

PCB 97

[07-Jul-1995]

STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

In re: Robert E. Cummings, Esq.--Respondent

PCB Files No. 94.51 and 95.06

DECISION NO. 97

Respondent, by and through counsel Thomas. J. Dailey, Esq., and Bar Counsel submitted a stipulation of facts which we adopt and attach hereto as Exhibit

1. All three appeared before the Board on June 2, 1995. Although the parties had previously signed a stipulation agreeing that a public reprimand is appropriate, Respondent argued that he had not understood the agreement.

His counsel urged that a private admonition be imposed. We recommend to the Supreme Court that Respondent be publicly reprimanded.

Respondent, who has been a member of the Vermont Bar for nearly 35 years, is before us on two different matters.

File 94.51

The first involves a lawsuit which Respondent filed in Vermont in October of 1990 on behalf of Mr. Burdo whose New York business sought to collect an unpaid bill of \$30,255 for work performed as a subcontractor on a construction project. Because Mr. Burdo had failed to register his company as a foreign business in accordance with 11 V.S.A. Sections 1621 and 1634, the court promptly dismissed the suit for lack of jurisdiction.

Respondent told his client that the suit had been dismissed but misrepresented the reasons for the dismissal. He told Mr. Burdo that the case had been dismissed because the business had failed to pay taxes owed to Vermont. He also told Mr. Burdo that the taxes had to be paid before the lawsuit could recommence.

Mr. Burdo immediately arranged to have these taxes paid and so notified Respondent. His business was badly in need of money, and he wanted to get the case moving again.

Respondent did not refile the law suit until February of 1992. Again it was dismissed pursuant to a motion filed by defendant arguing lack of jurisdiction because of failure to register the foreign business. Respondent did not file a response to this motion. An entry order granting the motion was filed in October. A dismissal order was filed in January of 1993. By then, the Statute of Limitations tolled Mr. Burdo's claim.

From the time of the first dismissal in May of 1990 until late 1993, Respondent had numerous conversations with his client about the case.

Respondent repeatedly misrepresented to Mr. Burdo that the case was pending. He would tell Mr. Burdo that they were waiting for a court date, or give some other reason for the delay. At one point, Respondent sent Mr. Burdo a tradename registration form, requesting that it be executed and returned. This served to reinforce Mr. Burdo's belief that his lawsuit was pending.

Throughout this time, Mr. Burdo was experiencing financial and emotional stress. His marriage broke up and he filed for personal and business bankruptcy. Respondent misrepresented to Mr. Burdo's estranged wife that the case was still pending and promised to send her documents from the case and a status report. He did not do so.

Finally, in late 1993 or early 1994, after yet another inquiry from his client, Respondent met with his client and told him the truth: the case had been dismissed and could not be filed again. They discussed the probable value of the lost claim. Eventually, after discussing the matter with another lawyer, Mr. Burdo settled for a payment of \$20,000 from Respondent who personally paid that sum.

DR 1-102(A)(4) provides that "[a] lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Respondent violated that rule by engaging in a pattern of deceit and misrepresentation. He not only misrepresented the reason for the first dismissal, he knowingly deceived his client into thinking that his second complaint remained pending for a year or more after it had been dismissed and could not be resurrected.

Respondent also violated DR 6-101(A)(3) ("[a] lawyer shall not neglect a

legal matter entrusted to him") by failing to ensure that the jurisdictional requirements of maintaining a lawsuit in Vermont on behalf of his client had been met--even after direct notice to him of the deficiency.

PCB File 95.06

The second disciplinary matter involves neglect of a real estate matter and joint representation of diverse interests.

In this case, an unmarried couple -- Mr. Babcock and Ms. Metcalfe -- retained Respondent in 1980 to prepare deeds so that Ms. Metcalfe would have an ownership interest in Mr. Babcock's house. They went to Respondent's office where they executed two deeds to vest in each of them a joint tenancy with rights of survivorship. Respondent was to have the deeds recorded. He neglected this task, however, and the deeds were never recorded.

Three years later, Mr. Babcock changed his mind. He went to Respondent's office and told a secretary there that he wanted to "un-do" the land deeds he had executed earlier. The secretary replied that this would cost \$25.00, which Mr. Babcock paid. He left the office believing that the house belonged only to him once more. The \$25.00 check was deposited into Respondent's checking account, although there is no evidence that Respondent knew anything about this.

The couple remained together for thirteen years and then separated. In 1993, Ms. Metcalfe learned that her rights in the property had not been protected. She retained an attorney and had to sue in order to establish her rights in

the property. She received a favorable ruling in 1994 and is now defending a partition action brought by Mr. Babcock.

