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[03-Dec-1999]

STATE OF VERMONT
PROFESSIONAL CONDUCT BOARD

In re: Melvin D. Fink, Esq., Respondent
PCB Docket No. 98.18

FINAL REPORT
Decision No. 142

We received the hearing panel's report, attached hereto as Exhibit 1 and incorporated herein by reference, on May 10, 1999. We held a hearing pursuant to AO 9, Rule 8D on June 11, 1999. Special Bar Counsel, Stephen S. Blodgett, Esq., and Respondent, appearing pro se, presented oral argument.

We adopt as our own the panel's findings of fact. We reach different conclusions of law, however.

Unlike the panel, we cannot conclude that the facts demonstrate by clear and convincing evidence that Respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of DR 1-102(A)(4). Such a finding would require a level of intentional thought here that is lacking. Indeed, the record demonstrates a level of neglect by Respondent which would negate any specific intent to deceive.

The facts show that Respondent received a call one day in May of 1997 from a client who had been involved in a difficult divorce six months earlier. Respondent had assisted in preparing the order for division of personal property which itemized a number of minor pieces of personal property. The order did not clearly reference a Subaru automobile which his client had in her possession at the time the divorce decree was entered. The decree stated that each party was awarded the personal property in his or her possession "free and clear of any and all marital right or claim of the other." While it would have been better practice to itemize such a significant item of personal property to avoid all confusion, it is clear that the client, Robin, was to have complete ownership rights in that vehicle.

Robin called Respondent that day because she wanted to trade the Subaru, but had discovered that her husband's name was still on the Certificate of Title. She did not want to contact her husband and asked Respondent if she could sign her ex-husband's name on the certificate.

Respondent told her that she could sign her husband's name on the Certificate of Title, relying upon something he had read in Corpus Juris Secundum some 5 or 10 years earlier concerning implied agency. In fact, Respondent's advice to his client was unsupported by that text. He did no research on the issue nor did he consider any methods by which the ex-husband's signature could be obtained or by which a new title could be issued without his signature.

What Respondent should have done was look up the law of the State of Vermont where he would have learned that there is a specific statute which covers situations just like this one. He could have advised his client correctly that she could obtain a new title - lawfully - by simply complying with 23 V.S.A. §2025. Respondent did not do so, however.

Respondent's advice was incorrect, although Respondent did not seem to know this. Relying upon Respondent's advice, his client forged her ex-husband's signature. This eventually led her ex-husband to file the complaint which eventually led to filing of this petition of misconduct.

Because Respondent endeavored to provide legal advice without adequate preparation in the circumstances, the record before us demonstrates a violation of DR 6-101(A)(2)(failure to handle a legal matter without preparation adequate in the circumstances). Other violations under the Code of Professional Responsibility may also be implicated. However, Special Bar Counsel's petition did not charge Respondent with neglect, and Respondent has had no opportunity to present a defense to such a charge. Due process requires that he be given such an opportunity. In re Ruffalo, 390 U.S. 544 (1968).

We believe that under our procedural rules we must dismiss the instant petition. We leave it to Special Bar Counsel to decide whether or not he wishes to amend the petition of misconduct to include a charge of negligence or any other violations which he feels is applicable. Should Special Bar Counsel choose to do so, new charges would be brought under Administrative Order No. 9 as amended September 1, 1999.

The charged violations of DR 1-102(A)(4)(conduct involving dishonesty, fraud, deceit, or misrepresentation) and DR 7-102(A)(7)(counseling a client in conduct that the lawyer knows to be illegal or fraudulent) are hereby dismissed.

Dated at Montpelier, Vermont this 3rd day of December, 1999.

PROFESSIONAL CONDUCT BOARD

/s/
Robert P. Keiner, Esq. Chair

/s/ /s/
Steven A. Adler, Esq. John Barbour

(ABSENT)
Charles Cummings, Esq. Paul S. Ferber, Esq.

/s/
Michael Filipiak Robert F. O'Neill, Esq.

/s/ /s/

Alan S. Rome, Esq.	Mark L. Sperry, Esq.
	/s/
Ruth Stokes	Joan Wing, Esq.
/s/	(ABSENT)
Jane Woodruff, Esq.	Toby Young

Footnotes

FN1. Since Bar Counsel did not charge Respondent with violation of DR 6-101, we need not consider whether this was Respondent's failure when he handled the original divorce. Nevertheless, Respondent had no explanation for his failure to consider the obvious solution provided by the Vermont Motor Vehicle Statute, 23 V.S.A. 2025.

FN2. Respondent's conduct in advising Robin Bushey as he did evidences a lack of fitness to practice law which would violate DR 1-102(A)(7). However, again, Bar Counsel chose not make such a charge, and therefore we cannot find such a violation.

