

PCB 87

[07-Apr-1995]

STATE OF VERMONT
PROFESSIONAL CONDUCT BOARD

In re: PCB File No. 93.36

DECISION NO. 87

This matter, presented to us by stipulated facts which we accept and incorporate herein by reference as our own, concerns an attorney's failure to consult with the client in regard to strategies and decisions which were the client's to make. For the reasons set forth below, we issue a private admonition.

FACTS

Respondent has been a member of the bar for more than 40 years. In late 1988, Complainant retained Respondent to represent her in a contract claim against an out of state company. Complainant believed that the defendant owed her at least \$6000 for personal property wrongfully held.

In the spring of 1989, Respondent filed a civil complaint in district court, claiming \$3,000 in damages on behalf of Complainant. At the time, the minimum damage level to maintain an action in superior court was \$5,000. Respondent filed in district court because he believed he could not prove the threshold of \$5,000 in damages.

Respondent did not discuss with his client the benefits or risks associated with filing for her desired amount in superior court. Respondent unilaterally made the decision to file the lawsuit in district court for an amount lower than she wanted. Respondent did not forward to his client a pre-filing draft of the district court complaint for her review.

When Complainant received a copy of the filed complaint, she immediately contacted Respondent and objected to the amount claimed for damages. In response, Respondent filed a motion to raise the damage claim from \$3,000 to \$5,000. The court initially granted this motion by entry order and, pursuant to the court's directive, Respondent filed a proposed order raising the damage claim. At the same time, Respondent filed a motion seeking a default judgment in the amount of \$5,000.

Some months later, the district court informed Respondent that the case was ready for a default order and directed him to file a proposed order within 30 days. Respondent had already filed a proposed order but submitted another one as requested. This second order allowed for damages only in the amount of \$3,000. The court entered default judgment for complainant per the proposed order.

Respondent does not recall why the amount dropped back to \$3,000, but notes in Respondent's file indicate that the court had apparently reversed itself and informed Respondent that no upward amendment would be permitted without new service of process on the defendant. Respondent's handwritten notes further indicate that he was concerned that new service might prompt an answer, thus eliminating the possibility of a default judgment. In any

event, he failed to discuss any of this with his client.

In the spring of 1990, Respondent filed a new action in superior court claiming damages of \$12,000. This complaint was dismissed a year later on the basis of res judicata.

To this date, Complainant has only a default judgment for less than half the amount to which she believes she is entitled. Respondent was unable to seek enforcement of the default judgment because defendant has no assets in this state.

Throughout most of the period during which Respondent represented this client, Complainant has found it significantly difficult to communicate with Respondent. On many occasions, she called or wrote to Respondent and received no response. Complainant paid to Respondent \$1,250 in attorney's fees, all of which Respondent has since returned to her.

CONCLUSIONS

DR 6-101(A)(2) prohibits a lawyer from handling "a legal matter without preparation adequate in the circumstances."

DR 6-101(A)(3) prohibits a lawyer from "neglect[ing] a legal matter entrusted to him."

In failing to discuss with his client the benefits and risks of filing an action in one court versus another court and to allow her to make an informed choice of proceeding, Respondent failed to prepare adequately the filing of

his client's case, in conformance with his client's wishes, in violation of DR 6-101(A)(2).

In failing to provide to his client copies of pleadings for her review and comment before filing, failing to discuss with her the benefits and risks of filing in one court versus another court, failing to discuss with his client the filing of the Motion for Default Judgment in an amount much less than her expressed desires and in failing to respond to repeated inquiries of the client, Respondent is in violation of DR 6-101(A)(3).

Section 4.43 of the ABA Standards for Imposing Lawyer Sanctions provides that a "[r]eprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client."

Section 4.44 of the ABA Standards provides that an "[a]dmonition is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client."

Complainant was injured in that she has been frustrated by the lack of communication with the Respondent and the lack of results. Six and one half years after she retained Respondent, she is no closer to obtaining a result satisfactory to her. She has a judgment she neither wanted, nor sought nor likes.

Respondent believed he was acting in the best interests of his client when he

filed for damages in district court for an amount less than that desired by his client.

While his judgement may have been a correct one, the decision as to whether to forego the claimed damages is one that Complainant should have been allowed to make based upon Respondent's advise and counsel. Respondent acted improperly in making such decisions for the client without either her knowledge or consent.

Fortunately, the default judgment in district court is not irreversible, so that the res judicata problem could be resolved. Therefore, there is no substantial, permanent injury.

The aggravating factors in this case are:

- * Respondent has substantial experience in the practice of law;
- * Respondent has received one prior sanction from this Board, a private admonition in 1978.

The mitigating factors in this case are:

- * Respondent had no dishonest or selfish motive;

- * Respondent cooperated fully with the disciplinary proceedings;
- * Respondent regrets his conduct and has expressed his remorse to Complainant;
- * The previous sanction is remote in time.

Based upon Respondent's representations to us, we find that there is little likelihood of repetition and no danger to the public. We conclude that a private admonition is appropriate and consistent with A.O. 9, Rule 7.

We direct the chair to issue a private letter of admonition to Respondent.

Dated at Montpelier, Vermont this 7th day of April, 1995.

PROFESSIONAL CONDUCT BOARD

/s/

Deborah S. Banse, Chair

/s/

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