Clearly, Respondent was not diligent in ensuring that the deeds of his clients had been properly recorded. Moreover, Respondent was not diligent in the training and supervision of his employees which should have prevented an employee from advising a client that an executed deed could be altered without the assent of all parties to the deed. Respondent's neglect of this case violated DR 6-101(A)(3).

The more substantial violation is in undertaking joint representation of the couple in the first place. DR 5-105(A) provides that "[a] lawyer shall decline proffered employment...if it would be likely to involve him in representing differing interests...." The conveyance of realty from one party to another, whether by gift or purchase, invariably involves differing interests and requires separate counsel.

Recommended Sanction

Three different sections of the ABA Standards for Imposing Lawyer Sanctions are applicable here. Section 4.43 provides, in pertinent part:

Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.

Section 4.43.

Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.

Section 4.62.

Reprimand is generally appropriate when a lawyer is negligent in determining...whether the representation [of a client] will adversely affect another client, and causes injury or potential injury to a client.

Section 4.33.

Both Mr. Burdo and Ms. Metcalfe were substantially injured by Respondent's misconduct. Mr. Burdo lost any opportunity to collect a \$30,000 debt he claimed was owed to him, although Respondent reimbursed him for 2/3 of that debt. Ms. Metcalfe has had to resort to litigation to protect her ownership interest in real property, an interest which would have been protected if Respondent had filed the deeds.

Respondent's state of mind was one of negligence in regard to protecting the interests of both clients; he acted knowingly in deceiving Mr. Burdo about the dismissal of his law suit.

We find the following mitigating factors present in this case:

* Respondent has no prior disciplinary

record;

- * Respondent made substantial restitution to Mr. Burdo prior to the involvement of Bar Counsel;
- * Respondent has cooperated with the disciplinary proceedings.

We find the following aggravating factors present in this case:

- * Respondent exhibited a selfish motive in his deceit of Mr. Burdo;
- * There are multiple offenses;
- * Respondent has substantial experience in the practice of law.

Respondent urges us to impose only a private admonition, a sanction which we find wholly inappropriate here. See A.O. 9, Rule 7 (A)(5). This was not minor misconduct and serious injury resulted. On the other hand, we are convinced that there is little or no likelihood that Respondent will again violate the Code of Professional Responsibility. It is clear to us that Respondent has been deeply affected by these proceedings.

We join in bar counsel's recommendation that a public reprimand issue. No

greater sanction is necessary to protect the public or educate the bar.

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

PROFESSIONAL CONDUCT BOARD

Deborah S. Banse, Chair

George Crosby

Donald Marsh

/s/

/s/

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/wsc/cummings.dec

STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

In re: PCB Files No. 94.51 and 95.06

Robert E. Cummings, Esq.--Respondent

STIPULATION OF FACTS

NOW COME Shelley A. Hill, Bar Counsel, and Robert E. Cummings, Respondent,
and hereby stipulate to the following facts:

1. Robert Cummings was admitted to practice law in the State of Vermont on
November 1, 1960. He is currently on active status.

PCB File No. 94.51

2. In early 1986 Ronald Burdo retained Mr. Cummings to represent his New
York company's interests in a lawsuit against a general contractor who had
not paid his company for sub-contract work completed. Mr. Cummings attempted
to collect, but, when unsuccessful, filed a lawsuit for \$30,255 on October 3,
1990.

3. The court granted the defendant's Motion to Dismiss for Lack of
Jurisdiction on October 25, 1990, citing plaintiff's failure to meet the
provisions of 11 V.S.A. Sections 1621 and 1634--not registering the foreign

business with the Secretary of State or in the town in which it conducted business.

4. Mr. Cummings told Mr. Burdo that the reason the case had been dismissed was that the business had failed to pay taxes it owed to Vermont for the money it had earned in this State. Mr. Cummings said that the taxes had to be paid before the lawsuit could recommence. Mr. Burdo, therefore, had his accountant recalculate his taxes immediately and paid approximately \$500 to the State. He immediately notified Mr. Cummings of the payment because his business was badly in need of money, and he wanted to get the case moving again.

5. Over the next several years Mr. Burdo experienced financial and emotional stress. His marriage broke up and he filed for personal and business bankruptcy.

6. Mr. Cummings refiled the complaint on February 18, 1992. On September 28, 1992 the defendant again filed a Motion to Dismiss for Lack of Jurisdiction for the same grounds asserted earlier, failure to register the foreign business pursuant to 11 V.S.A. Sections 1621 and 1634. Mr. Cummings filed no response to the motion, and the Motion to Dismiss was granted by entry order on October 19, 1992 for failure to comply with the registration requirements of Title 11. The court followed up that entry order by an order of dismissal dated January 18, 1993. By the time of the second dismissal, the statute of limitations on Mr. Burdo's action had passed.