CONCURRING OPINION

I write separately because I was a member of the Hearing Panel whose conclusions of law are modified by the attached Final Report of the Board, in which I know join. I cannot speak for my fellow Hearing Panel members, who were unable to participate in the consideration of this matter by the full Board. However, having listened to the arguments and reasoning of the entire Board, I have been persuaded to modify my views and to concur in the attached Final Report.

I have come to have the highest regard for the collective wisdom of the Board during my tenure. During that time scores of panel recommendations have been reviewed by the full Board, and many have been modified to reflect the Board's accumulated learning and experience. I believe it is unfortunate that those who will serve on the hearing panels under the new Professional Responsibility Rules, and those who will appear before them, will not continue to have the benefit of the collective wisdom of this Board.

/s/

Barry E. Griffith, Esq.

EXHIBIT 1
STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

In re: Melvin D. Fink, Esq., Respondent
PCB Docket No. 98.18

HEARING PANEL'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION OF SANCTION

Special Bar Counsel, Stephen S. Blodgett, Esq., filed a petition of misconduct on October 2, 1998, alleging that Respondent engaged in certain conduct which violated DR 1-102(A)(4)(conduct involving dishonesty, fraud, deceit, or misrepresentation) and DR 7-102(A)(7)(counseling a client in conduct that the lawyer knows to be illegal or fraudulent).

Respondent filed an answer, denying that the alleged conduct constituted violations of the Code.

Pursuant to A.O. 9 Rule 2(C), the Hearing Panel conducted a hearing on March 12, 1999 to determine whether Respondent had committed one or both of the violations charged. Upon consideration of all the relevant, credible evidence submitted by both parties, and the legal arguments made in support of their respective positions, we find the following facts by clear and convincing evidence.

FACTS

1. Respondent was admitted to the Vermont bar in 1969 and has practiced law continuously to the date of the hearing. He is a private practitioner in Ludlow, Vermont.

2. In 1996, he represented one Robin Bushey in a divorce from her husband, Jeffrey Bushey. The divorce was acrimonious.

3. In the divorce decree, issued December 9, 1996, each party was awarded the personal property in his or her possession "free and clear of any and all marital right or claim of the other..." At the time of the divorce, Robin Bushey had possession of a 1988 Subaru automobile although the title was in the name of both husband and wife.

4. In May of 1997, Robin Bushey (now Robin Krolick) wished to trade the car. She paid off the balance and was given the certificate of title. She was surprised to see that the title listed both herself and Jeffrey Bushey as owners.

5. She telephoned Respondent for advice. During that phone conversation, she explained that her ex-husband's name was on the title to the Subaru automobile. Given the difficulties of her divorce, the fact that the Subaru was not reliable and she needed another one, and the fact that she did not know where Jeffrey Bushey was living, she asked Respondent what she could do.

6. The following conversation ensued:

A. I called Mel because I didn't know what to do. I saw that it was in both of our names, which I was surprised. The car was mine. I had it from, you know, the time we were married and when the divorce was final. It was mine. So when I got it, I called Mel to ask

his opinion on what to do. And at the time I didn't know where Jeff lived or had a phone number because we had already been divorced and gone our separate ways.

Q. Okay. What did Mr. Fink tell you?

A. He looked in the document of our divorce, and he said that in there it was stated that what I took with me at the divorce was mine.

Q. And what else did he say?

A. As far as --

Q. Did you ask him if it was all right for you to sign Jeff's name?

A. Yes, I did.

Q. Would you have signed Jeff's name if you hadn't received legal advice that it was okay to do so?

A. No, I wouldn't.

Q. What did Mr. Fink tell you about signing Jeff's name?

A. He said I could . . . .

7. Respondent based his advice on a review of the divorce order and his belief, based on black letter law in 2A C.J.S. Agency section 58, which he had read in connection with another matter between 5 and 10 years earlier, that there was an implied in law agency relationship between Robin Krolick and Jeffrey Bushey which would allow her to sign his name on the certificate of title.

8. Respondent's advice to his client was unsupported by the cited text. He did no research on the issue nor did he consider any methods by which Jeffrey Bushey's signature could be obtained or by which a new title could be issued without obtained Jeffrey's signature (23 V.S.A. Section 2025).

9. Respondent did not tell her to disclose to the person who received the title that she had signed the certificate on behalf of Jeffrey Bushey. He simply informed her that she could sign Jeffrey Bushey's name to the certificate.

10. Robin Bushey subsequently went to a car dealership. The dealership told her that in order to trade the car in for another, the dealership had to have both signatures on the certificate of title.

