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[12-Jul-1996]

STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

In re Anonymous Attorney
PCB Docket No. 95.31

DECISION NO. 108

We have reviewed the hearing panel's report in which the majority recommends imposition of an admonition. The majority of the Board agrees with that recommendation.

Procedural History

Bar Counsel Shelley A. Hill filed a petition of misconduct against respondent, alleging that he violated DR 2-101(2) by writing three letters to a potential plaintiff in a divorce action.

The hearing panel heard this matter on January 3, 1996. Bar Counsel Shelley A. Hill and respondent, appearing pro se, were present. The evidence consisted of the introduction of three documents, attached hereto as redacted Exhibits 1, 2 and 3, and the testimony of respondent.

The panel submitted its report to us. Both parties were given an ample amount of time to submit briefs in accordance with A.O. 9, Rule 8 D. Bar counsel filed a brief. Respondent filed a letter which was considered by the board.

Both parties appeared before us on June 7. Initially, respondent asked us to recuse bar counsel from further participation in this case on the basis of alleged bias. We denied that motion as untimely and without support. Both parties then offered oral argument on this matter.

Facts

Respondent was admitted to the Vermont bar in October of 1990 and ceased practicing law here in the fall of 1993. Currently, respondent lives and works in Boston, Massachusetts, where he is a member of that bar. Respondent has a prior disciplinary history which includes a public reprimand.

Respondent's wife filed for divorce in late 1994. She began living with another man, DT, who, at that time, was separated from his wife, PT. The court eventually granted respondent's wife a divorce which became final in March of 1995.

Between September 20, 1994 and October 4, 1994, respondent sent PT three letters: Exhibits 1, 2, and 3.

In Exhibit 1, Respondent does not identify himself as an attorney;

Respondent does, however, repeatedly ask PT, a person he has never met, to contact him. It is in this first lengthy letter that Respondent states to PT that he can help her with respect to her divorce from her husband. Some of the ways Respondent said he could help her were:

> "help you get a divorce from him...at no cost to you but at great expense to him";
>
> "get you separate maintenance (alimony)";
>
> make "his life a living hell"; and
>
> assist "you to hit him so hard that he will join me in wishing he was never born".

Respondent sent a second letter dated September 27, 1994 just 7 days after the first letter. Respondent again does not yet identify himself as an attorney but continues to implore PT to contact him. Finally, on October 4, 1994 Respondent sent the third and final letter to PT and identified himself as an attorney who specialized in domestic relations. Respondent identified himself using the title "Esq." after his name. In the second letter, Respondent specifically references the first letter. In the third letter, Respondent specifically references the first and the second letters and implores PT to respond to him.

PT never answered any of the letters but, along with her husband, filed a complaint about them with the Professional Conduct Board.

Conclusions

When respondent wrote these letters, he was a lawyer. Taking the letters together, they refer to legal services which he claimed he could make available to her. We conclude that by writing this series of inter-related letters over a very short period of time, respondent made misleading representations about himself in violation of DR 2-101.

Respondent's letters were misleading because they were likely to create an unjustified expectation about what respondent could actually accomplish for her in a divorce action. For instance, respondent could not ethically represent PT himself nor had he any ethical means to obtain a divorce for her at no cost. He could not ethically assist her in obtaining separate maintenance or in making the defendant's life "a living hell". He could not ethically assist a litigant to "hit" another litigant "so hard" that he would wish "he was never born".

We will impose an admonition in this case because, given all the circumstances, this is a case of minor misconduct. A.O. 9, Rule 7 A(5)(b). There was no injury to the potential client, to the public, to the legal system, or to the profession. Although respondent acted selfishly and does have a prior disciplinary history, we find in mitigation that he was suffering from personal and emotional problems at the time. It is unlikely that this sort of misconduct will be repeated.

Dated at Montpelier, Vermont this 25th day of July, 1996.

/s/ /s/

Jane Woodruff, Esq.	Joseph Cahill, Jr., Esq.
/s/	/s/
Michael Filipiak	Ruth Stokes
/s/	/s/
Charles Cummings, Esq.	Robert O'Neill, Esq.

