PCB 3

[12-Oct-1990]

PROFESSIONAL CONDUCT BOARD

STATE OF VERMONT

In Re: PCB File No. 88.115

NOTICE OF DECISION

PCB No. 3

Procedural History

A complaint was filed with the Professional Conduct Board by a former client of Respondent, a member of the Vermont Bar.

Bar Counsel investigated this matter and, as a result of the investigation, entered into a stipulation of facts with the Respondent. Respondent waived all rights to an independent review by a hearing panel of that stipulation. Respondent further waived all procedural rights to which he was entitled under Administrative Order No. 9.

The Professional Conduct Board reviewed the stipulation of facts, conclusions of law, recommendation to the Professional Conduct Board, and waiver of procedural rights.

The Professional Conduct Board accepted that stipulation and hereby incorporates it into the following findings of fact and conclusions of law.

Facts

1. In the winter of 1986-1987, Complainant was receiving temporary total disability benefits under Worker's Compensation when he learned that his benefits had been cut off.

2. Complainant telephoned two attorneys to obtain help in restoring his benefits. Both of them charged $75 an hour which Complainant could not afford.

3. Complainant then telephoned Respondent who said he would take the case on a contingency basis. This was acceptable to Complainant.

4. Complainant and Respondent entered into a fee agreement on January 29, 1987 whereby Complainant agreed to pay one third of any received benefit checkto Respondent. Complainant agreed that the benefit checks would be mailed to Respondent's office where Complainant would pick them up on a weekly basis and pay the one third attorney's fees. Respondent wanted the benefit checks mailed to him so that he would be assured of payment from Complainant. This arrangement resulted in the creation of a constructive lien on the benefits.

5. At the time this agreement was reached, Respondent was aware that a lien on benefit checks could be obtained from the Commissioner of the

Department of Labor and Industry to assure payment of legal fees. Respondent knew that if such a lien was obtained, his fees would be limited to $35 an hr.or 20% of the recovery to a maximum of $3,000, whichever is less. Respondent did not want to apply for such a lien because he wanted more immediate payment at a higher rate.

6. Respondent did not know that the Department of Labor and Industry would not, in any case, approve a lien on temporary total disability payments. Temporary total disability benefits are designed to serve as wage replacement and are calculated at 2/3 of the average wage. They are subsistence level benefits. Benefits for permanent disability are based upon an estimate, rather than a calculated schedule. They are more akin to personal injury awards; there is an element of uncertainty and risk as to the extent of permanent disability benefits that might be awarded. Contingency fee agreements as to such benefits are therefore appropriate in the Department's view.

7. Officials of the Department of Labor and Industry believe it is unfair for an attorney to take a percentage of these subsistence benefits. If a lawyer bills an injured worker on an hourly basis for legal services rendered to secure temporary total disability benefits and if the attorney secures payment of those fees through a lien on permanent disability benefits, the Department of Labor and Industry would have viewed such a fee agreement as appropriate.

8. The Department of Labor and Industry has promulgated no rules and regulations nor issued any policy statement which would have informed

Respondent of an acceptable method of compensation in cases involving temporary total disability benefits. The Department has not informed the general bar of its position on contingency fee agreements in temporary total disability cases. Respondent made no inquiry of the Department of Labor and Industry as to how an appropriate fee agreement might be reached and had no knowledge of the Department's view in this regard.

9. After taking Complainant's case, Respondent immediately entered his appearance with the Department of Labor and Industry on behalf of Complainant. He determined that the reason the temporary disability benefits had been stopped was because necessary medical information to verify the disability had not been forwarded to the insurance carrier. Respondent submitted this information to the carrier on February 20, 1987 and benefits were reinstated. On March 4, Complainant received a check for $775 in back benefits, a third of which he paid to Respondent.

10. Beginning on March 4 and continuing until April 5, 1987, a check for $155 was mailed to Respondent's office. Until June 15, Respondent received $51.66 of each check and Complainant received $103.34.

11. On or about June 15, Complainant told Respondent that he could not get by on just 2/3 of his temporary total disability benefits. He asked Respondent to reduce his fees. Respondent reduced his fee from 33 1/3% to 20%. This was agreeable to Complainant. From June 15 until August 5, Respondent received $31 of the benefit check and Complaint received $124.

12. At first, Complainant was pleased with the result of Respondent's efforts on his behalf. However, he was not always notified promptly when the benefit checks were received; this delay was prejudicial to him. Complainant telephoned Respondent on several occasions to complain about the delay or to inquire as to the status of his case. Respondent did not promptly return these calls. Complainant was annoyed by Respondent's seeming disinterest in his case, but did not express this to Respondent.

13. Sometime during the spring of 1987, Complainant reached Respondent and asked him to reach a final settlement of this matter with the insurance company. Respondent advised Complainant that in order to obtain benefits for permanent disability, he would have to obtain a medical opinion as to the degree of his permanent disability. Respondent recommended to Complainant that he see a certain physician for an evaluation. Complainant made an appointment with the recommended physician.