11. Acting upon advice from her lawyer that it was legal to do so, Robin Bushey signed Jeffrey Bushey's name on the certificate of title. [Bar counsel's Exhibit 1]. She never disclosed, either by notation on the certificate or verbally to the dealership or in any other way, the signature on the certificate was not Jeffrey Bushey's signature.

12. Robin Bushey testified, and we so find, that she would not have

signed Jeffrey Bushey's signature for him without Respondent's counsel. We find that by signing the name of Jeffrey Bushey, Robin Bushey made a misrepresentation and deceived the dealership. She misrepresented to and deceived the dealership into believing that Jeffrey Bushey had signed the document and certified to the accuracy of the statements contained therein.

13. In telling Robin Bushey that she could sign Jeffrey Bushey's name on the certificate of title, he intended her to rely on that advice to sign Jeffrey Bushey's name, and he knew that she would rely on his advice in signing Jeffrey Bushey's name on the certificate of title, and that she did so.

14. We find Respondent's testimony that he did not believe that there was any harm to Jeffrey Bushey because of the provisions of the divorce decree giving Robin the Subaru automobile truthful. Contrary to Respondent's prolonged testimony as to what his legal analysis was underlying his opinion, we find that he gave her the advice to sign Jeffrey Bushey's name because he thought it was the simplest resolution of her problem and had, in Respondent's mind, was a minimal risk of adverse consequences. Respondent testified:

> A: . . . I also thought to myself -- and it's not the first time -- well, certainly bar counsel's suggestion that I committed a fraud is a very, very serious allegation in my mind. I shudder to think that anybody would consider that I have defrauded anybody. But when we talk about fraud -- and I didn't think of it exactly in terms of fraud when I gave the advice, but I thought in terms of what's wrong? Mr. Bushey has no interest in that car at all. [emphasis added]

15. Respondent never considered the significance of the fraudulent signature beyond the issue of Jeffrey Bushey's claim to ownership of the automobile. In fact, anyone dealing with that certificate of title and the Subaru car were subject to the misrepresentation that Jeffrey Bushey had certified the accuracy of the odometer reading, as well as that he had given up his rights in the car.

16. Indeed, Respondent gave very little thought to the consequences for his client. In response to a question from the Panel as to whether he ever considered using the divorce decree to obtain a certificate in Robin's name alone, he testified:

> Simply because she asked me for an opinion, and we didn't get that far. I could say to you I assume that maybe when she went up there she would have taken -- she had a judgment order with her but I wasn't thinking about that. I was addressing the question she had. I didn't know whether she would arm herself with that order or not. The order was the subject of our conversation. She knows how strongly I felt about it. I guess I didn't know whether she was going to utilize it or not.
>
> I thought I was addressing her question by giving her my opinion, and I did give her that opinion.

And further he testified:

> CHAIRMAN: And if I understand your testimony -- and correct me if I am wrong -- it never occurred to you to look at the motor vehicle statutes to see whether there was a provision that dealt with this situation?
>
> MR. FINK: That dealt with the situation of what?
>
> CHAIRMAN: Transferring title where it's covered by either a judgment of the court or stipulation.
>
> MR. FINK: No. No.
>
> CHAIRMAN: You don't think in representing your client that would be an appropriate inquiry for you to make before you told her to forge somebody else's signature?
>
> MR. FINK: I think that's a very, you know -- I don't want to get involved in a debate --
>
> CHAIRMAN: I am just asking you --
>
> MR. FINK: -- with the chairman.
>
> CHAIRMAN: I am just asking your state of mind and your view of whether what would have been appropriate.
>
> MR. FINK: Then I will certainly give my view. I object to the use of the term forging. Forgery --
>
> CHAIRMAN: Substitute whatever word you want. Do you think in representing a client who asks you should I sign someone else's name to a document of title that that client was entitled to have you check the statutes dealing with that specific property?
>
> MR. FINK: I think that's another matter altogether.
>
> CHAIRMAN: I just asked the question. Do you think the client was entitled to that or not?
>
> MR. FINK: If she had asked -- asked the opinion, yes. But the question that she particularly asked me was in my opinion could she sign his name to that title.

CONCLUSIONS OF LAW

Bar counsel has charged Respondent with two violations here: DR 1-102(A)(4)(conduct involving dishonesty, fraud, deceit, or misrepresentation) and DR 7-102(A)(7)(counseling a client in conduct that the lawyer knows to be illegal or fraudulent).

We find clear and convincing evidence that Respondent violated DR 1-102(A)(4). We do not find by clear and convincing evidence that Respondent violated DR 7-102(A)(7).

