141.PCB

[3-Dec-1999]

STATE OF VERMONT
PROFESSIONAL CONDUCT BOARD

IN RE: PCB Docket No. 96.49

FINAL REPORT

Decision No. 141

Introduction

In this case, Respondent was charged with misrepresenting to the court the reasons for filing a motion to withdraw from a divorce case. Respondent represented that his client had discharged him when, in fact, Respondent had refused to continue representation following a misunderstanding as to payment of his fees.

After conducting a full evidentiary hearing, the hearing panel submitted its report and recommendations to us on September 22, 1999. It found that Respondent violated DR 1-102 (A)(4) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) and DR 7-102(A)(5) (knowingly making a false statement of fact during the representation of a client), as charged in the petition.

Pursuant to Administrative Order No. 9, Rule 8D, parties were given an opportunity to file briefs. We heard oral argument on October 1, 1999. Bar Counsel Jessica Porter, Respondent, and Respondent's counsel appeared.

After consideration of counsel's oral and written presentations, we adopt the findings of fact, conclusions of law and recommended sanctions contained in the hearing panel's decision. We, therefore, will issue a private admonition.

Findings of Fact and Conclusions of Law

1. Complainant hired Respondent to represent her in a divorce action on August 3, 1989. At that time Respondent was aware that Complainant had no money. There was no written fee agreement. Although there was some discussion about Complainant's obligation to pay the bill, there is conflicting testimony as to when the bills were to be paid and by whom. At one point Complainant thought that her ex-husband would be ultimately liable for legal fees. She also thought that Respondent told her not to worry about the legal fees at this time.

2. In November 1989, Respondent appeared at a hearing and obtained a temporary order for Complainant. After that hearing, Respondent had no further meetings or telephone conversations with his client. Communication was handled through the mail or by support staff.

3. Respondent sent Complainant bills periodically. Complainant did not pay them. By some time in December of 1989, Complainant understood that she had an obligation to pay something toward her bill. She had no

funds and did not do so, although she worried about how the legal fees were mounting up.

4. By January, her concerns about the bills became acute. On January 15, she telephoned Respondent to discuss these concerns with him. Because she had some training as a paralegal, she wanted to suggest that perhaps she could help with preparing answers to interrogatories, in order to keep the costs down.

5. Respondent was not available to take Complainant's call and she was referred to Respondent's junior associate. Complainant told Associate that she was concerned about the costs and that she wanted to talk with Respondent about handling some of the work herself in order to contain them. She also said she wanted an explanation about some of the time billed. Complainant asked for a meeting to be scheduled with Respondent that week.

6. Associate relayed Complainant's concerns to Respondent via a memo which Complainant contends incorrectly characterized her demeanor as "irate".(FN1) The body of the memo states, in its entirety:

> [Complainant] is irate at your costs. Says she can no longer afford you. Wants to answer interrogatories herself (due 1/20). Wants an appointment, one half hour with you this week.
>
> I explained she couldn't represent herself until you withdraw.
>
> She doesn't want to pay for phone calls, etc, etc, etc . . .

7. When Respondent received this memorandum, he reviewed the billing records for the first time to see if he could learn what the problem was. He discovered that no retainer had ever been paid. He discovered that no payment had ever been made on over $1700.00 in legal services. Respondent was very surprised by this lack of payment.

8. Respondent became angry and upset at Complainant's attitude as it was reflected by Associate's memo. He was upset by her apparent failure to pay any money toward this account, contrary to his view of what their oral fee agreement required. Respondent had spent considerable time on her behalf, he felt he had done a good job representing her, and he felt that she was not appreciative of his efforts.

9. At this point, Respondent should have telephoned his client or scheduled the meeting which she had requested. By such direct contact, he may have been able to improve communications and discuss his client's legitimate concerns over costs. Instead, he decided, unilaterally and based upon the second hand information he had received from Associate, that he did not want to continue representing this particular client.

10. Rather than setting up the requested appointment, Respondent sent his client a letter on January 17 in which he informed her that if she wanted to represent herself, that was her prerogative. The letter went on:

> In the meantime, would you please make arrangements to make regular periodic payments on your statement as I have requested. I would go so far as to say I have put in an inordinate amount of time in this case in an attempt to assist you when you did not have any money and carried you

when you did not have any money, and assisted you when you did not have any money. It is nice to know my assistance is so much appreciated.

11. Complainant was shocked by this letter. She did not want a new lawyer; she had wanted to work with Respondent in order to contain costs. She also felt that his demand for payment was inconsistent with their oral agreement. She felt that her inquiries about her bill were not "complaints" about the services rendered; she wanted to discuss her concerns and her thoughts on how to minimize her costs.