14. The physician examined Complainant. She recommended surgery which Complainant declined. The physician reported to Respondent that Complainant did not seem to understand her recommendation regarding surgery, and that "nothing has moved forward." She indicated that Complainant's exam was a diagnostic one and that she had not done an examination upon which a permanency rating could be based.

15. On June 10, 1987, the insurance carrier asked Respondent to have the physician prepare an impairment rating. Respondent forwarded this request to the physician.

16. On June 16, 1987, Complainant finally telephoned the physician and learned for the first time he needed a second examination. Complainant promptly submitted to such an examination on July 29, 1987. The physician reported her permanency rating directly to the carrier.

17. On August 18, Respondent received from the carrier a proposed agreement for permanent partial disability compensation, also known as a Department of Labor and Industry Form 22. Respondent promptly obtained Complainant's signature on the form and submitted it to the Department of Labor and Industry on August 19. Per his client's request, Respondent asked that a lump sum payment be approved. The carrier had no objection to a lump sum payment.

18. Nothing further happened in this matter for several months, which caused Complainant a great deal of anxiety. He had few conversations with Respondent and this lack of communication led Complainant to believe that Respondent was not zealously pursuing Complainant's interests.

19. On October 21, the Department of Labor and Industry finally approved the Form 22 agreement. However, the Department declined to approve a lump sum payment because it believed Complainant was unemployed.

20. On October 27, Respondent forwarded a copy of this decision to Complainant and suggested to him that he obtain employment.

21. Complainant was employed at this point, although he did not

realize that this was an important fact and had not so informed Respondent. Rather than make any further attempts to communicate with Respondent, Complainant decided to handle the matter himself.

22. Complainant telephoned the Department of Labor and Industry and explained that he was employed and could verify the employment. He drove 106 miles to Montpelier to meet with a worker's compensation specialist. As a result of that meeting, settlement of the case by a lump sum payment was approved immediately. A check for $6,529.30 was issued to Complainant in early November, 1987.

23. When the check arrived in Respondent's office, he was surprised to learn that a lump sum payment issued. He telephoned Complainant who told him he had obtained the lump sum payment by doing all the "leg work" himself and that he did not believe he owed Respondent any of the proceeds. After some discussion, Complainant agreed to pay Respondent 10% of the proceeds. The proceeds were so distributed on or about November 12, 1987.

24. Respondent's time slip indicate that he rendered 7.75 hours of legal services to Complainant, although there may have been other minor services rendered which were not recorded because this was a contingency case. The total fees generated by this particular client were $2,237.51.

25. Subsequently, Complainant heard from a New Hampshire lawyer that it was illegal for an attorney to take a percentage of total temporary disability benefits. Complainant so informed Respondent. Respondent declined to refund any money because he was aware of no such law in

Vermont, because Complainant had freely entered into the contingency agreement, and because Respondent had reduced the terms of the agreement on two prior occasions.

26. Complainant filed a complaint with the Professional Conduct Board which initiated an investigation. Respondent co-operated fully in that investigation.

27. The lack of communication between Respondent and Complainant was prejudicial to Complainant and caused a lack of confidence in Respondent in particular and the legal profession in general.

28. By requiring his client's benefits checks to be mailed directly to him rather than to his client, Respondent was able to obtain a lien on Complainant's benefits while avoiding circumventing the Department of Labor and Industry's guidelines limiting fee agreements.

29. Respondent believes that his fee agreement with Complainant was not excessive at the time the agreement was made, but, in light of Department of Labor and Industry's position on fee agreements, acknowledges that a fee agreement regarding temporary total disability worker's compensation benefits should not be based on a percentage of the temporary total disability benefits recovered. Respondent agrees to abide by the decision of the VBA Fee Arbitration Committee as to what fee is appropriate in this case.

Conclusions of Law

/s/

The Code of Professional Responsibility provides, in pertinent part:

DR 1-102(A) (5) a lawyer shall not engage in conduct prejudicial to the administration of justice.

The Board finds that Respondent violated the above provision and issues a private admonition to the Respondent.

Dated at Montpelier, Vermont this 12th day of October, 1990.

PROFESSIONAL CONDUCT BOARD

/s/

J. Eric Anderson, Chair

/s/

Anne K. Batten

Leslie G. Black, Esq.

/s/

Richard H. Brock, Esq.

/s/

Joseph F. Cahill, Jr., Esq.

Nancy Corsones, Esq.

/s/

Christopher L. Davis, Esq.

/s/

Hamilton Davis, Esq.

Rosalyn Hunneman

/s/

Donald Marsh

/s/

Deborah S. McCoy, Esq.

/s/

Karen Miller, Esq.

/s/

Joel W. Page, Esq.

/s/

Edith Patenaude

/s/

Edward Zuccaro,Esq.