Respondent knows that a Certificate of Title is an important legal document. When it enters the stream of commerce, the Certificate of Title tells the next holder in due course that the representations contained therein are true. The law encourages the holder to presume that the signatures are authentic. The value of the uniform systems of title in interstate commerce is to streamline the sale of goods. If the title is defective, the rights of subsequent holders of that title can be compromised. That is, the significance of signatures on the Certificate of Title goes far beyond the interests between co-titleholders.

Attaching another's signature to a legal document is a serious matter. The signature is a representation that the person named has signed the document to everyone who takes that document. Consequently, Respondent's instruction resulted in the Certificate being signed by one other than the named owner. The result was to misrepresent to any transferee the legal significance of the document. This conduct was deceitful in that it was designed to, and did in fact, deceive any transferee into believing that Jeffrey Bushey had signed the Certificate.

Preliminarily, Respondent argues that he was only offering an opinion as to the legality of the conduct, not directing his client to engage in the conduct. We find that position factually unsupported. Essentially, Robin Bushey told him she wanted to sell the car but that Jeffrey had never signed off on the title.(FN1) Respondent knew that Robin was in a difficult situation and knew she was asking him what she should do. In that situation, he could not help but know that he was, in fact, telling her to sign Jeffrey's name.

Indeed, Respondent's contorted legal arguments are offered to cover Respondent's failure to exercise reasonable efforts to determine the correct resolution of the issue Robin Bushey's phone call presented to him.

Respondent testified that because Jeffrey Bushey had no interest in the vehicle, there was no harm in his ex-wife's signing his name. Respondent continues to overlook the fact that the Certificate of Title is a legal document and that the signatures on a it are relied on by transferees. Respondent also overlooks the fact that the signature constitutes a representation of mileage, as well as effecting a transfer of interest.

Finally, Respondent argued that other lawyers have their clients do the exact same thing as he had Robin Bushey do in the same situation. This arguments fails for three reasons. First, the argument was aimed at the alleged violation of DR 7-102(A)(7), which we have not found violated [see transcript pp.93, line 23 -94, line 3].

Second, the credible testimony did not support the argument as a matter of fact. Martha Davis testified:

> Q. Have you ever just sent your client to the dealership with your counsel being that it's legal to sign that ex-spouse's name and not included with that advice to disclose to the motor vehicle dealer that essentially that it's supported by a court order?
>
> A. I am not quite sure how to answer that question

except to say that in the three or four times that I have sent clients to the dealers I have said show them your order, do what they tell you, and if they need anything, have them get back to me.

Q. Why did you bother to send the order to the dealer? Why did you bother to advise to send the order to the dealer?

A. Because it's the order that gives the implied authority.

This testimony clearly demonstrates that Respondent's course of conduct was not the kind of conduct which experienced domestic relations lawyers engaged in. Rather it makes clear that a simple additional step could have been taken which would have prevented any misrepresentation or deceit of transferees of the Certificate and the car. By clearly informing the dealership that one spouse is signing for the other, the deception present in this case is not presented in the practice described by Respondent's witness.

Third, even if other lawyers direct their clients to sign the names of their ex-spouses to certificates of title without disclosure to the buyer, this would not change the result in this case. A wrongful course of conduct by other lawyers cannot be relied upon to justify improper conduct. See In re Illuzzi, 160 VT. 474, 488 (1993).

Respondent relied heavily on his reading of an article some five to ten years earlier from Corpus Juris Secundum to support his conclusion that he did not believe that the conduct was illegal. We have reviewed the article he cited, and clearly it does not support his conduct here. We find it incredible that a lawyer of Respondent's experience and training would tell his client to sign her former husband's name to a motor vehicle title certificate based upon his memory of something he had read long ago in Corpus Juris Secundum, without checking Vermont statutes to see whether they provided a solution or the situation presented. See 23 V.S.A. Section 2025.(FN2)

SANCTION

The starting point for the recommended sanction is 5.13 of the A.B.A. Standards for Imposing Lawyer Sanctions. We find no mitigating factors. As an aggravating factor, we find that Respondent refused to recognize the wrongful nature of his conduct. Indeed, he continued to raise specious legal arguments to justify the reality that he failed to do the kind of work to support his direction to his client that he should have. As a second aggravating factor, we find the vulnerability of the victim: his client. Robin Bushey called to get direction as to what she should do, and Respondent placed her in a potentially untenable legal position. By that, we do not mean that she necessarily would have incurred civil or criminal liability. Rather, she was subjected to the possibility of a serious investigation. Indeed, she was contacted by an investigator from the Department of Motor Vehicles. Fortunately for her, the Department decided not to pursue the matter.

As a third aggravating factor, we find that Respondent has a prior disciplinary record, although somewhat remote in time. Respondent was

publicly censured by the Vermont Supreme Court in 1987.