CONCURRING OPINION

We believe that the hearing panel and the board have reached the correct conclusions of law. Respondent clearly violated DR 2-101. However, the facts demand imposition of a public reprimand.

The majority correctly reads all three letters as a whole communication. The obvious point of the communication is solicitation of PT. Respondent states clearly in his first letter that he could "help [her] get a divorce...at no cost." Ex. 1. In the third letter respondent reveals to PT the reason he can help her obtain a divorce--that he is a lawyer and has expertise in domestic law. Ex. 3. With all due respect to the dissenting members, these offers go much beyond the statements of an aggrieved father.

As pointed out by the majority, these letters are replete with comments of how respondent could assist PT in his capacity as a lawyer. Even accepting the dissent's main point that respondent does not appear to have been soliciting a client and was merely offering his help with his knowledge of the law, such conduct by respondent is a violation.

> The general wording of the misconduct definitions allows lawyer discipline for conduct that is totally unrelated to a lawyer's practice. The theory behind discipline for such behavior is that a lawyer ought to be held to a higher standard of conduct than the average citizen because of his privileged role. Further, certain actions by an individual lawyer may be so egregious as to reflect negatively on the entire legal system.

ABA/BNA Lawyers' Manual on Professional Conduct at 101:104.

Respondent's conduct, as reflected in these three letters, was vengeful and a spiteful attempt to use, in the worst sense, the legal system to "get" DT. An attorney's obligation is to serve clients and the legal system, not to engage in manipulative conduct within the legal system to achieve an irresponsible personal goal. Obviously, respondent violated DR 2-101.

We cannot agree with the majority's conclusion, however, that the

conduct in question is "minor misconduct". To the contrary, attempts to manipulate the legal system to achieve one's own personal improper end strikes at the very heart of the system of justice that a lawyer is obligated to uphold.

Respondent also violated his duty to the public.

> The community expects lawyers to exhibit the highest standards of honesty and integrity, and lawyers have a duty not to engage in conduct involving... interference with the administration of justice.

ABA Standards for Imposing Lawyer Sanctions, at 5.

Respondent also violated his duty to the legal system. "Lawyers are officers of the court, and must abide by the rules of substance and procedure which shape the administration of justice." Id. Respondent also violated his duty to the profession, which requires adherence to rules concerning proper representation and maintaining the integrity of the profession. Id. at 6. Had PT been vindictive and accepted respondent's offer of assistance, respondent would have had the opportunity to "go after" DT, no holds barred. Respondent's offer to PT was not in accord with his obligation to use the legal system for the orderly pursuit of justice.

Respondent acted knowingly and intentionally. In the first letter, Respondent implored PT to "keep this letter and our relationship a secret. No one must know that I know about you." Ex. 1. Clearly Respondent knew at the time he wrote the letters that his conduct was improper. The only way to achieve his result was to do it in secret, as he attempted to do.

The majority holds that there was no actual injury to PT, but fails to address the issue of potential injury, which is certainly identifiable and potentially of a serious nature. DT would have had to counter whatever issues respondent could produce "to make his life a living hell." Ex. 1. He would have had do to so on his own, thus making him a very vulnerable target, or retain the services of an attorney, thus potentially costing him a lot of money.

The majority also did not thoroughly address the ABA guidelines which clearly require a greater sanction than admonition.

* Section 5.13 provides: "Reprimand is generally appropriate when a lawyer knowingly engages in...conduct that involves...deceit...and that adversely reflects on the lawyer's fitness to practice law."

* Section 6.22 provides: "Suspension is appropriate when a lawyer knowingly violates a court...rule, and there is injury or potential injury to a...party, or interference or potential interference with a legal proceeding."

* Section 6.32 provides: "Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of a legal proceeding."

* Section 7.2 provides: "Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to...the public, or the legal system."

Respondent acted knowingly and caused potential injury, perhaps of a serious nature. Accordingly, admonition is not appropriate.

The following aggravating factors are present:

* Respondent has a prior disciplinary offense, a public reprimand, imposed recently;

* There is a pattern of misconduct;

* Respondent does not accept the wrongful nature of his conduct.

Even giving respondent the benefit of the one mitigating factor found (personal and emotional problems), the aggravating factors far outweigh the one in mitigation.

