145.PCB

[16-Dec-1999]

STATE OF VERMONT
PROFESSIONAL CONDUCT BOARD

Re: PCB 99.82
J. ERIC ANDERSON, Esq., Respondent

DECISION NO. 145

FINDINGS OF FACT and CONCLUSIONS OF LAW
RECOMMENDATIONS

A hearing took place before the Board on July 9, 1999. The following members served as the Board for the hearing: Steven A. Adler, John Barbour, Michael Filipiak, Barry E. Griffith, Stephan Morse, Robert F. O'Neill, Mark Sperry, Mary Miles Teachout, Wynn Underwood, and Toby Young. Jessica G. Porter, Esq., was present as Bar Counsel. Respondent J. Eric Anderson, Esq. was present and represented by William Dorsch, Esq. Respondent's wife Susan was also present.

The Report and Recommendation of the Hearing Panel set forth stipulated facts which are stated below. Bar Counsel and Respondent's attorney presented oral arguments, and Respondent J. Eric Anderson addressed the Board.

The Board accepted the stipulated Findings of Fact from the Hearing Panel's Report. The Board considered Conclusions of Law and a Recommended Disposition at meetings held on July 9, 1999, August 11, 1999, and September 3, 1999. Mark Sperry subsequently recused himself from further participation in the matter. Following the Findings of Fact below are the Conclusions of Law and Recommended Disposition of the majority of the Board. There are also two separate opinions in which different members of the Board set forth concurring and dissenting positions.

FINDINGS OF FACT

1. The Respondent is an attorney licensed to practice law in the State of Vermont since 1969.

2. Respondent was a member of the Professional Conduct Board from 1983 to 1993 and was Chair of the Professional Conduct Board from 1989 to 1993.

3. Respondent met Gerald P. Cantini in the early 1980's and they co-counseled a few cases together over the next 10 years.

The Graf Complaint

4. The Professional Conduct Board received the Graf complaint against Gerald Cantini by a Ms. Graf in January 1989. As Chair of the

Professional Conduct Board, Mr. Anderson sent a letter to Mr. Cantini opening an investigation and requesting a response to the complaint. Mr. Cantini filed a response the same week.

5. In March 1989, the Board moved to defer investigation in the Graf matter due to the current A.O.9 rule which did not allow an ethics investigation when there was an underlying malpractice action. Since there was an underlying malpractice action, the case was to be deferred until A.O.9 was changed in July 1989 to permit a concurrent ethics investigation. Mr. Anderson was not present at the March 1989 meeting.

6. In August 1989, Ms. Wendy Collins was hired as the first full time Bar Counsel in Vermont; among her duties were administering the docket, establishing the Board meeting agenda, and bringing to the Board matters ready for Board consideration.

7. In 1990 and 1991, Ms. Collins had the Graf matter as one of her active cases. Meanwhile, respondent moved to his office in Manchester, Vermont where Gerald Cantini and Tracee Oakman practiced law together, and the Law Offices of Cantini, Anderson and Oakman came into existence in May 1991.

8. When Ms. Collins learned that Mr. Anderson had joined Mr. Cantini's office, she requested the Vermont Supreme Court assign Special Bar Counsel to the Graf case to avoid even the appearance of impropriety due to the fact that the Chair, with whom she worked extensively, was in the same office as the respondent.

9. The Chief Justice appointed Robert Keiner as Special Bar Counsel in May 1991. Mr. Keiner became a member of the Professional Conduct Board in July 1992 and at that time Mr. Norman Blais was then appointed to replace Mr. Keiner as Special Bar Counsel on the Graf complaint. Mr. Anderson had no involvement with the Special Bar Counsel appointments.

10. At the October 1992 Professional Conduct Board meeting, at the request of Mr. Blais, the Graf matter was put on the agenda and Mr. Blais recommended dismissal of the Graf complaint. The Board sent the matter back to Mr. Blais, requesting that Mr. Blais consider another possible violation.

11. Mr. Anderson was not present at the October 1992 meeting and had no knowledge of these events.

11. Mr. Anderson ended his service on the Professional Conduct Board in June 1993. In September 1993, Mr. Blais again recommended dismissal of the Graf matter. Then, in December 1993, the Graf matter was turned over to new Bar Counsel Shelley Hill, who recommended dismissal. The Professional Conduct Board finally dismissed the Graf matter in May 1994.

Structure of Anderson & Cantini Law Offices

12. The respondent, Tracee Oakman, and Mr. Cantini shared operating and trust accounts from 1991 until February 1994 when the operating accounts were separated. There was only one trust account with a joint ledger the entire time that Respondent and Mr. Cantini practiced together.

13. The office used stationary with the printed letterhead "Law Office

of Cantini, Anderson & Oakman" and later used letterhead saying "Law Offices of Cantini & Anderson" until March 1994 They advertised in the 1993-1994 telephone yellow pages and the Martindale-Hubbel directory as "Cantini, Anderson and Oakman," and they filed for liability insurance as a partnership in the years 1991, 1992 and 1993.

14. In March 1994, the offices added the notice "Not a Partnership" to the letterhead to notify the public of their limited business relationship.

