

PCB 91

[07-Jul-1995]

STATE OF VERMONT
PROFESSIONAL CONDUCT BOARD

In re: PCB File No. 95.40

PCB File No. 95.40.1

NOTICE OF DECISION

Decision No. 91

The stipulated facts of these two cases present a situation where Respondents' billing practices resulted in their acquiring a personal interest in their clients' cases in violation of DR 5-103(B).

Respondent in 95.40 was admitted to practice law in the State of Vermont more than 10 years ago. Respondent in 95.40.1 was admitted some five years ago. Both lawyers practice law together and, until recently, followed the same billing practices.

In non-contingency cases, Respondents required their clients to advance a non-refundable retainer as a minimum fee. Respondents would then document the hours of service each provided to the client. If the initial, minimum retainer amount was not fully expended, Respondents would keep the balance as their fee. If the initial, minimum retainer amount was fully expended, Respondents would require another lump sum advance fee. If there was a remaining balance of this second advance, it was refundable to the client.

Although the fee agreement form stated that the client was responsible for

all expenses of litigation, these expenses were actually taken out of Respondents' fees without any expectation of reimbursement.

The result of these fee arrangements was that Respondents had a financial interest in how each prosecuted the clients' cases. This arrangement resulted in Respondents paying their clients' expenses. If Respondents elected not to take a deposition or hire an expert witness, the fee would be greater than if they decided to take those courses of action on behalf of the client. If the costs of litigation were extraordinary, Respondents, on occasion, would request reimbursement from the client. Such practice was not, however, the usual course of doing business. The clients with whom Respondents made such fee agreements were not all indigent or parties to a class action. DR 5-103(B) provides, in pertinent part:

While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, unless the client is indigent or a party to a class action; a lawyer, may, however, advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

By assuming the costs of litigation on behalf of clients who were not indigent or members of a class action, Respondents violated DR 5-103(B).

Bar Counsel has recommended that these lawyers be privately admonished.

Section 4.34 of the ABA Standards for Imposing Lawyer Sanctions provides that

[a]dmonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the representation of a client may be materially affected by the lawyer's own interests...and causes little or no actual or potential injury to a client.

There is no evidence in the stipulated facts that any clients were actually injured by Respondents' fee arrangements, although there was clearly a potential for injury. Nor is there any evidence in the stipulated facts that Respondents acted dishonestly. In mitigation, we find that neither Respondent has a prior disciplinary record and both have taken corrective steps to insure that their fee schedules now comply with the Code. The only factor in aggravation is that Respondent in 95.40 has substantial experience in the practice of law.

The Board accepts Bar Counsel's recommendation. A letter of admonition will issue.

Dated at Montpelier, Vermont this 7th day of July, 1995.

PROFESSIONAL CONDUCT BOARD

/s/

Deborah S. Banse, Chair

/s/

George Crosby Donald Marsh

/s/

/s/

Joseph F. Cahill, Esq. Mark Sperry, Esq.

/s/

/s/

Nancy Corsones, Esq. Charles Cummings, Esq.

/s/

/s/

Paul S. Ferber, Esq. Robert F. O'Neill, Esq.

/s/

Nancy Foster Ruth Stokes

/s/

/s/

Rosalyn L. Hunneman Jane Woodruff, Esq.

/s/

Robert P. Keiner, Esq.

DISSENTING OPINION

There is no evidence in the stipulation that Respondents ever took any short cuts in order to obtain more fees at the expense of their clients. There is also no evidence that Respondents intended by their fee practices to obtain any interest in their clients' litigation. As I read the stipulated facts, it appears that Respondents failed to understand that their fee schedules could violate the Code. I would dismiss the complaint.

/s/

Karen Miller, Esq.

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