We would recommend to the Supreme Court that a public reprimand be imposed. Respondent intended to cause serious repercussions in violation of the Code, armed with his training and experience as a lawyer. His stated goal was to misuse his professional status as a lawyer to the detriment of another. Respondent did not offer his "help...for a favorable outcome or sage advice, [nor to give PT]...the peace of mind that [her] interests [were] protected." In re Pressley, 160 Vt. 319, 325 (1993). He offered his professional expertise solely for his own goals of seeking personal vengeance on a person he disliked.

/s/ /s/

Nancy Corsones, Esq. Karen Miller, Esq.

/s/ /s/

Deborah S. Banse, Esq. Nancy Foster

/s/

Rosalyn Hunneman

DISSENTING OPINION

We believe that the majority has erred in concluding that there is clear and convincing evidence that respondent violated DR 2-101(2). Therefore, we respectfully dissent.

DR 2-101 is entitled "Communications Concerning a Lawyer's Services.". Subsection (2), in both letter and spirit, prohibits the inappropriate

advertising or soliciting of business by a lawyer, in that capacity. The disciplinary rule has been modified by an outright prohibition of advertising in order to accommodate the First Amendment rights of lawyers.

As stated, any violation of DR 2-101(2) must involve false or misleading communications by a lawyer, while acting as such. Here, the question is whether the respondent created an unjustified expectation about results which he could achieve while serving as PT's lawyer. Clear and convincing evidence to this effect does not exist. We believe that the majority has been either unwilling or unable to distinguish distasteful, childish behavior form that which is unethical.

In reviewing exhibits 1 and 2, we find only letters from a distraught father those marriage is falling apart. The respondent has contacted the wife of the man now living with his (respondent's) own wife. He desperately seeks to conspire with her (PT), in order to make life difficult for that man. In contacting PT, it is clear that the respondent was seeking revenge, not a new client:

> "Our two children are suffering and I want him [DT] out of my wife's life. I feel that by making his life a living hell we can accomplish that".

[See exhibit 1]

The letters, if written on a lawyer's stationery, could be construed to make claims which are unjustified and violative of the rule in question. However, respondent's letters were not written on lawyer's stationery. They were written by a hurt, vengeful father and husband seeking any help whatsoever to hurt his wife and the new man in her life. Exhibits 1 and 2 reveal behavior on the part of the respondent which is vengeful, sad, and certainly distasteful. It should not be construed with unethical behavior which is nowhere therein revealed.

It is not until the third letter, exhibit 3, that the respondent indicates that he is a lawyer. Even this revelation is obtuse: "...I know a thing or three about marital law -- I am a lawyer specializing in domestic relations". This comment is sufficiently oblique to be childish. We read it to suggest that the respondent is familiar with the law of domestic relations, but not as a solicitation to PT that he take on her representation.

Respondent was clearly obsessed with his failing marriage and was desperate to get information from PT which would allow him to amass unflattering information about DT's character. Both the majority and the concurring opinion would have us read the three letters as one and conclude that the reference to being a lawyer in exhibit 3 is sufficient to find respondent was acting in that capacity throughout. We cannot agree. We accept the respondent's testimony that he was not acting in a professional capacity but in a personal one. In our evaluation of the three letters, there is revealed a deeply distraught father and husband, not a lawyer inappropriately soliciting business. This, we believe, is the gravamen of DR 2-101(2) and it has simply not been established here.

Not only does the majority's decision affect purely personal conduct, it construes the disciplinary rule in a manner which gives no notice to the unwary. By the majority's construct, a lawyer violates DR 2-101 if he

writes a letter expressing a knowledge of the law, even though he makes no representation that he is a lawyer and has no intent to solicit clients. There is no language in any of the letters which solicits PT as a client. Respondent offers "help," not legal services. He never indicates that he would handle the divorce himself. The undisputed testimony indicates that respondent was seeking information, not business. Childish and vindictive -- certainly. Unethical? No.

Finally, there is no evidence there was harm to anyone, not the public, not the profession, and not to the object of respondent's ire, DT.

We would dismiss these charges as unproven.