Consequently, we recommend that the Board recommend to the Supreme Court that it impose a public reprimand along with a period of probation that would require Respondent to obtain remedial training or education appropriate to the problems evidenced herein.

Dated this 10th day of May, 1999.

HEARING PANEL
/s/
Paul S. Ferber, Esq., Chair

/s/
Barry E. Griffith, Esq.

/s/

Toby Young

In re Fink (99-558)

[Filed 27-Oct-2000]

NOTICE: This opinion is subject to motions for reargument under V.R.A.P. 40 as well as formal revision before publication in the Vermont Reports. Readers are requested to notify the Reporter of Decisions, Vermont Supreme Court, 109 State Street, Montpelier, Vermont 05609-0801 of any errors in order that corrections may be made before this opinion goes to press.

No. 99-558

In re Melvin D. Fink, Esq. Supreme Court

On Appeal from
Professional Conduct Board

June Term, 2000

Stephen S. Blodgett, Special Bar Counsel, Burlington, for Appellant.

Melvin D. Fink of Fink and Birmingham, P.C., Ludlow, Appellee.

PRESENT: Amestoy, C.J., Dooley, Morse, Johnson and Skoglund, JJ.

SKOGLUND, J. Appellant Special Bar Counsel filed a petition of misconduct against appellee-attorney, alleging that appellee had violated

DR 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and DR 7-102(A)(7) (counseling client in conduct attorney knows to be illegal or fraudulent) of the Code of Professional Responsibility. (FN1) A hearing panel held a hearing, concluded that appellee had violated DR 1-102(A)(4), but not 7-102(A)(7), and recommended a sanction. The Professional Conduct Board (Board) subsequently held a hearing and adopted the panel's findings of fact, but concluded that appellee had not violated either DR 1-102(A)(4) or 7-102(A)(7), and dismissed the petition. Special Bar Counsel appeals the

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Board's conclusion that appellee had not violated DR 1-102(A)(4). We affirm.

The relevant facts are not in dispute. Appellee represented Robin Bushey in a divorce matter and assisted in preparing the parties' stipulated itemized division of personal property. The final divorce order incorporated the stipulation and further provided: "Each of the parties is awarded the personal property in his or her possession free and clear of any and all marital right or claim of the other . . . ." Neither the stipulation nor the final divorce order made reference to a Subaru automobile that Bushey had in her possession at the time the final divorce order was issued. As the Board stated: "While it would have been better practice to itemize such a significant item of personal property to avoid all confusion, it is clear that the client, Robin, was to have complete ownership rights in that vehicle."

A few months after the final divorce order was issued, Bushey decided to trade in the Subaru. When she realized that her ex-husband's name was on the certificate of title, and that, in order to trade in the car, she needed her ex-husband's signature, she called appellee and asked if she could sign her ex-husband's name. Relying on the above-quoted provision of the divorce decree, and upon something he recalled reading in a legal treatise several years earlier, appellee told Bushey that she could. When she traded in the car, Bushey signed her ex-husband's name, but did not tell the dealer that she had done so. The legal treatise appellee relied upon turned out to be inapplicable. Prior to giving his client the above-noted advice, appellee failed to conduct legal research on the issue. Had he done so, he might have discovered 23 V.S.A. § 2025 (involuntary transfers), under which Bushey could obtain a new title to the automobile under circumstances such as presented in this case.

The hearing panel, whose findings were adopted by the Board, stated:

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> We find respondent's testimony that he did not believe that there was any harm to Jeffrey Bushey because of the provisions of the divorce decree giving Robin the Subaru automobile truthful. . . . [W]e find that he gave her the advice to sign Jeffrey Bushey's name because he thought it was the simplest resolution of her problem and had, in Respondent's mind, was [sic] a minimal risk of adverse consequences.

The panel concluded that appellee had violated DR 1-102(A)(4), stating:

> [B]y signing the name of Jeffrey Bushey, Robin Bushey made a misrepresentation and deceived the dealership. . . . In telling Robin Bushey that she could sign Jeffrey Bushey's name on the certificate of title, he intended her to rely on that advice to sign Jeffrey Bushey's name, and he knew that she would rely on his advice in signing Jeffrey Bushey's name on the certificate of title, and that she did so.

The Board reversed. While noting that appellee may have provided legal advice without adequate preparation, the Board could not find "by clear and convincing evidence that Respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of DR 1-102(A)(4)."

