PCB 104

[12-Dec-1995]

STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

In re: PCB Docket No. 95.60

NOTICE OF DECISION

Decision Number 104

This matter came to us by a stipulation of facts submitted by respondent and bar counsel. The parties also submitted stipulated recommendations regarding conclusions of law and sanctions. The parties presented oral argument to us on November 3, 1995.

Based upon these proceedings and upon consideration of all of these documents, we have decided to issue a private admonition.

Facts

Victim was assaulted. Prosecutor brought charges against a criminal defendant for these crimes. The district judge urged the parties to engage in meaningful plea negotiations, which they did.

The prosecutor kept the victim and the victim's mother apprised of the plea negotiations and court proceedings.

Respondent had been admitted to the Vermont bar some six years prior to becoming involved in this matter. The victim and the victim's mother had met Respondent shortly after the victim had been assaulted. At one point the victim's mother called Respondent, worried that the case had not yet been tried and that it would be plea bargained, with the defendant receiving only a nominal sentence. Respondent gave the mother advice and urged her to make her feelings known to the state's attorney. Respondent invited her to call back with any questions or concerns.

Later that month the mother called again, telling Respondent that she had heard some very disturbing news from the state's attorney. The mother understood that the judge had made a statement reflecting a particular bias in sentencing theory. If true, it might mean that the defendant would not receive as severe a sentence as other defendants convicted of similar acts of violent behavior prosecuted under the same statute. Respondent told the mother that there was nothing that could be done about this particular case, although respondent would try to contact the judge to ascertain his position about sentencing this type of crime.

Respondent wanted to help the mother who was very distraught. Respondent telephoned the courthouse and asked to speak with the judge. Respondent had a prior professional relationship with the judge who accepted the call.

Respondent told the judge about the phone call from the mother of the victim. Respondent told the judge that the mother was very upset over second hand comments attributed to the judge reflecting generalized bias. Respondent said the purpose of the phone call was to ask if the attributed remarks were true. Respondent also made reference to the pending plea negotiations.

The judge replied that he could not discuss the issue and suggested respondent talk with the state's attorney. Respondent responded cordially, and the conversation terminated.

Pursuant to the Code of Judicial Conduct, the judge reported to the state's attorney and the defense attorney the fact and substance of respondent's telephone call.

Conclusions of Law

DR 7-110(B) of the Code of Professional Responsibility provides:

> In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or official before whom the proceeding is pending, except:
>
> (1) In the course of official proceedings in the cause.
>
> (2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.
>
> (3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.
>
> (4) As otherwise authorized by law, or by Section A(4) under Canon 3 of the Code of Judicial Conduct.

Former Canon 3, Section A(4) of the Code of Judicial Conduct, which has since been amended, provided in pertinent part:

> A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding.

In ascertaining the full import of DR 7-110, we consider the comment contained in EC 7-35 which provides:

> All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer. Ordinarily an oral

> communication by a lawyer with a judge or hearing officer should by made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of his client.

An issue arises as to whether this rule applies to lawyers who do not formally represent named parties in a pending case.

We are unaware of any reported cases where an attorney who does not represent a formal party in a proceeding has been found to have violated this rule as a result of direct, ex parte communication with a judge about a pending case, absent evidence of a clear intent to influence the court. Clearly improper motive is usually a hallmark of those published disciplinary cases involving DR 7-110. See, e.g., Florida Bar v. Saphirstein, 376 So.2d 7 (Fla. 1979)(attorney suspended from the practice of law for several acts of misconduct including contacting a referee in a pending disciplinary matter regarding another attorney, who was not his client, with clear intent to improperly influence the outcome of the proceedings). We conclude, however, that neither the attorney's evil intent nor the attorney's status as counsel of record are essential elements of a violation of DR 7-110(B).

The point of the disciplinary rule is to preserve a judiciary free of undue influence and a process that is fair to all participants. If an advocate for the victim of a criminal case discusses a sentencing issue directly with the judge, it is possible to influence that judge in his or her decision. When that discussion occurs without the knowledge of prosecutor or defense, neither party is in a position to rebut or even address any of the concerns which the advocate may have raised. This is patently unfair to the parties and destructive of the adversary process.

If respondent had reviewed the Code of Professional Responsibility prior to initiating the telephone call, respondent would have realized that it was wholly improper to telephone the judge to discuss his sentencing philosophy vis-a-vis a pending criminal prosecution. Respondent was negligent in not considering the ethical ramifications of the ex parte contact.

Sanction

We find that respondent acted negligently, in one instance, where no actual harm to the pending proceeding resulted. In mitigation, we find that respondent has no prior disciplinary record, had no selfish motive, co-operated fully with the disciplinary proceedings, and is remorseful. We find no aggravating factors present.

Therefore, we find Standard 6.34 of the ABA Standard for Imposing Lawyer Sanctions applicable. That standard provides:

> Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in improperly communicating with an individual in the legal system, and causes little or no actual or potential interference with the outcome of the legal proceedings.

Therefore, the chair will issue a letter of private admonition pursuant to A.O. 9, Rule 7(A)(5)(a).

Dated at Montpelier, Vermont this 1st day of December, 1995.

PROFESSIONAL CONDUCT BOARD

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