PCB 46

[04-Dec-1995]

STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

In re: PCB File No. 88.85

NOTICE OF DECISION

No. 46

PROCEDURAL HISTORY

A petition of misconduct was filed by special bar counsel alleging violations of DR 7-102(A)(2) and DR 7-102(A)(l). Respondent appeared pro se.
A stipulation of facts was submitted to the hearing panel signed by special bar
counsel and respondent. Incorporated in the stipulation as evidence were pleadings, correspondence, a police report, and the deposition of the complainant.

Respondent filed a motion to dismiss which was heard before a hearing panel of the Professional Conduct Board consisting of Leslie G. Black, Chair, Karen Miller, Esq., and Ms. Rosalyn Hunneman.

The panel recommended to the Board that it deny the Respondent's Motion to
Dismiss, that it accept the stipulation and the recommendations contained therein. The Board has so accepted the panel's recommendation and issues the following findings of fact and conclusions of law.

FACTS

Complainant was a passenger in an automobile driven by her nephew. While
the nephew was stopped at a stop light, his car was hit from behind by an uninsured motorist. Just before the statute of limitations was to run, the respondent brought an action on behalf of the complainant against her nephew alleging that the nephew operated his car "in a careless and negligent manner"
and that the "careless and negligent operation was a proximate cause" of the injury to the complainant. The driver of the other car and the nephew's insurance carrier were also defendants.

After the complaint was filed, an associate in the respondent's office was
primarily responsible for the handling of the case, although the respondent spoke on the phone with the complainant on several occasions.

In response to defendant's interrogatories the complainant was unable to state any acts of negligence on the part of her nephew nor could she state any
way in which his actions contributed to any injury to her.

The defendant's attorney wrote to the respondent's associate requesting

that he dismiss the case against the nephew. He refused to do so, stating that he would be in a better position to establish the negligence of the nephew when "all parties attempt to prove the facts by [presenting] their evidence."

The defendant moved for summary judgment on behalf of the nephew. No response was filed. The case was settled and the court granted summary judgment. At a later date the parties filed a stipulation for dismissal.

CONCLUSIONS OF LAW

DR 7-102(A)(2) provides that a lawyer shall not "knowingly advance a claim or defense that is unwarranted under existing law."

There is no evidence in the stipulation or in the exhibits which show that the respondent had any theory of negligence on the part of the nephew which would bring him under the exception of DR 7-102(A)(2). That exception provides that the attorney "may advance such a claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law." There is nothing in the complaint or any of the pleadings filed by the respondent or his associate advancing such a claim.

In his argument before the panel, respondent raises for the first time the issue of negligence of the nephew for failure to wear seat belts which he identifies as a new and changing area of the law. The panel does not disagree with the respondent that this may be a changing area of the law. However, we do not believe that the respondent can avail himself of this argument at this time since it was never raised at the time that the complaint was filed or during discovery. The allegations against the complainant's nephew sound only in negligence and the answers to the interrogatories and the correspondence surrounding the matter at the time all are silent on the seat belt issue.

At the time that the respondent filed the complaint against the complainant's nephew he points out that he was faced with the fact that the statute of limitations was about to run. Lawyer disciplinary agencies in other jurisdictions have held that, when faced with the expiration of the statute of limitations, a lawyer may bring a claim after making reasonable inquiry and may rely solely on his client's allegations if the attorney has no reason to disbelieve the client.(FN1)

The Board, like the panel below, is not persuaded by this argument primarily because there is no evidence that the client gave respondent any facts showing negligence on the part of the nephew. In addition, the argument for haste is diluted by the fact that the complainant apparently engaged the respondent, in this matter some 13 months before the statute was to run. Even if this Board were to accept the argument of the respondent that filing was necessary because of the imminence of the running of the statute, which argument the Board expressly does not accept, after receiving the response to the interrogatories, the respondent had an affirmative duty to dismiss the case or to withdraw from representation when no evidence of negligence was developed. This the respondent did not do.(FN2) There is no evidence that respondent made efforts on his own to establish facts by discovery that would

show negligence on the part of the nephew. He merely refused to dismiss when asked to do so by the defendant's attorney.

Since the disciplinary rule requires that the respondent act "knowingly," the panel had some concern that with the fact that while the respondent brought the original claim, the answers to interrogatories and the refusal to dismiss were actions taken by his associate. The Board, like the panel below, finds that the fact that the respondent was the attorney originally engaged by the complainant, that he signed the complaint on her behalf, that he had several phone calls with her after the complaint was filed, and the fact that as an employer he had the duty to supervise his associate, are facts sufficient to support a finding that respondent violated the disciplinary rules.(FN3)

Respondent's action in bringing the suit and in refusing to dismiss when he had no grounds for the negligence of the defendant constitute a violation of DR 7-102(A) (2) .

DR 7-102(A)(l) provides that a lawyer shall not "file a suit...when he knows or it is obvious that such action would serve merely to harass or maliciously injure another." This issue is not whether the respondent knew that it was merely harassing or malicious, but whether or not an objective attorney would know that it served merely to harass or injure another. There is no evidence of a legal claim as the basis of the filing of the action against the nephew. There is ample evidence from the deposition of the complainant that the filing of the complaint against her nephew and the refusal to dismiss it caused injury to the complainant's family relationships. Applying an objective attorney standard and finding no legitimate reason for the bringing of the suit and its continuance, the Board finds that the action was brought merely to harass the defendant's nephew and finds that the respondent violated DR 7-102(A)(1).(FN4)

SANCTION

The Board has imposed a private admonition on respondent for violation of DR 7-102(A)(l) and DR 7-102(A)(2).

Dated at Montpelier, Vermont this 4th day of December, 1992

PROFESSIONAL CONDUCT BOARD

/s/

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J. Eric Anderson, Chairman

/s/

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Deborah S. Banse, Esq.

/s/

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Nancy Foster

/s/

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Anne K. Batten

/s/

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Joseph F. Cahill, Jr., Esq.

/s/

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Rosalyn L. Hunneman

/s/

_____

Nancy Corsones, Esq.

Robert P. Keiner, Esq.	Christopher L. Davis, Esq.
/s/	
Donald Marsh	Hamilton Davis
	/s/
Karen Miller	Paul S. Ferber, Esq.
Edward Zuccaro, Esq.	

1 "A lawyer may file a suit before establishing a factual basis for the claim in order to meet the applicable statute of limitations provided there is a reasonable possibility that the lawyer can later establish facts to support the cause of action and the court's procedural rules do not require the lawyer to attest to the adequacy of the facts when filing a claim. Opinion 87-1, ABA/BNA 901:2702 (Ga. 1/89).

2 "If the lawyer is unable to establish the facts underlying the complaint after filing the suit, he must discuss dismissing the suit in that situation with the client. If the client refuses to dismiss the suit the lawyer must seek withdrawal and advise the client of his right to seek substitute counsel." opinion R-9, ABA/BNA 901:4705 (Mich. 10/90).

3 In re Berlant, 328 A 2d 471 (Pa. 1974) (discipline upheld where some of transactions were prepared and executed by petitioner's associate; In re Matter of crane, (violation of DR 7-lOl(A)(2), inter alia. upheld where petitioner had not fulfilled continuing obligation to supervise).

4 A lawyer may not knowingly assert a claim that has no jurisdictional basis. Opinion 85-11, ABA/BNA 801:4349 (Md. 9/84). "Such a filing would be done merely to harass or injure another and would be a claim unwarranted under existing law." Opinion E-236, ABA/BNA 801:3903 (Ky. 1980).