Reporting of Trust Violations

15. Just before Thanksgiving 1993, the office's secretary and the bookkeeper sat down with Mr. Anderson for three hours to discuss their concerns regarding Mr. Cantini's irregular money practices involving both the operating account and the trust account. Mr. Anderson was told about Mr. Cantini not depositing fee checks in the office operating account. The staff recalls telling Mr. Anderson about Mr. Cantini removing money from the trust account for expenses which had not occurred; i.e., billing for traveling expenses that did not take place. Mr. Anderson recalls the information regarding the fee checks, but does not recall being told that Mr. Cantini was removing money from the trust account for services that he did not perform. Mr. Anderson checked his own client statement and they were accurate, but he did not look at Mr. Cantini's client cards, even though the funds were coming out of the same client trust account. Mr. Anderson also spoke to Mr. Cantini who reassured him that there were no financial irregularities.

16. Mr. Anderson was again told about trust account irregularities by the third week of July 1994, when a new associate, Mr. H., reported to Mr. Anderson that Mr. Cantini had improperly taken money from the trust account for travel, which had not occurred, and that there were similar irregularities in another case in which the associate had extensively worked with Mr. Cantini.

17. On July 21, 1994, Mr. Anderson met with an attorney from another firm with whom he was co-counseling a case, and Mr. Anderson expressed concern that the trust account that he shared with Mr. Cantini did not balance and he was trying to determine what to do.

18. Although, Mr. Anderson had been told by the staff that there were trust irregularities, he did not file an ethics complaint with the Professional Conduct Board until August 30, 1994.

19. In the original complaint filed on August 30, 1994, Mr. Anderson stated he believed that Mr. Cantini was taking money from the office trust account without proper accounting.

CONCLUSIONS OF LAW and RECOMMENDATIONS

Bar Counsel has alleged three different areas of disciplinary rule violations, and seeks a public reprimand. Respondent agrees that he violated disciplinary rules in two of the three areas, but disagrees with the Bar Counsel on the third issue. He seeks a private admonition. The Conclusions and Recommendations are presented in three parts in order to reflect the members who constitute the majority of the Board on each issue.

PART I: CONDUCT RELATED TO TRUST ACCOUNT

DR 9-102(B)(3) & DR 9-102(C): Duty to Maintain Trust Account

DR 1-103(A): Duty to Report a Violation of a Disciplinary Rule DR 9-102(B)(3) provides that an attorney "shall maintain complete records of all funds, securities, and other properties of a client coming into possession of the lawyer and render appropriate accounts to his client regarding them." DR 9-102(C) requires that every attorney keep a detailed trust accounting system.

DR 1-103(A) states: "A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." DR 1-102 states: "A lawyer shall not violate a disciplinary rule."

Mr. Anderson was given information at the November 1993 meeting he had with his staff that funds in the client trust account he shared with Mr. Cantini were being misused. This information required him to investigate the possibility of irregularities in the account, and report any misuse of the funds by Mr. Cantini. Between November 1993 and July of 1994, he checked his own client cards, but he did not look at Mr. Cantini's client cards, even though the funds were being held and disbursed from the same client trust account. He failed to maintain proper oversight of his own client trust account, the account in which his own clients' funds were being held in trust. In July of 1994, he learned again that Mr. Cantini was making withdrawals from the trust account for improper purposes, yet he held this knowledge for more than a month before he finally gave the Professional Conduct Board notice of the violation on August 30, 1994. This was nine months after the information about trust account irregularities had been communicated to him.

Mr. Anderson agrees that he violated the Disciplinary Rules that required him to maintain complete records and a detailed accounting system of the trust account in which his clients' funds were held. He also agrees that he had an obligation to report his knowledge of Mr. Cantini's trust account irregularities much sooner, and that he violated a Disciplinary Rule by his unreasonable delay in waiting to make a report until August 30, 1994.

The Board concludes that Mr. Anderson violated DR 9-102(B)(3) and DR 9-102(C) with respect to the duty to maintain a trust account, and that he violated DR 1-103(A) with respect to a duty to report a violation of a disciplinary rule.

RECOMMENDATION

For the foregoing reasons, the Board recommends to the Vermont Supreme Court that Mr. Anderson be found to have violated DR 9-102(B)(3) and DR 9-102(C) regarding the duty to maintain a trust account and DR 1-103(A) regarding the duty to report a violation of a disciplinary rule.

Sanctions

The Board has concluded that Mr. Anderson's conduct shows violations of three disciplinary rules, all related to trust account activity. He failed to maintain his client trust account properly by delaying for several months an investigation into account activity after learning of the

possibility of improper withdrawals from that account. (DR 9-102(B)(3) and DR 9-102(C)). In addition, he failed to report a violation of a disciplinary rule, specifically Mr. Cantini's misuse of client trust funds, for an unreasonable period of time after learning of it. (DR 1-103(A)).