DR 1-102(A)(4) provides: "A lawyer shall not: . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Here, appellee was familiar with the final divorce order that awarded the parties the property in their possession; he knew the Subaru was in Bushey's possession; he believed his advice was supported by a legal treatise; and he believed that advising

Bushey that she could sign her ex-husband's name would cause no harm to anyone. Appellee's major transgression was that he failed to conduct adequate legal research. Given these facts, we agree with the Board that, while appellee's conduct may have been sufficient to conclude that he violated DR 6-101(A)(2) (attorney shall not handle legal matter without adequate preparation), the advice he gave Bushey did not constitute dishonesty, fraud, deceit, or misrepresentation.

The cases in which we have upheld the determination that an attorney has violated DR 1-102(A)(4) involve facts much more egregious than those of the instant case. See In re Karpin, 162 Vt. 163, 170-71, 647 A.2d 700, 704-05 (1993) (attorney instructed office worker to forge and notarize client's signature on affidavit, and made false assertions in memorandum to court; when forgery and false assertions were discovered, attorney lied to magistrate and drafted two affidavits, which he had office worker sign two months apart, stating she had mistakenly signed original affidavit); In re Bucknam, 160 Vt. 355, 367, 628 A.2d 932, 939 (1993) (attorney misrepresented status of case to clients; attempted to alter implied fee agreement; negligently failed to supply detailed accounting of expenses; and acted vindictively toward clients by refusing to provide them with retainer agreement, revising offer to successor counsel concerning potential recovery, and retaining clients' file to pressure them into paying expenses legitimately in dispute).

The same is true of other jurisdictions applying DR 1-102(A)(4), with language identical to Vermont's rule. See People v. Shields, 905 P.2d 608, 611 (Colo. 1995) (attorney engaged in fraudulent billing practices); People v. McDowell, 718 P.2d 541, 543-46 (Colo. 1986) (attorney represented both buyer and seller of corporation and failed to tell buyer that three judgments had previously been entered against corporation; thus, attorney "knowingly withheld highly material information from his client, with the result that the client was given an untrue picture of the financial

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condition of the business he was about to purchase"); Committee on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Davidson, 398 N.W.2d 856, 858 (Iowa 1987) (where attorney for estate filed for and collected payment for unauthorized trip, then later took trip solely to justify receiving payment, court stated: "This action by Davidson, seeking approval by the court for compensation for services never requested by the trustees nor authorized by the will . . . constitutes a blatant misrepresentation to the court"); Louisiana State Bar Ass'n v. Nabonne, 539 So.2d 1207, 1209-10 (La. 1989) (attorney allowed statute of limitations to expire on client's lawsuit, then "deceived his client into thinking that a suit was pending by showing the client sham pleadings which were confected solely for the purpose of promoting the deception"); In re Kranis, 219 A.D.2d 278, 279 (N.Y. App. Div. 1996) (attorney "blatantly neglected cases entrusted to him by five clients and misled those clients into believing that the cases were being actively pursued"); State ex rel. Oklahoma Bar Ass'n v. Moore, 741 P.2d 445, 446-48 (Okla. 1987) (attorney used estate funds for own purposes; submitted fraudulent tax return, forcing heir to mortgage property to pay taxes; forged names of co-executors, and altered documents); In re Hockett, 734 P.2d 877, 883 (Or. 1987) (attorney assisted clients in fraudulent transfers with intent to cheat creditors of their lawful debts).

In cases with facts similar to those of the instant case, applying DR 1-102(A)(4), with language identical to Vermont's rule, courts have concluded that the attorney did not violate the rule. See In re Bargman, 704 N.Y.S.2d 25, 25-26 (N.Y. App. Div. 2000) (no violation of DR 1-102(A)(4) where attorney represented seller in real estate transaction; buyer gave attorney $14,000 in escrow; attorney asked seller if he could use money; seller said yes, and attorney did, believing seller's permission was sufficient); see also Committee on Prof'l Ethics and Conduct of the Iowa State Bar Ass'n v. Bitter, 279 N.W.2d 521, 526 (Iowa 1979) (attorney did not violate DR 1-102(A)(4) where

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he did not fully represent facts in motion for extension of time; "rule does not apply to mere negligence, and would not be violated by acts resulting from 'haste' or 'oversight' . . . , absent other aggravating circumstances"); In re Disselhorst, 444 N.W.2d 334, 338 (N.D. 1989) (attorney who negligently failed to return numerous client phone calls, failed to send child custody papers to successor attorney, and failed to return retainer until after client filed complaint, did not violate DR 1-102(A)(4)).

We conclude that, under the facts of this case, appellee did not violate DR 1-102(A)(4).

Affirmed.

FOR THE COURT:

_____
Associate Justice

Footnotes

FN1. As of September 1999, Vermont follows the Rules of Professional Conduct. There is no question that this case is governed by the Code of Professional Responsibility.