/s/ /s/

Donald Marsh Robert P. Keiner, Esq.
Chair

NOTICE: This opinion is subject to motions for reargument under V.R.A.P. 40 as well as formal revision before publication in the Vermont Reports. Readers are requested to notify the Reporter of Decisions, Vermont Supreme Court, 109 State Street, Montpelier, Vermont 05609-0801 of any errors in order that corrections may be made before this opinion goes to press.

No. 96-376

In re Mark E. Warren, Esq. Supreme Court

Original Jurisdiction from
Professional Conduct Board

October Term, 1997

Shelley A. Hill, Bar Counsel, White River Junction, appellant

Mark E. Warren, pro se, Boston, Massachusetts, appellee

PRESENT: Amestoy, C.J., Dooley, Morse, Johnson and Skoglund, JJ.

PER CURIAM. This is an appeal by bar counsel of a decision of the Professional Conduct Board recommending an admonition as discipline for respondent's misconduct in violation of DR 2-101(2). We decline the Board's recommendation and impose a public reprimand.

Respondent attorney's wife filed for divorce in 1994 and began living with another man, D.T. At that time D.T. was separated from his wife, P.T. Between September 20, 1994 and October 4, 1994, respondent sent to P.T.

three letters, which are the subject of this proceeding.

In the first letter respondent tells P.T. that his wife is living with her husband, D.T., and that he wants to stop their relationship by "making his life a living hell." Although respondent does not identify himself as an attorney, he states that he can help her get a divorce from her husband "at no cost to you but at great expense to him." Respondent repeatedly asks P.T. to contact him. The letter concludes by stating that respondent "will get tremendous satisfaction out of assisting [P.T.] to hit [D.T.] so hard that he will join me in wishing he was never born."

The second letter dated September 27, 1994 refers to respondent's first letter and asks P.T. to contact him. Finally, on October 4, 1994, respondent sent the third letter to P.T. requesting, yet again, that she contact him. In this letter respondent identifies himself as an attorney, stating that "the reason I think I can help you is that . . . I am a lawyer specializing in domestic relations."

After holding a hearing, a six-member plurality of the Board concluded that respondent made misleading representations about himself. Respondent could not ethically represent P.T. in a divorce action or obtain a cost-free divorce for her. Likewise, he could not ethically assist her to make D.T.'s life "a living hell." The plurality, therefore, determined that the letters were likely to create an unjustified expectation about respondent's ability to successfully represent P.T. in a divorce action in violation of DR 2-101(2).

A five-member concurrence agreed that respondent violated DR 2-101(2), but disagreed with the plurality's finding that his conduct amounted to "minor misconduct." Finally, two members dissented, finding that respondent's conduct was not a violation of his professional responsibilities.

The Board was also divided as to the proper sanction. The plurality recommends a private admonition, believing this is a case of minor misconduct. The concurrence recommends a public reprimand, believing that respondent's misconduct is of a more serious nature.

Initially, respondent has not appealed the Board's finding that he violated DR 2-101(2). Instead, respondent argues that this Court lacks jurisdiction to sanction him as an attorney because he has resigned from the Vermont bar. We disagree.

This Court's disciplinary authority extends to "[a]ny lawyer admitted in the state, including any formerly admitted lawyer with respect to acts committed prior to resignation." A.O. 9, Rule 4A(1). Although respondent resigned from the Vermont bar on November 15, 1996, the letters predicating this disciplinary hearing were sent while respondent was admitted. This Court, therefore, has jurisdiction to sanction respondent notwithstanding his resignation.

We now consider whether a private admonition is the appropriate sanction for respondent's misconduct. Bar counsel essentially argues that we should reverse the Board's recommendation that we admonish respondent and impose a more stringent sanction because he knowingly violated his ethical obligations as an attorney. We agree.

When sanctioning attorney misconduct, we have looked to the American Bar Association's Standards for Imposing Lawyer Sanctions (ABA Standards) for guidance. See, e.g., In re Pressly, 160 Vt. 319, 322, 628 A.2d 927, 929 (1993); In re Rosenfeld, 157 Vt. 537, 546, 601 A.2d 972, 977 (1991). The Standards contain recommended sanctions for ethical violations and identify four factors that courts should weigh when determining whether the recommended sanction is appropriate. The four factors are the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct, and the existence of aggravating or mitigating circumstances. See In re Karpin, 162 Vt. 163, 173, 647 A.2d 700, 706 (1993); ABA Standard 3.0.