Administrative Order 9, Rule 7 sets forth the possible sanctions for violations. The Rule sets forth a clear policy that private admonitions are to be reserved for only limited situations. "Only in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer, should an admonition be imposed." A.O. 9, Rule 7(A)(5). The Rule establishes a public reprimand as the expected minimum sanction, with a private admonition available for those cases in which a minor violation occurred but in isolation and without impact. See the structure and terms of A.O. Rule 7(A).

Thus, before a private admonition is imposed as the sanction for a violation, three elements must be found:

1. The misconduct is minor.
2. There is little or no injury to any of the following:
   --a client
   --the public
   --the legal system
   --the profession, and
3. There is little likelihood of repetition by the lawyer.

The Rule provides that unless all of these elements are present, a private admonition is unwarranted.

For several reasons, this case does not fall within the parameters set by the Rule for a private admonition.

First, the misconduct cannot be classified as "minor." An attorney's obligation to be vigilant in protecting the security of client funds, including a partner's client funds, and an attorney's obligation to protect the integrity of the profession by promptly reporting trust fund violations, are extremely fundamental principles of professional responsibility.

Violations of an attorney's professional duty to safeguard client funds cannot be treated as de minimus. Even if no client of Mr. Anderson's was personally or permanently deprived of money, substandard conduct in the protection of client funds cannot be considered as "minor" misconduct. Mr. Anderson failed to investigate sufficiently whether Mr. Cantini was making improper withdrawals from a joint client trust account in which Mr. Anderson was holding money in trust for clients. By this failure, he put at risk his "own" clients' money, for if Mr. Cantini was drawing funds out of the account for improper purposes, he may have been draining the account, leaving insufficient funds to cover the deposits of Mr. Anderson's clients. Mr. Anderson had an obligation to investigate whether or not this was occurring. By failing to make a timely investigation, he also put at risk the clients of Mr. Cantini. Their money was potentially being wrongly invaded, yet he did not act to safeguard their interests. Because he and Mr. Cantini were partners, he had a direct obligation to those clients that he failed to meet. Even if they were not (which is difficult to conclude considering the joint account as well as all the hallmarks of partnership,

including partnership liability insurance), then his failure to report Mr. Cantini's violations in a timely manner put those clients' funds at continuing risk of misuse. In either event, such conduct signifies a failure to exercise professional responsibility for the funds of his own and another attorney's clients, and as such, it is hard to give such conduct the label of "minor misconduct."

Mr. Anderson's misconduct is also not a single occurrence, or even a violation of only one disciplinary rule. His delay in investigating the client trust account and his delay in reporting Mr. Cantini's trust account violations took place over a period of time. Thus, his conduct is not "minor" in the sense of constituting an isolated incident showing a momentary lapse of judgment, but rather shows a pattern of failure to meet two minimum standards on fundamentals of professional responsibility over a period of months. It is strained to characterize such misconduct as "minor."

Because the first element for a private admonition is not met in that the violations cannot be described as "minor misconduct," a private admonition is not a suitable sanction.

Even if one were to conclude that the misconduct qualifies as minor, the second element, which must also be present, is not met. For this second requirement to be satisfied, there can be little or no injury to any of the following: a client, the public, the legal system, or the profession. This means that there must be minimal, if any, impact in each of these spheres of potential effect.

In Mr. Anderson's case, the facts do not show any pecuniary loss to any client. Nonetheless, such conduct has an effect on the public. It leads the public to the conclusion that lawyers cannot be trusted. The harm to the public is to undermine confidence and trust in attorneys, to whom important affairs are entrusted. The public is harmed when it cannot rely on attorneys to scrupulously protect client funds entrusted to them. When the public cannot trust attorneys on basic principles of professional responsibility and the profession thereby suffers a loss of public confidence, there is loss of public trust in the administration of our system of justice as a whole. The harm, while difficult to quantify because its manifestation is not concrete, is pervasive; its effect, while intangible, is powerful. Also to be considered is the harm to the profession and standards of professional responsibility resulting from an inexperienced associate such as Mr. H. observing that the duty to safeguard client funds is not taken seriously but is only treated as "minor misconduct."

As the Chair of the Professional Conduct Board, Mr. Anderson was a public symbol of the high level of integrity and professional responsibility expected of attorneys. For an attorney in that role to have engaged in multiple violations involving fundamental principles of professional responsibility represents a betrayal of public trust in attorneys that makes the loss of public confidence in the profession and the legal system even more profound.

In summary, because Mr. Anderson's pattern of conduct involved multiple violations of fundamental professional obligations over a period of time, it cannot be deemed "minor misconduct," and because there has been intangible but significant harm to public trust, the legal profession, and

confidence in the legal system, a private admonition is not warranted under the Rule and would not be a sufficient response to the seriousness of the misconduct.

While the third requirement for a private admonition is met in that the likelihood of repetition by Mr. Anderson is minimal, a private admonition cannot be the sanction since two of the three requirements necessary for the imposition of this sanction are not met. The conduct warrants a public reprimand in order to restore public confidence in the profession and the legal system.

