

[01-May-1992]

STATE OF VERMONT
PROFESSIONAL CONDUCT BOARD

In re: Docket No. 89.63.1

NOTICE OF DECISION

PCB NO. 33

This matter was heard by a hearing panel consisting of: Richard L. Brock, Chair, Edward R. Zuccaro, and Hamilton Davis. The hearing panel reported its findings of fact and recommended conclusions of law to the Board and a Rule 8D hearing was held on March 13, 1992. Respondent appeared; special bar counsel did not.

Upon consideration of the panel's report and arguments of respondent, the Board voted to dismiss the petition. The Board's findings of fact and conclusions of law are set forth below.

1. Respondent represented wife in a divorce case.
2. The divorce was hotly contested as to the division of property. There was considerable personal animosity between husband and wife.
3. Husband was particularly difficult. He appears to have delayed and stalled the proceedings out of personal animosity towards wife. He was undisputedly in substantial contempt of numerous court orders. As a result, wife was in dire financial straits, facing the loss of her home and the destruction of her credit rating.
4. This particular complaint arose because of an impasse between the parties relating to certain personalty of husband located in the home which had been awarded to wife. Specifically, located in the home which had been awarded to wife. Specifically, he was awarded certain property that she was reluctant to release until he had complied with some of the money payment orders as to which he was then in default.
5. Husband, on the other hand, was unwilling to surrender any money until he had received his personalty.
6. In an attempt to straighten this out, counsel for the husband arranged that husband would deliver to counsel a certificate for approximately 47 shares of stock held in the name of husband. It was delivered by husband to his own counsel with the express understanding that it would not be delivered to wife until husband had picked up his personalty.
7. Husband's counsel sent a copy of that stock certificate to Respondent so that Respondent could determine on behalf of wife that the certificate was indeed negotiable and could be cashed by wife.
8. Respondent believed that the Corporation which had issued the stock required the original in order to opine as to negotiability.

9. On September 11, 1989, Respondent called opposing counsel to convey his client's desperate need for money and to discuss the need for the original stock certificate to determine negotiability.

10. Counsel for the husband agreed to give the original of that stock certificate to Respondent solely for the purpose of presenting it to the Corporation for the determination of negotiability.

11. On September 11, 1989, a staff member of Respondent's firm picked the stock certificate up at opposing counsel's office. The certificate was delivered with a note indicating that it was delivered only for that determination of negotiability. (Exhibit A).

12. On September 12, 1989, Respondent took the original stock certificate to the Corporation and spoke with a representative. She informed him that the certificate appeared negotiable and told him that it would take approximately two weeks to liquidate it.

13. On Wednesday, the 13th, wife called Respondent. He told her that the certificate was negotiable but that negotiation would take about two weeks. Respondent felt a strong emotional need to give her some reason to believe that progress was being made and that her desperate financial problem would be resolved. He therefore told her that she could keep the stock certificate as long as she held it until the proposed exchange of the stock certificate for the personalty was confirmed. He attached a note and delivered the stock certificate to her. The note specifically requested that she not do anything with the certificate until she contacted him.

14. Respondent had had a long-standing professional relationship with wife and had every reason to believe that she would follow these instructions exactly.

15. On Thursday the 14th and Friday the 15th, Respondent attempted to call opposing counsel. They were unable to connect. On Monday the 18th Respondent saw opposing counsel in court. They were both accompanied by clients and could speak only briefly. Respondent inquired of opposing counsel whether or not there was a deal. Opposing counsel said that he would contact his client.

16. On the 18th, probably after that conversation at court, opposing counsel sent a letter to Respondent. It was received the 19th or the 20th.

17. Sometime in the interim, husband became suspicious that the stock certificate might have been delivered. He called Respondent and Respondent broke off the conversation when husband launched into a string of expletives.

18. Respondent attempted to have husband pick up his personalty at the house at that time. Husband stated that he was too upset to do any such thing, under circumstances which suggest that he may have been enjoying the discomfort of all concerned.