7. From the time of the first dismissal, Mr. Burdo had numerous

conversations with Mr. Cummings about the status of the case. Mr. Cummings repeatedly told Mr. Burdo that the case was pending and that they were waiting for a court date, or gave some other reason for the delay.

8. By letter dated August 2, 1993 Mr. Cummings sent to Mr. Burdo a Tradename Registration form, requesting that it be executed and returned. Mr. Burdo did so. This communication served to reinforce Mr. Burdo's belief that his lawsuit was pending. In December 1993 Mr. Burdo's estranged wife called Mr. Cummings and asked about the status of the case. Mr. Cummings failed to tell her that the case had been dismissed and promised to send to her documents from the case and a status report. He did not do so.

9. Mr. Burdo called Mr. Cummings several months after August 1993 to once more inquire about the status of the case. Mr. Cummings asked him to come to the office, where he informed him that the case had been dismissed and could not be filed again. Mr. Cummings and Mr. Burdo discussed the relative financial merits of the case. Mr. Burdo took time to consult with another attorney about the financial discussion and thereafter settled the case with Mr. Cummings for \$20,000. Mr. Cummings paid the settlement personally.

10. Mr. Cummings is in violation of DR 6-101(A)(3) and DR 1-102(A)(4).

PCB File No. 95.06

11. George Babcock owned a home. In 1980 he and his then-girlfriend, Kathleen Metcalfe, decided that she should have an ownership interest in the home. The two retained Mr. Cummings to complete the legal requirements. Mr.

Babcock and Ms. Metcalfe went to Mr. Cummings office and executed two deeds to vest in each of them a joint tenancy with rights of survivorship. Mr. Cummings was to have the deeds recorded.

12. Mr. Babcock and Ms. Metcalfe remained together for 13 years but never married.

13. By 1983 Mr. Babcock changed his mind about wanting Ms. Metcalfe to have any interest in the home. He went to Mr. Cummings' office, where he spoke to a secretary. He told the secretary that he wanted to "un-do" the land deeds he had executed earlier. The secretary told Mr. Babcock that there would be a charge of \$25.00. He wrote out a check for \$25.00 and left, thinking the house belonged only to him once more. The \$25.00 check was deposited into Mr. Cummings' checking account. There is no evidence that Mr. Cummings had any personal involvement in this transaction in 1983.

14. The 1980 deeds had never been recorded, apparently through oversight.

15. Ms. Metcalfe learned for the first time in 1993 that her rights in the property had not been protected. Ms. Metcalfe retained an attorney and has had to engage in litigation to establish her rights in the property. She received a favorable ruling in 1994 and is now defending a partition action brought by Mr. Babcock.

16. Mr. Cummings is in violation of DR 6-101(A)(3) and DR 5-105(A).

17. Mr. Cummings has no previous disciplinary sanctions.

18. Mr. Cummings made substantial restitution to Mr. Burdo, prior to the involvement of Bar Counsel.

19. Mr. Cummings has cooperated with the disciplinary proceedings.

20. Mr. Cummings demonstrated a selfish motive in PCB File No. 94.51.

21. There is a pattern of misconduct.

22. There are multiple offenses.

23. Mr. Cummings has substantial experience in the practice of law.

24. Mr. Cummings' state of mind was negligence in PCB File No 95.06 and in his failure to protect the rights of his client in PCB File No. 94.51. Mr. Cummings' state of mind was knowing when he engaged in the deceit of his client in PCB File No. 94.51.

Dated at Montpelier, Vermont this 9th day of May, 1995.

/s/

Shelley A. Hill

Dated at Bennington, Vermont this 5th day of May, 1995.

/s/

Robert E. Cummings

ENTRY ORDER

SUPREME COURT DOCKET NO. 95-368

OCTOBER TERM, 1995

In Re ROBERT E. CUMMINGS, ESQ,	}	APPEALED FROM:
	}	
	}	
	}	Professional Conduct Board
	}	
	}	
	}	DOCKET NOS.
		PCB 94.51 & 95.06

In the above-entitled cause, the Clerk will enter:

Pursuant to the recommendation of the Professional Conduct Board filed July 17, 1995, and approval thereof, it is hereby ordered that Robert E. Cummings, Esq., be publicly reprimanded for the reasons set forth in the Board's final report attached hereto for publication as part of the order of this Court.

A.O. 9, Rule 8E.

BY THE COURT:

/s/

Frederic W. Allen, Chief Justice

/s/

Ernest W. Gibson III, Associate Justice

/s/

John A. Dooley, Associate Justice

/s/

James L. Morse, Associate Justice

/s/

Denise R. Johnson, Associate Justice