A.O. 9 Rule 8(D) requires that mitigating and aggravating circumstances be specified. There are mitigating factors that favor Mr. Anderson in the consideration of sanctions. He had practiced law in Vermont for 25 years without any professional conduct violations. He eventually reported the trust account misconduct of Mr. Cantini, and he cooperated fully with Bar Counsel during these proceedings. He has shown remorse for his substandard conduct. There are also aggravating factors. He had substantial experience in law practice, and should have been fully aware of the fundamentals of professional responsibility in protecting client funds. Also, his position on his partnership status with Mr. Cantini during this period appears to be less than candid.

Because of the mitigating factors, there is no need for a sanction stronger than a public reprimand. Because the conduct cannot be considered "minor" and there has been harm to public confidence in the profession, and because of the aggravating factors, the recommended disposition is a public reprimand rather than a private admonition.

RECOMMENDATION

For the foregoing reasons, the Board recommends to the Vermont Supreme Court that Mr. Anderson be found to have violated DR 9-102(B)(3) and DR 9-102(C) regarding the duty to maintain a trust account and DR 1-103(A) regarding the duty to report a violation of a disciplinary rule, and that the sanction be a public reprimand. There is a dissenting opinion on the issue of the sanction.

MEMBERS OF THE BOARD:

/s/ 12/03/99

_____

John Barbour Date

/s/ 12/13/99

_____

Stephan Morse Date

/s/

_____

Robert F. O'Neill, Esq. Date

/s/ 12/07/99

_____

Hon. Mary Miles Teachout Date

/s/ 12-09-99

_____
Hon. Wynn Underwood Date

/s/ 12/03/99

_____
Toby Young Date

PART II: PARTNERSHIP

DR 2-102(D): Statements Implying Practice in a Partnership

DR 2-102(D) states: "Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact."

Mr. Anderson now says that he and Mr. Cantini were not partners. From May of 1991 until March of 1994 they used joint letterhead, joint bank accounts, joint insurance applications and joint advertisements which stated or implied to the public that they were in partnership. They presented themselves to the public as if they were a partnership. Mr. Anderson maintains that despite these acts signifying partnership, he and Mr. Cantini were not in a partnership. On that basis, he agrees that he violated DR 2-102(D), because he concedes that he presented himself to the public as though he were in a partnership.

The Board cannot accept Mr. Anderson's current position that he was not in a partnership with Mr. Cantini during 1991 to 1994. The Board concludes that Mr. Anderson and Mr. Cantini functioned as a partnership during that period, and presented themselves to the public as a partnership, and therefore were practicing in a partnership. The majority of the Board concludes that because Mr. Anderson was practicing in a partnership with Mr. Cantini in fact, he cannot be disciplined for presenting himself in exactly that relationship. Therefore, the Board finds no violation of DR 2-102(D).

There is a dissenting opinion on this issue.

RECOMMENDATION

For the foregoing reasons, the Board recommends to the Vermont Supreme Court that Mr. Anderson be found not to have violated DR 2-102(D) regarding representation of partnership status.

MEMBERS OF THE BOARD:
/s/ 12/03/99

_____
Steven A. Adler, Esq. Date
/s/ 12/03/99

_____
John Barbour Date
/s/ 12/03/99

_____
Michael Filipiak Date
/s/ 12/03/99

_____
Barry Griffith, Esq. Date

/s/

_____
Robert O'Neill, Esq. Date

PART III: APPEARANCE OF IMPROPRIETY

DR 9-101: Failure to Avoid the Appearance of Impropriety

DR 9-101 is a Disciplinary Rule entitled "Avoiding Even the Appearance of Impropriety." DR 1-102 states: "A lawyer shall not violate a disciplinary rule." Bar Counsel alleges that Mr. Anderson violated DR 9-101 by failing to avoid the appearance of impropriety during the extended period when he was Chair of the Professional Conduct Board and the Graf complaint was pending against Mr. Cantini, with whom he appeared to be in partnership. Mr. Anderson does not agree that he violated DR 9-101.

The majority of the Board concludes that the obligation to avoid even the appearance of impropriety did not require Mr. Anderson to take affirmative steps to ensure that the Vice Chair or the Court Administrator's Office was responsible for monitoring progress on the complaint against Mr. Cantini. Therefore, the majority concludes that Mr. Anderson did not violate the disciplinary rule requiring avoidance of even an appearance of impropriety, DR 9-101.

There is a dissenting opinion on this issue.

RECOMMENDATION

For the foregoing reasons, the Board recommends to the Vermont Supreme Court that Mr. Anderson be found not to have violated DR 9-101 regarding avoidance of the appearance of impropriety.

MEMBERS OF THE BOARD:
/s/ 12/03/99

_____
Steven A. Adler, Esq. Date
/s/ 12/03/99

_____
John Barbour Date
/s/ 12/03/99

_____
Michael Filipiak Date
/s/

_____
Robert O'Neill, Esq. Date

/s/ 12/03/99

_____
Toby Young Date

CONCURRENCE AND DISSENT

STATE OF VERMONT
PROFESSIONAL CONDUCT BOARD

IN RE: J. Eric Anderson, Esq.
PCB Docket No. 99.82

We respectfully dissent from the majority's imposition of a public reprimand for violation of D.R. 9-102, the so called "trust account" violations. For reasons detailed following, while finding a violation of the disciplinary rule, we would impose a private admonition rather than a public reprimand. In other respects we concur with the majority opinion which found no violations of D.R. 2-102(d) or D.R. 9-101.

