126.PCB

[4-Dec-1998 & 1-May-1998]

STATE OF VERMONT
PROFESSIONAL CONDUCT BOARD

IN RE: PCB File No. 97.10

ORDER

Procedural Background

On May 1, 1998, a divided Professional Conduct Board ruled that a prosecutor violated two disciplinary rules of the Code of Professional Responsibility. In a 6 to 3 vote, a private admonition was issued. Three members of the Professional Conduct Board filed a written dissent, arguing that no sanctions be imposed and that the Professional Conduct Complaint be dismissed.

After issuance of the decision, the special bar counsel who prosecuted the underlying complaint and the attorney for Respondent, the subject of the complaint, jointly filed a motion asking that this Board reconsider its decision in one particular. While not challenging the conclusion that the Respondent violated DR 7-106(C)(4) (expressing personal opinion), the joint request was that the Board reconsider whether the facts or the law support a finding that the Respondent also violated DR 7-106(C)(1) in introducing prior bad acts evidence during a criminal trial. Oral argument on the Motion to Reconsider was heard and Memoranda of Law were submitted. The Board did agree to reconsider its May 1, 1998 Decision.

For reasons stated below, the Board now strikes that portion of the Decision that finds the Respondent violated DR 7-106(C)(1). In all other respects, our prior Decision is affirmed.

Factual Background

None of the relevant facts were disputed before the Board. Indeed, the matter came before us on a stipulated set of facts, which may have contributed to the disquietude among the Board. Given stipulated facts, live testimony is not taken, removing the ability of the Board to assess demeanor, credibility and all of the other attributes that make confrontation an essential part of our advocacy system. The very nature of this case concerns the conduct and demeanor of witnesses in the midst of a heated and serious felony trial involving allegations of heinous sexual misconduct against young children.

It is in any event clear that this prosecutor sought to introduce "prior bad acts" of the Defendant on the strength of VRE 404, an evidence rule allowing testimony of prior conduct where there is a distinctive pattern or conduct to help establish the identity of a perpetrator. Previously, this Board had concluded that the Respondent had proffered evidence that was so prejudicial it could not possibly be admissible. That

is, any reasonable prosecutor who researches the law of "prior bad acts" would know that the proffered testimony was improper and should not be placed before a jury. Respondent and special Bar counsel now point out that "prior bad acts" evidence has been admitted in other cases when it was sufficiently probative. See, e.g. State v. Bruyette, 158 Vt. 21 (1992); State v. Noyes, 157 Vt. 114 (1991); State v. Giroux, 151 Vt. 371 (1989); State v. Parker, 149 Vt. 393 (1988). In other words, a "reasonable" prosecutor may well conclude that the disputed testimony was admissible.

A minority of this Board points out that the cases relied upon in asking us to reconsider our earlier decision are distinguishable on their facts. The minority argues persuasively that the specific facts used in this trial were so highly inflammatory that any resultant conviction would be irreparably tainted. In this argument, the minority is correct.

That, however, does not answer the ethical problem presented to this Board, to wit: has there been a violation of DR 7-106(C)(1) or in other words, did the Respondent "state or allude to any matter that [the Respondent] has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence." The burden, as always, is on Bar counsel to establish by clear and convincing evidence that the Respondent's belief in admissibility of the proffered evidence was not a reasonable one.

Over and above Bar counsel's concession that he cannot meet this standard, on reconsideration, two factors convince the majority of the Board that our previous finding of a violation of this Rule was in error and must be stricken. First and foremost, we cannot overlook the plain language of the disciplinary rule we are asked to enforce. That rule requires that we confront the Respondent's belief, speaking in terms of whether the Respondent had "no reasonable basis . . .." To be sure, the minority of the Board points out that this Rule should have a purely objective standard applied, i.e. the "reasonable prosecutor" standard. Few lawyers, the minority suggests, would come before this Board conceding that they had no reasonable basis to offer certain evidence at trial. That, of course, returns us to having to assess the credibility of witnesses, including respondents, who appear before us in contested cases. More importantly, however, is the fact that we may not re-write the Rule in a particular case because we are unhappy with the outcome its application demands.

