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Robert F. O'Neill, Esq.

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Nancy Foster

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Ruth Stokes

/s/

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Rosalyn L. Hunneman

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Jane Woodruff, Esq.

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Edward Zuccaro, Esq.

For the reasons articulated in the hearing panel's report, I disagree with the majority's conclusion that Respondent's actions with respect to the file

constitute a violation.

/s/

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Nancy Corsones, Esq.

dal/9146.

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STATE OF VERMONT  
PROFESSIONAL CONDUCT BOARD

IN RE: PCB FILE NO. 91.46

HEARING PANEL'S REPORT TO THE PROFESSIONAL CONDUCT BOARD

FACTS

[The hearing panel issued findings of fact which are summarized as follows:

[Respondent ably represented his client, the complainant here, in her divorce. The litigation was acrimonious, spanning over 5 years and cost the client some \$23,000 in legal fees. Respondent was not paid for his services until the completion of the divorce.

[Subsequently, the client's ex-husband sued Respondent and filed a disciplinary complaint against Respondent. At this same time, Respondent was handling some post-divorce appellate matters for client. Client hoped to recover attorney fees. Respondent billed her for \$1,050 in legal services. Some of these legal services were for defending himself in the civil law suit and disciplinary inquiry.

[Client was distressed by the way in which Respondent was handling the appellate matter. Client complained to Respondent about this and about his bill. Respondent offered to withdraw as counsel and to forgive the unpaid fees of \$1,050. Client agreed to these terms and asked Respondent to send her complete file to her new counsel who practiced on the other side of the state. Respondent then asked client to execute mutual releases, whereupon he would release her file. Client refused to sign the release.

[During the course of his representation, Respondent had sent to his client copies of all communications, including correspondence and pleadings, both sent and received. Respondent resisted the request to transfer the file which exceeded one complete file drawer in size. Respondent maintained that he needed portions of the file to defend himself against the ex-husband's accusations. New counsel asked Respondent for copies of the trial transcript and for a copy of the superior court judge's opinion. After some period of delay, Respondent complied with this request.

[Ultimately, new counsel did not need the complete file because the client's pending appeal was dismissed on procedural grounds. - ed.]

## CONCLUSIONS OF LAW AND RECOMMENDED SANCTION

The complaint against Respondent alleges three violations of the Code of Professional Responsibility as follows:

First, Bar Counsel alleges that Respondent violated DR 1-102(A)(7) by charging client for time he devoted to his defense of a civil action in which he was a defendant, and for time spent in defense of a Professional Conduct Board complaint filed against him.

Second, Bar Counsel alleges that Respondent violated DR 6-102(A) by offering to forgive a fee he claimed was due to him from client, in exchange for a mutual waiver of liability, whereby he attempted to exonerate himself from or limit his liability to client for his personal malpractice.

Third, Bar Counsel alleges that Respondent violated DR 9-102(B)(4) by failing to deliver promptly properties in his possession to which client was entitled by failing to deliver her file to her new attorneys.

The Panel will deal with each of the alleged violations separately:

### VIOLATION OF DR 1-102(A)(7)

#### Charging Improper Fees

The parties agree that this was a particularly acrimonious divorce spanning a



period in excess of five years. Respondent's bills include more than a 1,000 entries spread over almost 150 pages . . .

Of the thousands of charges included in Respondent's billings to his client over the five years during which he provided legal services, there appear to be at most four or five charges which are questionable. These total less than \$100.00. The Panel agrees with Respondent's characterization of these billing improprieties as minor and insignificant compared to the extensive legal services provided by Respondent and is not persuaded that Respondent has engaged in conduct that adversely reflects on his fitness to practice law in violation of DR 1-102(A)(7).

#### VIOLATION OF DR 6-102(A)

##### Attempt to Exonerate Himself from Liability

Bar Counsel alleges that DR 6-102(A) is straight forward and mandates "a lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice".

The first question considered by the Panel was whether DR 6-102(A) prohibits an attorney from obtaining a release from his client under any circumstances. This is a question which has never been decided by the Vermont Supreme Court. While it cannot be said that there is an absolute prohibition of obtaining a release, it is clear from all of the cases cited by both Bar Counsel and Respondent that the right of a lawyer to limit his or her liability to a client for the lawyer's personal malpractice is extremely circumscribed.

A lawyer has been held to have an affirmative duty to advise the client of the client's right to seek other counsel and to advise the client about the nature and existence of any potential claim the client may have against the lawyer. In *Matter of Discipline of Schmidt*, 402 N.W. 2nd 544 (Minn. 1987); see also *Tallon v. Committee on Professional Standards*, 86 App.Div.2nd 897 (N.Y.A.D. 3d Dept., 1982). The Panel agrees with the rule urged by Bar Counsel that a lawyer may obtain a release from a client for the lawyer's possible or actual malpractice only after (a) the client is instructed to obtain independent legal advice about the propriety of signing a release, (b) the client has been informed about the possible claims the client may have against the lawyer, and (c) the lawyer and the client have specifically negotiated and settled those malpractice claims. The Panel is persuaded by clear and convincing evidence that Respondent's conduct failed to satisfy this test.