12. In order to straighten out this misunderstanding, she contacted his office again. She was unable to reach him or to obtain an appointment with him.

13. Complainant then wrote a letter which was received in Respondent's office on January 24, 1990. In her letter, in which she tried to be conciliatory and appreciative, Complainant made it absolutely clear that she wanted Respondent to continue to represent her. Complainant paid a small portion of the outstanding fees to Respondent, concluding that she hoped her "letter clears up any strained feelings and that we can continue to work together."

14. In the meantime, Respondent dictated a letter on January 23, 1990 which was demeaning and wholly inappropriate. In his letter he berated Complainant for her "absolute audacity" in complaining about his bill. He wrote, "As I advised you in my letter of 17 January, you are to obtain other counsel." Respondent complained that he was "no longer going to put up with your insults, your demands to me and this office."

15. On or about the same date, Respondent also informed opposing counsel that he was withdrawing from the case. He wrote a confirming letter on January 23, stating that Complainant would be obtaining other counsel "premised upon non-payment of my statements."

16. Complainant was emotionally distraught by Respondent's letter, having taken some considerable time trying to communicate with Respondent and having sent him $200.00. She received a response to her letter in mid February which merely stated, "What, if any, arrangements have you made pertaining to my last letter. I did receive your last letter after my letter had gone out." By this point, Complainant had become depressed and was having difficulty coping with demands of creditors. At some point after learning that Respondent would no longer represent her, she stopped opening the mail from his office.

17. On February 27, 1990, Respondent filed a motion to withdraw, and sent a copy to Complainant who did not open it. As the basis of his motion, Respondent falsely stated to the Court:

> That Defendant has stated that she no longer required the services of [Respondent's] law offices and requested withdrawal of counsel, therefore counsel feels at this state that he can no longer adequately represent his client.

18. At no time did Complainant ever state that she no longer required the services of Respondent's law offices. At no time did Complainant ever ask Respondent to withdraw as counsel.

19. Complainant learned of the motion to withdraw when she received a telephone call from the Clerk of Courts asking her if she was going to attend a motion hearing scheduled for that day. Complainant did not want Respondent to withdraw but believed that there was nothing further she could do to stop him. She did not appear, and the motion was granted as a matter of course.

20. Thereafter Complainant did make some efforts to represent herself, but she never entered a pro se appearance. Therefore, she never received notice of the final hearing. A judgment favorable to her former husband was entered. When Complainant learned about the judgment, she was able, at additional expense, to have it set aside and amended somewhat.

21. In 1995, Complainant, now living out of state, became aware of other complaints about Respondent regarding his unprofessional treatment of another client in connection with a billing dispute. Complainant decided to review her own case and came upon the motion which stated that she had asked Respondent to withdraw from her case. Upon learning of this false statement, she filed a complaint with Bar Counsel on November 14, 1995.

22. Respondent first became aware of the complaint by letter he received from Bar Counsel on February 8, 1996. He immediately notified Bar Counsel that his recollection was vague and portions of his file had long since been turned over to other attorneys. However, Respondent did not testify as to any failure of memory at the hearing. To the contrary, his testimony indicated that he had not forgotten this matter.

23. Respondent testified at the merits hearing that his statement to the court in the withdrawal motion was based not upon any conversation with Associate but upon the memo from Associate. The memo does not state that Complainant asked him to withdraw or wanted a new lawyer, as he so represented to the court. It is clear that Respondent fired his client, and not the other way around.

24. The Code of Professional Responsibility details the conditions under which an attorney may withdraw from representation. An attorney must request permission to withdraw from representation if he is discharged by the client, DR 2-110(B)(4). An attorney may request permission to withdraw from representation, or if the client "deliberately disregards an agreement or obligation to the lawyer as to expenses and fees", DR 2-110(C)(1)(f).

25. Here Respondent misled the court by averring facts which, if true, gave him grounds for a mandatory withdrawal request. If he had correctly and honestly represented his grounds as a billing dispute, there would have been an inquiry as to whether the client had deliberately disregarded an obligation to pay fees. Given the lack of fee agreement and Complainant's view that the obligation to pay fees had been postponed, Respondent may have had difficulty prevailing on his motion to withdraw. He certainly would have had to spend more time on it than on a mandatory withdrawal request. When asked why he did not present these grounds to the court, Respondent testified that he wanted to protect his client from the public disclosure of her financial failures. We find that testimony to be disingenuous.