We conclude that the rule demands a two part analysis. The use of the phrase "no reasonable basis" does signify an objective standard; in this, the entire Board is in agreement. However, the rule then modifies the objective standard by requiring us to consider the state of mind of the lawyer: Did this particular lawyer, in stating or alluding to some matter, sincerely hold a good faith belief that the "prior bad acts" evidence proffered was either admissible under existing law or by a non-frivolous argument for the extension, modification or reversal of existing law? In this analysis, we analogize to Vermont Rule of Civil Procedure 11 which governs representations to a Court by an attorney. Phrased alternatively, we conclude that a violation of DR 7-106(C)(1) requires proof by clear and convincing evidence both that a) measured by an objective standard, there is no reasonable basis for offering specific evidence; and b) measured by a subjective standard, the proponent of the evidence did not subjectively believe the evidence was admissible. This latter element could be established, for instance, by showing the evidence

as being offered for some improper purpose, as might be the case under V.R.C.P. 11(b)(1).

As stated above, the reasonableness of one's belief must be measured at the time the evidence is proffered. The fact that evidence may ultimately be, on appeal, deemed inadmissible, it is not dispositive of whether an ethical violation occurred. Were that the case, any subsequent appellate reversal, could lead to charges to a violation of a disciplinary rule. It would also have the effect of subjecting a lawyer who follows the precepts of DR 7-102(2) by advancing claims supported by good faith argument for an extension of current law to be in violation of this instant Rule, if he or she guesses wrong, as measured after the fact by an appellate ruling. This interpretation would create an intolerable situation.

Secondly, evidentiary rulings are the responsibility of the trial judge. When the dust settles, the Board is left with the proposition that the Respondent prosecutor offered evidence, the Defendant objected and the trial court ruled. Our adversary system, and indeed our ethical rules, require that attorneys abide by the trial court's rulings unless and until it is later overturned on appeal, as occurred here. However much we may abhor prosecutorial zeal when it gets in the way of reasoned judgment, we must ultimately rely on the trial court to provide the checks and balances in our system, at least so long as there is some reasonable basis for a prosecutor's action. The sanctions the Respondent suffered, that the conviction of a quite probably guilty defendant was overturned, must suffice. See, e.g. EC 7-20, 7-22, 7-23.

We are also mindful of the fact that Vermont is one of only two states that still follow the older American Bar Association Disciplinary Rules rather than the Model Code adopted in the other 48 states which in large part eliminates the ambiguities inherent in the previous set of rules. In short, we are convinced that, however misguided we may now think the prosecutor's belief may have been, in retrospect, at the time the evidence was offered, the Respondent did sincerely believe there was a reasonable basis to support the admission of the evidence, and the trial judge agreed.

ACCORDINGLY, our May 1, 1998 Decision No. 126 in this matter is revised as follows:

- Respondent is in violation of DR 7-106(C)(4) for injecting personal views on the evidence into the proceedings.
- Respondent is hereby sanctioned by private admonition.

Dated at Montpelier, Vermont this 4th day of December, 1998.

PROFESSIONAL CONDUCT BOARD

Steven A. Adler

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Steven A. Adler, Esq.

John Barbour

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John Barbour

Charles Cummings

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Michael Filipiak

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Charles Cummings, Esq.

Michael Filipiak

Nancy Foster

Toby Young

Nancy Foster

Toby Young

Ruth Stokes

Mark L. Sperry, Esq.

Ruth Stokes

DISSENT

We must respectfully dissent from the decision reached here by the majority.

In the criminal case at issue, the Defendant was on trial having been charged with several counts of sexual assault on young children. The assaults involved the sodomizing of the alleged victims.

As indicated by the majority, V.R.E. 404(b) allows for the introduction of prior bad acts under certain circumstances. That rule, in its entirety, reads as follows:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The thrust of the rule, therefore, is to disallow evidence which is designed to have a jury conclude that the Defendant is a person of bad character. The exceptions to the rule simply permit the admission of relevant evidence not intended to impugn the character of the Defendant. The prior bad acts offered by the Respondent/Prosecutor here came during the course of her cross-examination of the Defendant. She questioned him about having anal intercourse with his wife and asked him if he enjoyed it. She asked whether he had been caught in a compromising position with another man, implying homosexual actions. She went through a laundry list of names of adults, questioning whether the Defendant had had sexual relations with these individuals. She questioned whether the Defendant had missed the birth of his daughter due to his use of alcohol and drugs and whether he had been in bed with another woman when his wife returned from the hospital. Finally, the Respondent questioned the Defendant about whether he had exposed himself to a group of children (who were not involved in this prosecution).

