120.PCB

[2-May-1997]

STATE OF VERMONT
PROFESSIONAL CONDUCT BOARD

In re: PCB File No. 93.07

DECISION NO. 120

This matter was presented to us by stipulated facts. Bar counsel and respondent submitted briefs, appeared before the Board and presented oral argument.

We accept the stipulated facts as our own with one exception. We strike paragraph 13 as a conclusion of law which we do not find. Given the length and detail of the stipulation, we will summarize it here briefly.

FACTS

At the time of these events, respondent had been a lawyer for some five years, two of them as a member of the Vermont Bar. His area of practice was business and land use law. As an outgrowth of that practice, he became involved defending a contentious law suit involving individual and corporate misdeeds, breaches of duties, fraud, and other willful and malicious conduct. Respondent had no expertise in this area and mishandled the litigation.

His mistakes began with failing to answer the complaint within the required 20 days. He answered after 50 days following two letters from plaintiff's counsel, one of which threatened a motion for a default judgement.

Respondent then failed to produce answers to interrogatories and to a request for production of documents in a timely matter. Respondent did not even submit the requests to his client until a week before the answers were due. The client failed to provide the information. For the next 14 months, plaintiff sought compliance with this discovery request by writing letters to respondent, filing a motion to compel, receiving an order compelling production, filing a motion for sanctions, receiving another order compelling production plus an award of costs, and filing a third motion to compel along with a request that a mittimus be issued against the defendant. Respondent produced the answers to the interrogatories on the courthouse steps just prior to the hearing on plaintiff's motion for a mittimus.

There remained the issue of production of documents. Those were not produced until plaintiff filed yet another application for a mittimus, until the court had to hold yet another hearing, and until the court ordered production of documents by 5 p.m. the next day. Then the defendant complied.

Throughout this time, respondent asked his client to produce the

requested material. Respondent succeeded in eventually producing the material only by going to his client's business and compiling the documents himself.

Respondent's other problems during this litigation involved the deposition of the defendant which was duly noticed by plaintiff's counsel. A day or two before the scheduled deposition, respondent called plaintiff's counsel with the news that the corporate client had filed for bankruptcy. Respondent did not inform plaintiff's counsel that they would not be attending the deposition.

During this conversation, respondent failed to mention to opposing counsel that he and his client would not be attending the deposition. Respondent had the mistaken belief that the fact of bankruptcy stayed the litigation. He assumed that plaintiff's counsel understood that the deposition could not go forward.

Respondent's understanding of the law was incorrect. Plaintiff's counsel prepared for the deposition and plaintiff drove some five or six hours from his out of state home in order to attend the deposition.

When neither respondent nor his client appeared, plaintiff's counsel proceeded to the courthouse to file a motion for sanctions. Respondent was reached at an out of town closing. By way of a telephone conference, the court assessed sanctions against respondent personally in the amount of $1,000.

Respondent did not pay this fine at first. He did not believe that the order was valid in the face of the bankruptcy action, although he did not seek review to the order. He finally paid the fine two years later.

The deposition of defendant remained outstanding. Plaintiff filed another notice along with a list of documents to be brought to the deposition. Respondent and his client appeared but did not bring with them the requested documents. Respondent had failed to comply with V.R.C.P. 30(b)(5) requiring written notice of his objection to the request for production.

Respondent's final problem in this litigation involved the court's order requiring his client to permit plaintiff access to all the corporate books and records.

After the court made such an order, the plaintiff tried to obtain access directly from the defendant. When defendant refused, plaintiff's counsel filed a motion for an order holding defendant in contempt and for attorney's fees. A hearing was held on this motion but despite personal service of the notice of hearing, neither the defendants nor respondent appeared.

A court order issued requiring access by a date certain or sanctions would result. Respondent wrote to opposing counsel, indicating his willingness to co-operate with this order and requesting notice of the date when plaintiff would be in the area to look at the books. A date was agreed upon. Respondent informed his client of the date, but one of the corporate employees again denied access.

A motion for sanctions resulted. The court ordered production and

imposed costs. As with the answers to interrogatories, plaintiff's counsel was unable to obtain access to these corporate books until filing the third motion to compel along with a request that a mittimus be issued against the defendant. As with the requests for answers to interrogatories, respondent failed to ensure compliance of the court orders by his clients.