ABA Standard 5.13 provides that "[r]eprimand is generally appropriate when a lawyer knowingly engages in . . . conduct that involves . . . misrepresentation and that adversely reflects on the lawyer's fitness to practice law." Standard 7.2 suggests that a lawyer be suspended when the lawyer "knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to . . . the public or the legal system." If, however, the conduct is an isolated instance of negligence that causes little or no actual or potential injury, the Standards recommend an admonition.

A private admonition is not appropriate in this case because respondent knew when he sent the letters that his offer to represent P.T. was a violation of the Code of Professional Responsibility. Respondent sought to conceal his conduct. In his first letter, he asked P.T. to "keep this letter and our relationship a secret. No one must know that I know about you." That respondent tried to keep his conduct a secret indicates that he knew that it was improper. Moreover, respondent's testimony at the hearing and the content of his letters only make sense as an offer to use his knowledge of the law and legal experience in an unethical manner. Finally, respondent admitted knowing that he could not ethically represent P.T. When the Board asked him whether it would have been a violation of the disciplinary rules for respondent to have represented P.T., respondent replied, "Yes, absolutely."

It is no defense for respondent to claim that he was not acting in his capacity as an attorney. "An attorney is subject to [discipline] even for actions committed outside the professional capacity." In re Berk, 157 Vt. 524, 530, 602 A.2d 946, 949 (1991). Additionally, the record is barren of any evidence to support this argument. When asked how he would obtain a divorce for P.T. at no cost, respondent first replied that he intended to refer the case to another attorney; yet he never contacted the attorney to determine whether she would take the case for free. Respondent then indicated that he believed P.T. was indigent and, presumably, that she could obtain free legal services; yet he admitted that he "didn't know what the facts were."

We, therefore, find that respondent knew that his conduct was improper. We note that the Board's opinion does not make an express finding as to respondent's mental state, other than to say that he acted "selfishly." On this record, however, the Board's failure to make a finding that respondent knowingly violated his ethical obligations was clearly erroneous. See In re Bucknam, 160 Vt. 355, 362, 628 A.2d 932, 936 (1993).

Respondent's mental state is an important element in determining what

sanction should be imposed. Given our disagreement with the Board over respondent's mental state, we must revisit the Board's decision to recommend a private admonition. The Board based its recommendation on its finding that respondent's conduct did not cause any injury. We agree that there was little actual injury as a result of respondent's conduct. We do not agree, however, that this is a case of "minor misconduct" warranting a mere admonition. See A.O. 9, Rule 7A(5)(b) (admonitions proper "[o]nly in cases of minor misconduct"). Respondent knowingly violated his ethical duties and injury was avoided only because P.T. fortuitously decided to file a complaint instead of following respondent's advice.

Sanctions are intended to protect the public from lawyers who have not properly discharged their professional duties and to maintain public confidence in the bar. See In re Shepperson, 164 Vt. 636, 637, 674 A.2d 1273, 1274 (1996) (mem.); Berk, 157 Vt. at 532, 602 A.2d at 950. Respondent has a prior disciplinary record, including a recent public reprimand. At the Board hearing, respondent refused to even acknowledge the wrongful nature of his actions. If respondent continues to believe this type of conduct is permissible, it increases the likelihood of repeat violations. Taking into account these aggravating factors, a private admonition will neither adequately protect the public, nor will it maintain the public's confidence in the bar. Considering that respondent acted knowingly, but that his conduct caused little actual harm, a public reprimand is the appropriate sanction in this case. Compare ABA Standard 7.2 (suspension if knowing violation) with ABA Standard 7.4 (admonition if little or no injury).

Mark E. Warren is publicly reprimanded for violation of DR 2-101 of the Code of Professional Responsibility.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

_____
John A. Dooley, Associate Justice

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James L. Morse, Associate Justice

_____
Denise R. Johnson, Associate Justice

_____
Marilyn S. Skoglund, Associate Justice