These evidentiary matters were taken up with the trial judge, out of the presence to the jury and prior to their admission. Despite defense objections, the judge allowed all of the aforementioned prior bad acts to be elicited by the prosecutor and presented to the jury.

The jury convicted the Defendant. On appeal, the Vermont Supreme Court reversed the conviction. State v. Lawton, 164 Vt. 179 (1995). Among the grounds for reversal, the Court condemned that aspect of the prosecutor's cross examination of the Defendant regarding the prior bad acts mentioned above and determined that the trial judge had incorrectly admitted this testimony.

It is the Board's position that we are not bound in our decisions on ethical misconduct by the evidentiary rulings of a trial court and/or the subsequent conclusions reached regarding those rulings by the Vermont Supreme Court. While we are troubled by the trial judge's admission of this evidence, we agree with the majority that such a decision may be given some weight in determining the reasonableness of a prosecutor's actions.

The ethical rule involved is DR 7-106(C)(1). It reads as follows:

> (C) In appearing in his professional capacity before a tribunal, a lawyer shall not: 1. State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

Respondent argues that "the critical question is whether at the time the Respondent introduced the evidence at trial she had a reasonable belief that it was relevant and admissible." She goes on to argue that the only evidence before the Board is that she did. This does not take into account reasonable inferences that the Board may reach based upon the evidence before us. At the time of the prosecution, the Respondent was an Assistant Attorney General specially assigned to sex crime prosecutions. Cases of this nature are often replete with "prior bad acts" evidence. We can only infer that this and any other prosecutor specially assigned to such prosecutions has familiarized herself with V.R.E. 404(b) completely. That being the case, we are at a loss to understand how this Respondent could "reasonably" have believed in the admissibility of the proffered evidence, notwithstanding the ruling of the trial judge. As an example, we address the issue of the testimony elicited by the Respondent about whether the Defendant had anal intercourse with his wife and whether he enjoyed anal intercourse generally. The prosecutor attempted to justify the eliciting of this testimony as being probative of the Defendant's specific method of anal sex - digital penetration as a prelude to anal intercourse - to show that the Defendant abused the children in this case. In State v. Bruyette, 158 Vt. 21 (1992), the Vermont Supreme Court established a very high threshold for the admissibility of such evidence. The Court stated that the acts in question "must be so distinctive, in effect, [as] to constitute the defendant's signature." In Vermont, Bruyette was one of the seminal cases in the area of prior bad acts at the time of this trial. We cannot help but conclude that a prosecutor in the Attorney General's sex crimes division would be familiar with this case, particularly in light of the prior bad acts which she sought to introduce in the Lawton case. Even if we agreed with the majority that the "reasonable basis" (for the proponent's belief in the admissibility of the evidence) required under DR 7-106(C)(1) is a subjective standard, we are nonetheless constrained to conclude that no such reasonable basis existed here. We reiterate that while the trial judge's ruling of admissibility has been given some weight in our analysis, neither his ruling of admissibility nor the Court's subsequent condemnation of that ruling on appeal is dispositive of the issue before us.

We would affirm the Board's earlier determination that Respondent violated DR 7-106(C)(1) in this case.

Robert P. Keiner	Paul Ferber
_____	_____
Robert P. Keiner, Esq.	Paul Ferber, Esq.
Robert O'Neill	Alan Rome
_____	_____
Robert O'Neill, Esq.	Alan Rome, Esq.

[1-May-1998]

STATE OF VERMONT
PROFESSIONAL CONDUCT BOARD

IN RE: PCB DOCKET 97.10

Notice of Decision
Decision No. 126

Respondent, after 5 years of experience as a trial attorney, prosecuted a serious felony case. It was a trial of great passion, involving allegations of heinous and repugnant conduct against victims of tender age. At the end of the trial, the jury returned a verdict of guilty. That conviction was eventually overturned because of errors the trial court made in admitting evidence that should not have been admitted. A second trial court ruled that double jeopardy protection precluded a retrial of the defendant.

The defendant filed a complaint against the prosecutor, initiating the instant disciplinary action. No hearing was necessary as the parties submitted stipulated facts and many attached exhibits. These included key portions of the transcript of the proceedings below. We heard oral argument from the parties.