Concurring

NOTICE: This opinion is subject to motions for reargument under V.R.A.P. 40 as well as formal revision before publication in the Vermont Reports. Readers are requested to notify the Reporter of Decisions, Vermont Supreme Court, 109 State Street, Montpelier, Vermont 05609-0801 of any errors in order that corrections may be made before this opinion goes to press.

No. 99-558

In re Melvin D. Fink, Esq.

Supreme Court

On Appeal from
Professional Conduct Board

June Term, 2000

Stephen S. Blodgett, Special Bar Counsel, Burlington, for Appellant.

Melvin D. Fink of Fink and Birmingham, P.C., Ludlow, Appellee.

PRESENT: Amestoy, C.J., Dooley, Morse, Johnson and Skoglund, JJ.

MORSE, J., concurring. I concur, but point out that my vote to affirm the Board rests essentially on the standard of review that, in my view, is best suited to appeals of this nature.

The Board is akin to a jury, and must exercise judgment to temper arguably technical violations of the Code with a collective view of fairness. See In re Pressly, 160 Vt. 319, 322, 628 A.2d 927, 929 (1993) (Court gives deference to Board's recommendations on sanctions); see also

Administrative Order No. 9, Rule 1(F)(3) (version in effect prior to September 1, 1999 revision) (Board charged with responsibility to make findings concerning attorney conduct). This exercise of judgment by a majority of the Board could be ignored by this Court, as if we were the judges of the facts, but, in my view, that would be a mistaken exercise of appellate review. See Pressly, 160 Vt. at 322, 628 A.2d at 929 (this Court must uphold Board's findings unless clearly erroneous).

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The Court in this case has not defined the applicable standard of review. The dissenting members of the Court have essentially substituted their judgment for that of the Board's, an improper standard, in my view. I would pay deference to the Board's assessment of the attorney's conduct, and not second guess its conclusion unless clearly unreasonable. Where reasonable people might differ on the outcome, we should defer to the judgment of the Board.

Furthermore, even assuming that respondent violated the provision of the Code with which he was charged, the dissenting Justices overstate the severity of the violation and the need for sanctions. There was no evidence that the attorney here willfully committed fraud, deceit, or misrepresentation. Nor was there any evidence of a pattern of prior misconduct, or of a venal or dishonest motive. Indeed, the Board's factual findings, which are not challenged by the dissenters, establish that the attorney believed, however foolishly, that he was giving sound legal advice. This amounts at most to negligence, not to intentional fraud and deceit.

Not every technical violation of the Code requires the imposition of discipline. See State ex rel.Oklahoma Bar Ass'n v. Dudman, 981 P.2d 314, 316 (Okla. 1999) (attorney's unintentional violation of Rule did not warrant imposition of discipline). Rather, the Board must consider whether discipline is required, and the degree to be imposed, through a reasonable and reasoned process, taking into account the seriousness of the transgression, the presence of a dishonest or selfish motive, whether there has been a pattern of impropriety, and the effect of the violation on the public and the administration of justice. See Model Rules for Lawyer Disciplinary Enforcement, Rule 10 cmt. (1996) (imposition of sanction may depend upon variety of mitigating and aggravating factors).

Therefore, even if the dissenting Justices were correct that a violation occurred in this case, I would not be persuaded that the Board's decision should be reversed and the matter remanded for

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the imposition of sanctions.

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Associate Justice

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Dissenting

NOTICE: This opinion is subject to motions for reargument under V.R.A.P. 40 as well as formal revision before publication in the Vermont Reports. Readers are requested to notify the Reporter of Decisions, Vermont Supreme Court, 109 State Street, Montpelier, Vermont 05609-0801 of any errors in order that corrections may be made before this opinion goes to press.

No. 99-558

In re Melvin D. Fink, Esq. Supreme Court

On Appeal from
Professional Conduct Board

June Term, 2000

Stephen S. Blodgett, Special Bar Counsel, Burlington, for Appellant.

Melvin D. Fink of Fink and Birmingham, P.C., Ludlow, Appellee.

PRESENT: Amestoy, C.J., Dooley, Morse, Johnson and Skoglund, JJ.

DOOLEY, J., dissenting. I agree with Justice Johnson's dissent and write separately to address the additional rationale cited by the Board for its decision. Appellee defended his conduct by stating that he had read in Corpus Juris Secundum some 5 or 10 years earlier that under circumstances like those present in this case his client had the implied agency to forge her husband's signature. He could not later, however, produce this reference. The Board accepted this defense and found that, even though there is no support in C.J.S. for the advice given by appellee, and as a result, he may have violated a requirement of adequate preparation, he thought he was giving proper advice and did not act dishonestly or fraudulently.