26. Respondent offered testimony at the hearing which demonstrated that he took some important steps to protect his client's interests such as contacting opposing counsel and securing additional time for answers to interrogatories. Such actions would be in conformance with DR 2-110(A)(2) which requires the lawyer to

> take reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

However, Bar Counsel did not charge Respondent with violating that rule, and we cannot consider here whether or not the rule was fully satisfied

27. The only charged conduct here involves false statements. We have no difficulty concluding that the statements made to the court were not true. The next issue to determine is whether Respondent's knew at the time he made these statements that the statements were false.

28. We find that all of the credible, relevant evidence shows that Complainant never made these statements to Respondent or anyone in his office prior to her letter received January 24. Even if we were to find that Respondent negligently assumed from Associate's memo of January 13 that his client wanted new representation, that does not explain how Respondent could persist in that negligent assumption upon receiving Exhibit 14. Exhibit 14, the letter received by Respondent on January 24, constitutes his client's final communication on this subject.(FN2) Her letter clearly and unequivocally conveyed to Respondent her desire to continue with Respondent as her lawyer.

29. We conclude that by stating the opposite of that sentiment to the court, Respondent knew his statements to be untrue. Respondent thereby violated both DR 1-102(A)(4) (engaging "in conduct involving dishonest, fraud, deceit or misrepresentation") and DR 7-1-2(A)(5) (knowingly making false statements of fact during the representation of a client).

Sanction

In considering the appropriate sanction we consider the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors. Standard 3.0, Standards for Imposing Lawyer Sanctions, ABA, 1991. This has long been the standard followed by the Professional Conduct Board and the Vermont Supreme Court. See In Re Berk, 157 Vt 524, 532 (1991).

Respondent violated his duty of candor and honesty to the court. Standard 6.0. The judicial system must be able to rely upon the representations of the lawyers. Lawyers must be scrupulously honest in their communications with the court and take pains not to mislead or misinform.

Other than the fact that Respondent knew the statements were false when he made them, we can make no further findings regarding Respondent's state of mind.

As to injury, the harm caused by the false statement was that the court facilitated Respondent' efforts to abandon this client wrongfully. The applicable Standard for imposing sanctions here is 6.12 (suspension) or 6.13 (public reprimand). These standards provide general guidelines, and we deviate from those standards because of the particular aggravating and mitigating factors present here.

As to aggravating circumstances, particularly Standard 9.22(a), we note that two and a half years prior to the events here, Respondent was privately admonished by this Board. We also find that the ultimate victim, his client, was vulnerable. Standard 9.2 (h). At the time of this infraction Respondent had substantial experience in the practice of law. Standard 9.22 (i). As to Standard 9.22(g), refusal to acknowledge wrongful nature of conduct, we note that Respondent testified that he felt badly if he contributed to Complainant's obvious anguish over the way she was "fired" and abandoned by her lawyer. Yet, Respondent did not exhibit any remorse and continues to feel justified that his representations to the court were honest without pointing to any credible evidence that would substantiate his position.

In mitigation, we find that Respondent was co-operative with disciplinary counsel and these proceedings. Standard 9.32(e). The most significant mitigating factor present here is 9.32(i), delay in disciplinary proceedings. That compels us to impose a private admonition as recommended by Standard 6.14.

From the beginning, Respondent has asserted that the equitable laches should bar this action. We find that argument unavailing, and decline to dismiss this case on those grounds.

The general rule in lawyer disciplinary proceedings is that "delay will not be a defense to the disciplinary proceeding absent a showing of clear or specific prejudice." 101 ABA/BNA Lawyers' Manual on Professional Conduct 2113. See In Re Geisler, 614 NE2d 939 (Ind Sup.Ct 1993); In Re Carson, 845 P2d 47 (Kan Sup.Ct 1993); Board of Bar Overseers v. Dineen, 557 A2d 610 (Maine SupJudCt 1989); Maryland Attorney Grievance Commission v. Owrutsky, 587 A2d 511 (Md CtApp 1991).

There may be cases where the passage of time is so great that it affects the fundamental fairness of disciplinary proceedings, thereby giving rise to a due process violation. See, e.g., Tennessee Bar Association v. Berke, 334 SW 2d 567 (Tenn CtApp 1960)(petition dismissed where conduct not charged until nine years after brought to the attention of the disciplinary authority and where the lawyer had committed no other transgressions in the interim). That is not the case here.

Complainant did not discover the false statement until five years after it was made. She then reported it promptly to the Professional Conduct Board. Respondent became aware of the complaint a few months after disciplinary counsel became aware of it and just shy of six years after the misconduct occurred.