The conventional wisdom is that ignorance of the law is no excuse. By analogy to the professional conduct rules for lawyers, all members of the bar are presumptively held to the same standard that they know and follow: the lawyer's code of ethics. This is a fallacy. The Vermont Professional Conduct Board and the American Bar Association have long considered inexperience in the practice of law to be a mitigating factor. Compare, A.B.A. Standard for Imposing Lawyer Sanctions § 9.32(f)(mitigating factor includes inexperience in the practice of law) with § 9.22(I)(aggravating circumstance includes substantial experience in the practice of law). That is, newer lawyers who violate a disciplinary rule are cut more slack than experienced lawyers. In light of the esoterica of some of our rules and the uncertainty in their interpretations, this long held dichotomy makes sense.

Our quarrel with the majority opinion here is that it elevates this distinction to new heights. The respondent, as a former chair of the PCB, is being held to an indistinct standard which is somewhere above that standard we have previously used for experienced members of the Bar. Mr. Anderson, who like other members of the PCB serve without remuneration, is being publically reprimanded for failing to sooner turn in his partner when trust account irregularities were brought to his attention. We think this imposes a newer, heightened standard of scrutiny heretofore unrecognized in reported Vermont decisions and unfair to the respondent. It seems, in fact, that Mr. Anderson is being sanctioned because he was the PCB Chair, or at least, that his public service is a de facto aggravating circumstance in determining his proper sanction.

To be sure, lawyers have a duty to keep accurate financial records as they pertain to their clients. D.R.9-102(B)(3); 9-102(C). Should an irregularity appear, it is incumbent upon any lawyer to make inquiry. So far, we are in agreement with the majority. Nowhere does our code detail the nature of the inquiry which must be made and herein lies the rub. The facts before the Board are by stipulation; as a result, both majority and dissent have the identical material before them. In November of 1993, a secretary and the bookkeeper came to Mr. Anderson with the concern that his partner was not depositing fee checks in the general office operating account. (Finding of Fact #16). Having been alerted to an irregularity, it would only become incumbent upon Mr. Anderson to investigate if the account contained client funds. In other words, we agree with the majority that the issues in this case are triggered only if one assumes that Mr. Anderson was told of client fund irregularities, which has not been established.

However, even assuming arguendo that Mr. Anderson was alerted to

improper milage billings, the fact is that he did investigate by first talking to his partner and asking for details. One can imagine how, in the real world of interpersonal relations, this would certainly be a delicate conversation. Simply put, one does not easily confront another professional, to say nothing of one's partner, with questions that impugn their integrity. In any event, the conversation occurred and the partner had some explanations for the irregularities. Mr. Anderson then checked "his own client statement and they were accurate, but he did not look at Mr. Cantini's client cards, even though the funds were coming out of the same client trust account." (FOF#16) .

The Stipulation of Facts is maddingly vague about exactly how the trust accounts were kept, or how much money may have been missing. From an accounting perspective it is obvious that some money could have been stolen from Mr. Cantini's accounts, but not so much money that there wouldn't still be enough to cover the Anderson accounts. In other words, Mr. Anderson would have had to check all the client trust ledgers and not just his own since the funds were co-mingled. This was error by Mr. Anderson, and it is on this failure that the majority concludes Mr. Anderson's actions demand public sanction. In other words, it is not his failure to investigate, but his failure to investigate throughly enough. "The harm," concludes the majority, "is even greater because of the fact the Mr. Anderson engaged in this conduct during and after having served for a long time as the Chair of the Professional Conduct Board." Majority opinion at p.10.

We think this is Monday morning quarter backing. Even assuming arguendo that the reporting of any irregularities with enough to trigger a duty to investigate, the fact is that he did investigate. Boiled down to its essence, the majority concludes that it has been proved by clear and convincing evidence Mr. Anderson did not investigate enough. This added requirement of a specific quantum of investigation is simply not present in the rules of conduct by which Mr. Anderson was required to practice.

One problem inherent with sometimes glacial speed of our disciplinary process is that events have a way of developing in the interim. We know now, with the wisdom of hindsight, that Mr. Anderson's partner was indeed involved in inappropriate behavior; in 1995, he was disbarred. That fact can have no place in evaluating the propriety of actions taken in 1993.

In fairness to the majority, they support their recommendation of a public reprimand in part on Mr. Anderson's own admission that he violated DR1-103A, the duty to report a violation of a disciplinary rule. This rule affectionately known as the "rat rule" requires a lawyer to report himself or herself or any other lawyer whom he knows is violating a disciplinary rule. Even the majority does not go far as to say that Mr. Anderson knew Mr. Cantini had violated a disciplinary rule when he had knowledge of alleged trust account irregularities. The most they say is that he should have investigated further. Therefore, his duty under the "rat rule" is not triggered when his staff gave him information in November of 1993 of trust account irregularities. Rather, the majority concludes that It was triggered in July of 1994.