Eventually, this case went to trial although respondent withdrew as counsel when it became clear that respondent would become a witness. The civil trial was never completed because all the defendants declared bankruptcy. The plaintiff unsuccessfully pursued defendant in bankruptcy court.

CONCLUSIONS

This disciplinary action is the result of a complaint filed in early 1992 by the plaintiff who alleged that respondent purposefully delayed discovery and intentionally obstructed the course of his litigation. While these facts would seem to support that conclusion, intentional misconduct was not the reason for the delays.

The delays were due to a confluence of several factors. First, was respondent's own inexperience at complex business litigation and his reticence to seek the help of more more experienced counsel. Second, was respondent's inadequate efforts to control his client.

Third, Respondent experienced a combination of personal tragedies that affected every facet of his life. During this time period, respondent's law practice nearly collapsed through forces totally outside his control. He became a parent under extremely difficult circumstances and, at the same time, Respondent's father died.

As a result of all these events, respondent neglected this litigation. As a result of his negligent attention to this case, he missed discovery deadlines, neglected to file pleadings on time, neglected to appear at hearings, neglected to make the efforts necessary to control his client, neglected to follow the rules of civil procedure, and neglected to give opposing counsel adequate notice that he would not be attending a deposition.

Respondent knew that his clients were causing discovery delays and that the delays were interfering or had the potential to interfere with the court proceedings. Respondent should have realized that this case was beyond his abilities to handle at that time in his life. Unfortunately, he remained in the case while neglecting to give it the attention it required.

We conclude that respondent violated DR 6-101(A)(3) by neglecting this legal matter entrusted to him. Fortunately, this was the only case so neglected. While multiple acts of neglect are evidenced, there was no pattern of similar misconduct with other cases and other clients. In mitigation, we note the extraordinary personal problems experienced by respondent and described above. In addition, respondent was relatively inexperienced, has no prior or subsequent disciplinary history, and suffered the imposition of other sanctions such as the $1,000 fine. He had no dishonest or selfish motive, was co-operative with these disciplinary proceedings which for reasons apparently not within his control took nearly five years to complete. We find no aggravating factors and no danger to the public.

In consideration of all of the above, we impose a private admonition.

Dated at Montpelier, Vermont this day of May, 1997.

PROFESSIONAL CONDUCT BOARD

/s/

Robert P. Keiner, Esq. Chair

/s/	/s/
John Barbour	Michael Filipiak
/s/	/s/
Nancy Foster	Jessica Porter, Esq.
/s/	/s/
Alan Rome, Esq.	Ruth Stokes

DISSENT

We are greatly troubled by the majority's decision here to admonish respondent.

The facts evidence a situation where discovery in a complex civil case required 14 months to complete, an event not unusual in civil practice. Had Respondent here engaged in intentional or bad faith obstruction of the discovery process, we would not hesitate to find a violation. Those are not, however, the facts of this case.

The delay was caused not by the lawyer failing to provide information in his possession, but by the client failing to provide the information to his lawyer. Respondent cannot be held responsible for his client's conduct. If Respondent erred, it was in sticking by this client rather than withdrawing when his client became so obviously difficult to represent.

To be sure, it is not good practice to fail to respond to motions or to allow court ordered deadlines to expire without any notice to opposing counsel or the court that deadlines cannot be met. Such conduct, however, is not a disciplinary violation. It is conduct which should be monitored in the first instance by the court before which the litigation is pending. That is what happened here, with somewhat severe personal sanctions

resulting. Further involvement in this matter by the disciplinary arm of the Supreme Court is overkill.

We are also concerned that the majority's decision sends the wrong message to the bar. By this decision the majority is opening a Pandora's Box of complaints about discovery disputes that have no rightful place before this board.

We conclude that the facts do not evidence a violation by clear and convincing evidence. We would dismiss.

/s/ /s/

Joseph Cahill, Jr., Esq. Charles Cummings, Esq.

/s/ /s/

Paul S. Ferber, Esq. Karen Miller, Esq.

/s/

Robert O'Neill, Esq.

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