On the record before us, we conclude that Respondent violated two disciplinary rules of the Code of Professional Responsibility. These violations are based upon Respondent's improper comments during cross-examination of the defendant and because Respondent offered "prior bad acts" evidence that Respondent should have known was inadmissable and highly inflammatory.

We must begin this discussion by stating that we find Respondent a competent, dedicated and sincere lawyer who believed strongly in the merits of the State's evidence against the defendant. Respondent zealously prosecuted the case in good faith.

However, in at least two parts of the trial, Respondent's zeal lacked a quality that our adversary system of justice demands from those lawyers willing to bear the responsibility of bringing the full power of the State against an individual accused of a crime. Zealous advocacy on the part of a prosecutor must be tempered by concern not only about the outcome of the trial, but the means employed in obtaining that outcome. The prosecutor's zeal in proving a case beyond a reasonable doubt must be accompanied by a concomitant dedication to following the rules of evidence and ethics to insure that the defendant receives a fair trial. Respondent neglected to do so in this case.

The first area of misconduct involves Respondent's comments upon the credibility of the defendant. Disciplinary Rule 7-106(C)(4) states, in pertinent part,

> In appearing in his professional capacity before a tribunal, a lawyer shall not ... [a]ssert his personal opinions as to the ... credibility of a witness...

In cross-examining the defendant, Respondent used words which conveyed Respondent's personal belief that defendant was lying. The words came in the form of a statement or commentary, rather than as a question. This is impermissible. Respondent was endeavoring to cross examine the defendant regarding a prior statement which he had made indicating that he would always deny the allegations against him, regardless of the weight of the evidence to the contrary. Respondent blundered in that effort. Whether that blunder was due to exhaustion or lack of experience or lack of preparation, we do not know. While the evidence before us shows that Respondent did not have a purposeful intent to inject a highly prejudicial remark at a crucial point in the trial, it is absolutely impermissible for lawyers to inject their personal views on the evidence into the proceedings, whether by mistake or design. It was a mistake which, however unintentional, clearly violated DR 7-106(C)(4). Compare State v. Lapham, 135 Vt. 393 at 407 (1977).

The second area of misconduct had to do with Respondent's introduction of " prior bad acts" evidence. Evidence of "prior bad acts" is generally not admissible, although there are exceptions to this general rule. Introduction of this evidence is often difficult and dangerous. A lawyer who seeks to introduce it should research each individual bad act to determine its admissibility well before trial. A good trial lawyer should brief this research for the benefit of the court.

In this case, Respondent introduced evidence of many inflammatory and prejudicial acts in the past that had no relevance to the particular charges before the jury. If Respondent had thoroughly researched the rules of evidence prior to trial, Respondent would have known that the evidence which Respondent intended to offer was improper. Given the subject matter, Respondent must have been aware of its inflammatory nature. Apparently, Respondent did not utilize the research and consideration necessary to assure that the proposed evidence was admissible and not unfairly prejudicial to the defendant.

The tragedy in this case is that not only did Respondent offer the impermissible evidence, the trial court admitted it. The trial court's erroneous rulings validated Respondent's mistaken belief that the evidence

was permissible. Respondent's focus and emphasis on the improperly admitted evidence compounded the problem and led to the reversal of the conviction.

Disciplinary Rule 7-106(C)(1) states, in pertinent part:

> In appearing in his professional capacity before a tribunal, a lawyer shall not ...[s]tate or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will be supported by admissible evidence.

We find by clear and convincing evidence that Respondent's belief in the admissibility of the proffered evidence was not a reasonable one. A review of the rules of evidence and relevant case law would have so indicated. We cannot condone Respondent's initial failure to recognize that the proffered evidence was way out of bounds, notwithstanding the trial court's error in allowing the evidence to be admitted.

Sanctions

Thus presented with two violations of the Code of Professional Responsibility, we have concluded that the appropriate sanction is a private admonition. There are many mitigating factors. Respondent has co-operated fully with this disciplinary inquiry and has shown great remorse. Other sanctions already imposed, such as the reversal of the conviction, have for this Respondent been of far more serious consequence than any sanction we might impose or recommend here. See A.B.A Standards, Rule 9.32(k). Respondent has learned a great deal about litigation as a result of this experience and there is little likelihood of repetition. Respondent has no prior disciplinary history. Respondent is a highly respected attorney with a good reputation. Respondent's misconduct was because of carelessness and negligence, not because of purposeful intent. There are no aggravating factors.