19. Respondent immediately attempted to recover the stock certificate.

20. Wife had in fact forwarded it to the Corporation, apparently for negotiation and cashing. Respondent was able to have the certificate returned by Federal Express to husband on September 20, 1989.

CONCLUSIONS OF LAW

Based on a probable cause determination by the Professional Conduct Board, special bar counsel brought a charge alleging that the conduct of Respondent in obtaining the stock certificate under representations that it was to be used solely for purposes of determining negotiability and then, without authority, delivering it to wife, violated DR-102(A)(4). Specifically, it was alleged that this conduct constitutes a misrepresentation.

The ethical considerations to Canon 1 of the Code make clear that a high standard of conduct is expected of attorneys, at least when they act in a professional capacity. Respondent was clearly acting in a professional capacity.

Respondent testified that he acted out of compassion and because he felt wife needed some tangible evidence that progress was being made in alleviating her terrible problems. Furthermore, the Panel inferred from the testimony, both of opposing counsel and Respondent, without being told directly, that this entire unfortunate situation arose primarily because of apparent obstructionist tactics by husband. Although husband's conduct was not and should not be under consideration, the Panel does feel that an accurate picture of the stresses and strains on Respondent cannot be drawn without reference to this background.

Furthermore, Respondent had every reason to believe that wife would do as he told her. He had a long-standing attorney-client relationship with her. She had never before disobeyed his instructions. Last, the Panel is convinced that Respondent had no ill will nor did he behave in a way which he calculated would give him or his client an advantage.

Nevertheless, having said that, the Panel did believe that Respondent's conduct was a technical violation of code. It is clear from the evidence that opposing counsel was induced to deliver the stock certificate on representations that the certificate would only be used for purposes of making a determination of negotiability. It is clear that the certificate was used for that purpose but then Respondent, without any authority, additionally took it upon himself to deliver the certificate to wife. While the panel believed that he did not mean any injury to husband and indeed simply hoped to expedite the process, he was without authority to so deliver the certificate to wife.

The Panel believes that where one attorney secures from another the delivery of an instrument and conditions his receipt of that instrument on certain promises, both attorneys are entitled to know that those representations will be followed. In this context, that means that once Respondent represented to opposing counsel that the stock certificates would be used for no purpose other than the determination of negotiability, and once opposing counsel was induced to deliver the stock certificates in apparent reliance on that representation, then opposing counsel is entitled to know that Respondent will strictly follow and abide by his representations.

Therefore, the Panel found that Respondent's failure to abide by his representations was a misrepresentation under DR1-102(A) (4) and was a violation of the code.

The Board accepted the Panel's Findings of Fact but was unable to follow the panel to a finding of misrepresentation under the applicable DR. The Board believes that the critical element in this representation is the intent to deceive or mislead at the time that the representations in question are made. The Board sees no evidence to justify such a finding. In other words, the Board was unable to find from the evidence and the facts found by the Panel that at the time Respondent induced opposing counsel to deliver the stock certificate, Respondent intended to deliver the stock certificate for any purpose other than that stated by him to opposing counsel. Therefore, there was no misrepresentation. Without a factual basis to find misrepresentation, the Board feels that this matter must be dismissed.

This is not to say that the Board is approving Respondent's conduct. Nor is it to say that it might not have constituted conduct prejudicial to the administration of justice under DR1-102 (A) (5), nor that it was not a breach of Respondent's agreement with Mr. Blodgett. However, none of these matters were charged or at issue.

Therefore, the Board dismisses this matter.

Dated: May 1, 1992.

PROFESSIONAL CONDUCT BOARD

/s/

J. Eric Anderson, Chairman

/s/

Deborah S. Banse, Esq.

/s/

Anne K. Batten

/s/

Leslie G. Black, Esq.

/s/

Donald Marsh

/s/

Shelley A. Hill, Esq.

/s/

Edward Zuccaro, Esq.

/s/

Richard Brock, Esq.

/s/

Joseph F. Cahill, Jr., Esq.

/s/

Nancy Corsones, Esq.

/s/

Christopher L. Davis, Esq.

/s/

Hamilton Davis