In the third week of July, 1994, a new associate with the firm came to Mr. Anderson and reported that Mr. Cantini was billing Mr. Cantini's own clients for travel time when in fact, Mr. Cantini had not so traveled. FOF#17. Specifically, the associate reported that Mr. Cantini submitted a

bill for $43. and change for travel associated with some real estate title work. On July 21, 1994, Mr. Anderson received information from an attorney at another firm who also raised trust account concerns. Mr. Anderson investigated, determined that this was indeed misbilling and, on August 30, 1994, reported Cantini to the Professional Conduct Board. Mr. Anderson concedes that he should have moved more promptly. Once again, this is not a failure to act, but a failure to act promptly enough. As with the violation concerning the trust account, it is a matter of degree.

Private admonitions are appropriate where the misconduct is minor, there is little or no injury and there is little likelihood of repetition by the lawyer.

The Majority agrees that there is no likelihood of repetition by the lawyer. Further, the majority cannot articulate any specific injury to any client but concludes there is an intangible injury to the public and the profession when any misuse of client trust funds is revealed. By that analysis, no violation of DR2-102 could ever result in a private admonition because there would always be some intangible diminution of confidence in the legal profession. We dissent from this conclusion because we think that result, while perhaps appropriate as a policy decision, is not appropriate ex post facto. More simply put, it is unfair to the profession to change the rules and apply them retroactively. It must be noted that the same sense of unfairness has led the majority to conclude that Mr. Anderson cannot be found to have violated DR 9-101, failure to avoid the appearance of impropriety, in the handling of the Cantini complaints.

With regard to that allegation, when the Cantini complaint came before the professional conduct board, Mr. Anderson properly recused himself. However, the complaint languished for an undue amount of time before action was taken. A majority of this Board determined that Mr. Anderson could not be disciplined to failing to insure the prompt administration of a disciplinary complaint, because the practice at that time was to simply refer the complaint out to the Attorney General's office. In short, it would be inappropriate to change the rules after the fact.

Finally, the majority concludes that this misconduct, the failure to investigate thoroughly, was not "minor." This is necessarily a judgement call. We would agree that no investigation by Mr. Anderson would be more egregious and should result in a public reprimand. We agree that, with the wisdom of hindsight, more investigation would have been preferable. We cannot agree that his actions constituted a de minimus investigation. He did take steps to protect the integrity and security of client funds and was mollified by the assurances of his partner. Faced with Mr. Cantini's protests of innocence and any corroboration, we conclude that, measured against the rest of the experienced bar and not against some new standard for PCB chairs, Mr. Anderson's violation of the rule was minor and the appropriate sanction is a private admonition.

For these reasons, we respectfully dissent from the imposition of a public reprimand.

PROFESSIONAL CONDUCT BOARD

/s/

_____

Steven A. Adler, Esq.

/s/

_____
Michael Filipiak

CONCURRING AND DISSENTING

STATE OF VERMONT
PROFESSIONAL CONDUCT BOARD

Re: PCB 99.82
J. ERIC ANDERSON, Esq., Respondent

The majority of the Board has concluded that Mr. Anderson has violated three disciplinary rules relating to trust account activity. The undersigned concur with the Board's conclusions as to violation of those rules, and with the recommendation of the majority for a sanction of a public reprimand.

The Hearing Panel also concluded that Mr. Anderson violated two additional disciplinary rules, one by inaccurately portraying his partnership status (DR 2-102(D)), and one by failing to avoid the appearance of impropriety in failing as PCB Chair to delegate to the Vice Chair or Court Administrator responsibility for a professional conduct complaint against his law partner (DR 9-101). The majority of the Board disagreed with the Hearing Panel, and found no violations of DR 2-102(D) and DR 9-101. The undersigned dissent on the issues and for the reasons stated below.

DR 2-102(D): Statements Implying Practice in a Partnership or Other Organization

The majority concludes that Mr. Anderson cannot be disciplined for holding himself out as being in a partnership with Mr. Cantini when he was not because the Board concludes that he was in a partnership with Mr. Cantini, despite Mr. Anderson's current contention that he was not.

The Rule states as follows: "Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact." (Emphasis added.) DR 2-102(D). The Rule imposes the professional obligation on an attorney to make public statements and portrayals about his or her practice status accurately.

An attorney who is not a partner with another yet represents to the public that he is, or an attorney who is a partner in fact but represents that he is not, is not conducting himself with the basic integrity required of attorneys under both the spirit and the letter of the Code of Professional Responsibility and specifically DR 2-102(D). The public is entitled to rely on statements by attorneys that they are who they say they are, and that they have in fact the partnership or other status that they

present to the public. This is fundamental to public trust in attorneys.

Mr. Anderson has made two inconsistent public representations about his practice relationship with Mr. Cantini during the period from 1991 to 1994. During that period, his representations to the public were that he was in practice in a partnership with Mr. Cantini: they used a classic partnership style of firm name, partnership letterhead, joint offices, joint bank accounts, and joint advertisements. They had a single client trust account and joint liability insurance. He agrees that he stated or implied that he was in practice in a partnership during that period. The Board, including the undersigned, conclude that not only did he portray himself as practicing in a partnership, he was in fact practicing in a partnership.