Dated at Montpelier this 1st day of May, 1998.

PROFESSIONAL CONDUCT BOARD

/s/
_____
Robert P. Keiner, Esq. Chair

_____ _____
John Barbour Joseph F. Cahill, Jr., Esq.

/s/ /s/
_____ _____
Charles Cummings, Esq. Paul S. Ferber, Esq.

_____ _____
Michael Filipiak Nancy Foster

Rosalyn L. Hunneman	Robert F. O'Neill, Esq.
/s/	
Jessica Porter, Esq.	Alan S. Rome, Esq.
/s/	/s/
Mark L. Sperry, Esq.	Ruth Stokes

Jane Woodruff, Esq.

In Re: PCB Docket No. 97.10

DISSENT

I feel strongly that I must dissent from the majority opinion because I disagree entirely with the majority's conclusions and believe that the case should be dismissed.

The majority has concluded that Respondent violated two different rules. In my opinion, the majority has erred.

The first rule at issue is DR 7-106(C)(4). The majority finds that this rule was violated when Respondent phrased the last question of the cross-examination in the form of a statement rather than a question. A lawyer's comment upon the credibility of a witness is apparently impermissible; whereas a question along the same lines is permissible. A statement such as "You have a pattern of lying" is unethical, but a question such as "You have a pattern of lying, don't you?" is acceptable.

After reading the transcript, it is impossible for me to believe that Respondent's statement at the end of the cross examination was more than slightly influential, if that, in the jury's guilty verdict, when the evidence and sworn testimony were so compelling.

First, the jury heard the entire cross-examination by a probing and zealous advocate - a style generally accepted these days. Second, a jury is composed of mature, educated citizens. This jury was not likely to have been unduly influenced by one final statement which, after all, was consonant with their verdict.

Third, and most importantly, the comment was an insignificant part of a much larger trial concerned with egregious child abuse. The comment in

question came at the end of a very lengthy cross examination on a Saturday evening. There was strong medical evidence and convincing testimony from the victims - more than enough to prove the defendant guilty beyond a reasonable doubt, and the jury so found.

Finally, the statement in question was made without objection from the defense counsel or any comment from the judge, both of whom have had years of trial experience.

For all of these reasons, I would dismiss the allegation that Respondent violated DR 7-106(C)(4). To do otherwise, it seems to me, would elevate a possible minor infraction to an unsupportable serious charge.

The second rule at issue is DR 7-106(C)(1). That rule prohibits a lawyer from using evidence which the lawyer has no reasonable basis to believe was admissible. The majority's conclusion that the Respondent violated this rule is particularly distressing to me because the clear and convincing evidence in the record before us is that Respondent believed the proffered evidence was admissible at the time it was offered. That was Respondent's stipulated testimony. There is no evidence to contradict that testimony. I find Respondent to be believable and sincere. The record is replete with instances in which Respondent took pains to ensure that the evidence was being properly admitted. The clear and convincing evidence is that Respondent had every intention of complying with the rules of evidence and procedure. Further, the trial court admitted the evidence; thereby supporting Respondent's reasonable belief that the evidence was proper. The fact that the Vermont Supreme Court later found that the trial court erred in this ruling should not be used to sanction the Respondent.

For all these reasons, I would dismiss the allegation that Respondent violated DR 7-106(C)(1).

In conclusion, I must say that the fact that the Vermont Supreme Court reversed the guilty verdict on what appears to me to be based on an inaccurate reading of the transcript, is very disturbing. A careful comparison of the direct examination and the cross examination establishes, in my opinion, a clear connection between the direct and the cross examinations. Furthermore, the fact that the reversal was based in a large part upon the conclusion that the Respondent intentionally engaged in prosecutorial misconduct - without even giving the prosecutor a chance to respond, seems to me to be grossly unfair and not supported by the record.

For the second trial court to dismiss the proceedings entirely on essentially the same grounds, without a hearing, an action which had the effect of overturning a guilty verdict in a very serious case of child abuse, is unforgiveable. I hope the Board will not add to these unfortunate outcomes by sanctioning the Respondent..

Dated at Montpelier, Vermont this 1st day of May, 1998.

/s/

Rosalyn Hunneman

/s/

John Barbour

/s/

Nancy Foster

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