The second issue considered by the Panel with respect to this violation involved whether Bar Counsel was required to prove by clear and convincing evidence, as a necessary element of the alleged violation, that the Respondent committed malpractice in the course of his representation of the complainant. While most of the cases cited by both Bar Counsel and Respondent involved conduct on the part of lawyers where there was little doubt that there was malpractice, Respondent has not cited any cases standing for the proposition that actual malpractice is an essential element of a finding that DR 6-102(A) has been violated. In fact, it has been held that there is no merit "in the contention that since he (the Respondent lawyer) had committed no malpractice, there was no harm in (obtaining from a client) the release". In *re Preston*, 111 Ariz. 102, 523 P.2d 1303 (1974).

The Panel also considered whether "intent" is a necessary element to establish a violation of DR 6-102(A). Again, while most of the cases cited by both Bar Counsel and Respondent involved lawyers who committed malpractice and then intentionally sought to limit their liability by obtaining releases, there does not appear to be support for the position that actual intent to violate the Rule is an essential element of the offense. It has been specifically held that a lawyer's knowledge of the prohibition contained in the Rule is irrelevant. *Florida Bar v. Leopold*, 320 So.2d 819 (Fl. 1975). Nevertheless, the lawyer's knowledge of the prohibition and the lawyer's intent to commit the violation clearly goes to the question of the appropriateness of sanctions.

Bar Counsel has proved by a preponderance of the evidence that Respondent violated DR 6- 102(A).

#### VIOLATION OF DR 9-102(B)(4)

##### Failing to Deliver the File

Bar Counsel has alleged that Respondent refused to deliver client's file to her new lawyer when she instructed him to do so. At the hearing Respondent testified that it was his practice to furnish his clients with copies of all correspondence and documents generated both by Respondent and received by Respondent in connection with representing the client. He further testified that client had in fact received copies of all such documents and correspondence. Nevertheless, client no longer had her copies and her new lawyer requested additional copies of documents from Respondent and

Respondent did not immediately produce them. The record indicates that he in fact did ultimately produce the requested documents and that client was not prejudiced by any delay.

Considering all of the factors involved in this case including the volume of files in the possession of Respondent, the fact that Respondent had been sued by client's former husband and had a need for some of the files and records to defend that suit, and that client had received copies of the documents in question, the Panel is unable to find by clear and convincing evidence that Respondent has violated DR 9-102(B)(4).

#### RECOMMENDED SANCTIONS

In determining what sanctions should be imposed, we look to the ABA Standards for Imposing Lawyer Discipline for guidance. Standard 3.0 recommends that we consider a) the duty violated, b) the lawyer's mental state, c) the actual or potential injury caused by the misconduct, and d) any aggravating or mitigating factors.

##### A. Duty Violated.

Respondent had a duty to inform his client of the need to obtain independent legal advice with respect to the release and possible claims which the client may have had against the lawyer. A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities. EC 6-6.

#### B. Respondent's Mental State.

Respondent testified at the hearing that he was not aware of the prohibition contained in DR 6-102(A). Nevertheless, ignorance of his duty to his client does not excuse the offense. Although lack of intent is irrelevant as to whether the code has been violated, it is a significant issue with respect to what sanction should be imposed. The Panel believes that it should be considered in mitigation and we do so in this case.

#### C. Actual or Potential Injury.

There was no actual or potential injury to the client in this case and this is a mitigating factor which the Panel has taken into consideration.

#### D. Aggravating and Mitigating Factors.

We find that Respondent had no intention to harm client. Respondent has made full and free disclosure to Bar Counsel and has evidenced a cooperative attitude towards these disciplinary proceedings. Respondent is of good character with good reputation in his community as an honest and professional lawyer.

In aggravation, we find that Respondent has substantial experience in the practice of law. There is no excuse for his failure to educate to himself about his duties with respect to attempting to limit his liability to clients. We are also aware that Respondent has a prior disciplinary record including a recent public reprimand. However, the circumstances surrounding

those cases are totally unrelated to the violation of DR 6-102(A) wherein Respondent sought to obtain a release from his client and we therefore do not find them to be aggravating factors.

E. Applicable Standards.

The ABA Standard most applicable to this case is Standard 4.64 which states in part that an admonition is generally appropriate when a lawyer engages in an isolated instance in failing to provide a client with accurate or complete information, and causes little or no actual or potential injury to the client. We conclude in this case that Respondent was negligent in failing to advise his client to consult with another lawyer with respect to the release which he attempted to obtain.

In conclusion, we respectfully recommend to the Board that it adopt these Findings of Fact and Conclusions of Law and that it issue a private admonition.

Dated at St. Johnsbury, Vermont this 11th day of October, 1994.

/s/

Edward R. Zuccaro, Esq. Chair

Hearing Panel

Dated at Rutland, Vermont this 11th day of October, 1994.

/s/

Nancy Corsones, Esq.

Dated at Rutland, Vermont this 13th day of October, 1994.

/s/

Rosalyn L. Hunneman

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