In the context of these proceedings, and apparently at other times subsequent to 1994, Mr. Anderson has disclaimed that from 1991 to 1994 he practiced in a partnership with Mr. Cantini. This is a different representation about his practice status during the 1991-94 period, and both cannot be true. One of them constitutes an inaccurate statement about his practice status.

Since he was in fact in a partnership, it is a violation for him to argue to the Board in these proceedings that he was not in a partnership then, but was 'in fact' in some "other organization" (i.e., solo practice). DR 2-102(D). The violation has taken place during the course of these proceedings, at a time subsequent to the 1991-94 period in question. Thus, although it was not a violation for him to have held himself out as a partner in 1991-94 when he actually was, it is a violation for him to have recharacterized his status afterwards as having been in an "other organization" (solo practice), when that was not the case.

Although the analysis shows that the grounds are different than the ones Mr. Anderson accepts as a basis for a violation, the undersigned nonetheless find a violation of DR 2-102(D). This is a different conclusion than the majority of the Board reached, which was that there was no violation of DR 2-102(D). It should be noted that the Hearing Panel accepted Mr. Anderson's admission to a violation on the grounds he asserted. The undersigned have since concluded that the analysis set forth herein more accurately defines the basis for the violation.

For the foregoing reasons, the undersigned respectfully dissent from the conclusion of the majority on this issue. The undersigned conclude that Mr. Anderson violated DR 2-102(D) by stating subsequent to 1994, including in these proceedings, that he was not in partnership with Mr. Cantini in 1991-94, when in fact he was.

With respect to a recommended sanction, this conduct has a significant impact on public trust and confidence in attorneys, and consequently on the legal profession and the legal system as a whole. It cannot be described as "minor", and therefore does not qualify for a private admonition under Rule 7(A)(5). Therefore, we recommend that the sanction be a public reprimand.

s/s 12/13/99

_____ _____

Stephan A. Morse Date

/s/ 12/06/99

Hon. Mary Miles Teachout	Date
/s/	12-09-99
Hon. Wynn Underwood	Date
/s/	12/15/99
Toby Young	Date

DR 9-101: Failure to Avoid the Appearance of Impropriety

DR 9-101 is a Disciplinary Rule entitled "Avoiding Even the Appearance of Impropriety." DR 1-102 states: "A lawyer shall not violate a disciplinary rule." Bar Counsel alleges that Mr. Anderson violated DR 9-101 by failing to avoid the appearance of impropriety during the extended period when he was Chair of the Professional Conduct Board and the Graf complaint was pending against Mr. Cantini, with whom he appeared to be in partnership. Mr. Anderson does not agree that he violated DR 9-101.

Mr. Anderson was Chair of the Professional Conduct Board frohe matter had not progressed past a prehearing stage during the seventeen months that Mr. Anderson had been Board Chair. No further action was taken on the Graf complaint during the next eight months that Mr. Anderson served as Chair of the Board. While Mr. Anderson was disqualified from acting on or even supervising progress on the complaint, he had an obligation to ensure that supervision of the case was being exercised by the Board Vice Chair or some other substitute. He did not do so.

In a usual case, the Bar Counsel would have exercised staff oversight responsibility on the progress of the case, and brought to the attention of the Chair any problems with unreasonable delay in the handling of complaints. Bar Counsel could not do so with respect to the Graf complaint, however, since Bar Counsel was disqualified herself, due to the Chair's relationship with Mr. Cantini. She had arranged for the case to be assigned to Special Bar Counsel. The fact that Bar Counsel usually tracks the progress of cases does not absolve the Chair from all responsibility with respect to delay in cases. Mr. Anderson, as Chair, had a responsibility to shift to the Vice Chair responsibility for cases in which he had a conflict. As an alternative to making sure that the Vice Chair was supervising the case, Mr. Anderson could have informed the Court Administrator's Office of the conflicts of both himself and Bar Counsel, and asked the Court Administrator to supervise progress on the case. He did not do so.

It should be noted that there are no facts suggesting that Mr. Anderson actively engaged in conduct of any kind to bring about delay in the handling of the Graf complaint against Mr. Cantini. Nonetheless, he had an affirmative obligation as Chair of the Board to assure that the case was being supervised by the Vice Chair or the Court Administrator's Office so that progress on the case was not unreasonably delayed. Otherwise, the complainant, who is a member of the public, might reasonably become suspicious that the reason the matter was taking so long to proceed through the Professional Conduct Board process was that Mr. Cantini was the law partner of the PCB Chair, Mr. Anderson. An attorney who undertakes the

responsibility of PCB Chair has an obligation to anticipate such criticism, and take steps to prevent the development of such a suspicion, which is harmful to public confidence in the profession and the legal system.