The delay of nearly four additional years in this matter reaching a hearing panel is more troubling. We are aware that lack of prosecutorial resources and a large case backlog have plagued the Office of Bar Counsel for some time. We assume that was the cause for the delay in bringing charges. Nevertheless, during that four year interim, Respondent was aware

that this matter was under investigation. He had ample time to retrieve his file from subsequent attorneys. While there is a claim that Associate is no longer available, we fail to see why her testimony would be of assistance to Respondent. Given that Respondent testified that the only information he received from Associate was contained in the memo, not in any oral communication, there would appear to be little for Associate to offer.

The majority of jurisdictions respond to delay in disciplinary proceedings as a mitigating factor, rather than as a defense based upon laches. See, e.g., Florida Bar v. Micks, 628 So2d 1104 (Fla Sup Ct 1993)(bar's delay in filing disciplinary action would not affect determination of guilt, but could be considered in determining sanctions). We conclude that we should take that same approach.

Since these events occurred, Respondent was disciplined on three separate occasions. Since the last discipline was imposed in 1995, no further disciplinary proceedings have been brought.

The purpose of disciplinary proceedings is not to punish the transgressor but to protect the public and the profession from attorneys who engage in unethical conduct. Because these events occurred nine years ago and because Respondent's subsequent experience with the lawyer disciplinary system may have already had a rehabilitative impact upon Respondent, we conclude that little point is served in imposing a public sanction at this point.

Dated at Montpelier, Vermont this 3rd day of December, 1999.

PROFESSIONAL CONDUCT BOARD

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

/s/	/s/
_____	_____
Steven A. Adler, Esq.	John Barbour
_____	_____
Charles Cummings, Esq.	Paul S. Ferber, Esq.
/s/	/s/
_____	_____
Michael Filipiak	Barry E. Griffith, Esq.
/s/	/s/
_____	_____
Robert F. O'Neill, Esq.	Alan S. Rome, Esq.
ABSENT	
_____	_____
Mark L. Sperry, Esq.	Ruth Stokes

Joan Wing, Esq. Toby Young

DISSENT

I cannot join in the majority's recommended sanction, therefore I must respectfully dissent. In this particular case, Respondent has been found to have violated two very serious disciplinary rules which both involve dishonesty. There is nothing more important to maintain the public's confidence in the legal profession than being able to rely upon a system that does not tolerate any form of dishonesty. When one couples a knowing misrepresentation with the fact that it was made in the judicial arena, the violations become all that much more egregious.

In the present case, the Complainant was very vulnerable. She was going through a difficult divorce and was facing mounting financial problems that she was attempting to cope with. She attempted to work with the Respondent to keep her legal fees down, but these attempts were not looked upon favorably by the Respondent. The Complainant became increasingly depressed, to the point where she no longer opened her mail from the Respondent.

The majority cites aggravating and mitigating factors and then relies principally upon the delay in the proceedings since the complaint was filed to justify its recommendation for a private admonition. I cannot accept that analysis as appropriate.

Here the Respondent knowingly violated his duty of candor to the court, a core duty. In doing so, he was able to wrongfully abandon a vulnerable client.

Respondent had substantial experience in the practice of law. Prior to the events of this case this Board privately admonished him. The Hearing Panel found that Respondent exhibited no remorse. The facts of this case cry out for at least a public reprimand. If you follow ABA Standards for Imposing Discipline, 6.12 suggests that when the falsehood is knowingly made to a court, suspension generally is appropriate. The Hearing Panel specifically found that the Respondent knew the statements were false. The majority then relies upon the delay in the proceedings and the Respondent's cooperation in the proceeding to reduce his sanction to a private admonition. In my estimation, the cooperation and the delay do not justify recommending a private admonition. Given the facts of this case, one could argue convincingly for a period of suspension. I would give some weight to the two mitigating factors relied upon by the majority. The weight that I would assign to them would be to take the sanction out of the realm of suspension and place it firmly as a public reprimand. For these reasons,

I respectfully dissent.

/s/

_____

Jane Woodruff

Footnotes

FN1. Why Associate used the word "irate" in her memo is irrelevant. Possible explanations run the gamut from an honest, but possibly inartful attempt to characterize the client's demeanor, to a ploy by the associate to urge her boss' attention to a neglected file. The associate has apparently left the state and possibly the country and is unavailable. The important point is that Respondent read far more into the memo than was written and made unwarranted conclusions about his client's attitudes and desires.

FN2. Respondent acknowledged in a letter he dictated to his client on February 9 that he had received her letter and, presumably, read it.