I am very troubled by the "I once read it in a book" defense, and the Board's acceptance of it. I recognize that one can find many broad legal propositions in legal treatises, some in direct

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conflict with others. But, if the public is to have any confidence in the integrity of the enforcement of ethical standards, there must be a limit to a claim that ethical misconduct is excused because the lawyer remembers once reading somewhere that the misconduct is legally acceptable.

This case lies beyond any reasonable limit. The whole purpose of

forging a signature is to misrepresent that the signator has agreed to be bound to the legal document involved. By definition, a forged signature is a fraud on the person whose signature is forged, as well as any person who acts in reliance upon the signature. A claim that something in C.J.S. would say that such a forgery is lawful is patently incredible and unacceptable for a profession that promises the public knowledge, competency, and judgment.

I am sensitive to Justice Morse's point that we must employ a standard of review that gives deference to the Board's application of the Code of Professional Conduct. I also believe, however, that this Court must be accountable to the citizens of Vermont in enforcing ethical norms to ensure public trust and confidence in the legal profession. Reluctantly, I conclude that the Board's decision in this case cannot be squared with our duty to the public.

I respectfully dissent from the dismissal of the complaint and would remand for the Board to impose an appropriate sanction. I am authorized to say that Justice Johnson joins in this dissent.

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Associate Justice

Dissenting

No. 99-558

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PRESENT: Amestoy, C.J., Dooley, Morse, Johnson and Skoglund, JJ.

JOHNSON, J., dissenting. I do not believe that today's decision can be squared with the plain wording of the Code of Professional Conduct. The decision is not only erroneous, but, in my view, it sends a very wrong message, both to the bar and to the public whose interests the Code is supposed to protect. To the members of the bar, it says, you will not be held to the ethical standards of the Code, as long as you are fortunate enough that your misconduct does not happen to cause serious harm. To the public, the decision can only add to its concerns as to whether the profession is capable of policing its own members. I respectfully dissent.

DR 1-102(A) provides that "A lawyer shall not: . . . (4) Engage in conduct involving . . . deceit or misrepresentation." (Internal punctuation omitted.) Signing a legally significant document with someone else's name knowing that the other has not given authorization to do so, is (a) a

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misrepresentation of the genuineness of the signature and/or of one's authority to execute the document and is, therefore (b) a deceitful act against anyone relying on the genuineness/authority of the signature.

While it is easy to imagine much more serious cases of deceit and misrepresentation than this, there can hardly be a plainer one. Thus, unless the appellee is to be excused because he merely procured the act through giving advice to his client, as opposed to forging the signature himself, he unquestionably violated the Code. The majority does not excuse his conduct on this ground, and a moment's reflection on the concepts of agency, causation and conspiracy will confirm why it has not.

It is true that the appellee's conduct resulted in his client achieving a result to which she was apparently entitled. That is a consideration that should go to the severity of the sanction, however, not to the conclusion as to whether a violation occurred in the first place. I think the Hearing Panel was well within its discretion in deciding that, under the circumstances, the minimum sanction was warranted. I cannot agree with the Board, however, which adopted the Hearing Panel's findings of fact in their entirety, that no violation occurred. See In re Morrissette, 161 Vt. 576, 579, 636 A.2d 329, 332 (1993) (mem.) (attorney violated DR 1-102(A)(4) by altering release of right of first refusal after clients had signed it); In re Conti, 380 A.2d 691, 692 (N.J. 1977) (attorney violated DR 1-102 (A)(4) by signing clients' names to deeds and acknowledging signatures despite permission to do so); see also, State ex rel. Nebraska State Bar Ass'n v, Kelly, 374 N.W.2d 833, 837 (Neb. 1985) (forging client's endorsement on bond receipt violates DR 1-102(A)(4) despite attorney's belief that conduct was "ministerial in nature and done as a service to his client").

The concurrence characterizes this issue as a question of standard of review. It is not. Where

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the Board ought to be entitled deference, akin to a jury, is in its fact finding role. The issue before us, however, is whether appellee's conduct, as determined by the Board, amounts to a violation of DR 1-102(A)(4). This issue is most plainly a question of law; the Board's legal conclusions must be "clearly and reasonably supported by the evidence." In re Rosenfeld, 157 Vt. 537, 543, 601 A.2d 972, 975 (1991) (quoting In re Wright, 131 Vt. 473, 490, 310 A.2d 1, 10 (1973)). Indeed, under these facts, the Board's conclusion that no violation occurred was clearly erroneous. The Board has the opportunity to temper "violations of the Code with a collective view of fairness" when it recommends sanctions. It may not impose its view of fairness in deciding whether a violation occurred at all.

I would reverse the decision of the Board and issue a public reprimand. I am authorized to state that Justice Dooley joins in this dissent.

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Associate Justice