An appearance of impropriety was created when Mr. Anderson, as PCB Chair, entered into "partnership" in May of 1991 with an attorney, Mr. Cantini, when he knew a complaint had been pending against Mr. Cantini for 2 years and four months, and then did nothing over the next 25 months to assure that a responsible substitute had assumed responsibility for tracking the progress of the case. Such an appearance of impropriety could easily have been avoided by delegation of Chair responsibility to the Vice Chair.

Mr. Anderson has argued through counsel that during the time immediately preceding the relevant period, it had not been standard practice for the PCB Chair to engage in active management of pending cases, and that particularly when Special Bar Counsel was appointed for cases, the progress of cases depended to a large extent on the pace set by the individuals serving as Special Bar Counsel. Even within that context, Mr. Anderson knew, when he entered a professional relationship with Mr. Cantini, that a complaint had been pending against Mr. Cantini for over two years; he had signed the letter opening the investigation in January of 1989. He knew in October 1992, three and one-half years later, that it was not dismissed, and that seventeen months of that period had been on his watch as PCB Chair. He knew that Bar Counsel Wendy Collins was disqualified from the case. He knew that the Board had a Vice Chair, and that the Court Administrator's Office had general oversight responsibility over PCB matters. He knew, or should have known, that it was important not to create the possibility of anyone believing that the reason the progress of the case was slow was that Mr. Cantini was his law partner. Such a perception would be harmful to the trust and confidence the public places in the bar to maintain ethical standards in the profession through a disciplinary process that is fairly and impartially administered. Under these circumstances, he had an affirmative responsibility to avoid even the appearance of impropriety by making sure that the Vice Chair or CAO were exercising responsibility for the case. He failed to do so, and thereby violated DR 9-101.

Such misconduct has a significant impact on the public, and on public trust and confidence in attorneys, the legal profession, and the legal system as a whole. As a result, the misconduct cannot be described as minor. Thus, the misconduct does not qualify for a private admonition under Rule 7(A)(5). A public reprimand is necessary to restore public confidence in the Professional Conduct Board to enforce standards of professional responsibility. It is the only means of overcoming public suspicion and distrust of professional peer review.

/s/	12/13/99
Stephan A. Morse	Date
/s/	12/06/99
Hon. Mary Miles Teachout	Date
/s/	12-09-99
Hon. Wynn Underwood	Date

In re Anderson (99-550)

[Filed 26-Dec-2000]

ENTRY ORDER

SUPREME COURT DOCKET NO. 99-550

OCTOBER TERM, 2000

In re J. Eric Anderson	}	APPEALED FROM:
	}	
	}	
	}	Professional Conduct Board
	}	
	}	
	}	DOCKET NO. 99.82

In the above-entitled cause, the Clerk will enter:

Respondent J. Eric Anderson appeals from the conclusion of the Professional Conduct Board that he violated the Vermont Code of Professional Responsibility: (FN1) DR 9-102(B)(3) (maintain and render complete records and accounts of all client funds and property), 9-102(C) (maintain trust accounting system), and 1-103(A) (disclose unprivileged knowledge of disciplinary rules violation). He also appeals the Board's recommendation that he be publicly reprimanded. Respondent claims that the Board erred in (1) concluding that he took too long to report the mishandling of client trust accounts by a partner; (2) concluding that he did not investigate these allegations thoroughly enough; and (3) holding him to a higher standard because he was a past member of the Board. We affirm and impose the recommended sanction.

The facts were stipulated to by the parties. Respondent is licensed to practice law in Vermont, and he was a member of the Board from 1983 to 1993, acting as Chair from 1989 to 1993. He shared operating and trust accounts with attorney Gerald P. Cantini and another lawyer from 1991 until February 1994. The shared trust account had a joint ledger and was the only trust account used by these lawyers. The office used printed letterhead that read "Law Office of Cantini, Anderson & Oakman" and later just "Law Offices of Cantini & Anderson." These attorneys were listed as a partnership in Martindale-Hubbel's directory and obtained liability insurance as a partnership between 1991 and 1993. In March 1994, the notice "Not a Partnership" was added to the letterhead.

Just prior to Thanksgiving 1993, the office's secretary and the bookkeeper informed respondent that there were irregularities in Cantini's handling of the operating and trust accounts. The staff recalls informing respondent that Cantini had removed moneys from the trust account for expenses that never occurred, and that Cantini was not depositing fee checks in the operating

account. Respondent recalled being told about the fee checks, but he did not recall being told about the trust fund irregularities at this time. Respondent did check his own client trust account records for accuracy but did not check Cantini's records, even though they used the same account. Respondent spoke with Cantini who assured him there was no need for concern.

Later, in July 1994, a new associate informed respondent that Cantini had improperly taken money from the trust account for travel expenses that were never incurred, and that there were other irregularities in Cantini's handling of funds. On July 21, 1994, respondent admitted to another attorney that the account did not balance and that he was trying to determine what should be done. Respondent filed an ethics complaint against Cantini on August 30, 1994, stating that he believed Cantini was taking money from the client trust account without proper accounting.

Based on the foregoing facts, a three-member hearing panel concluded that respondent had violated DR 2-102(D) (lawyers may state or imply a partnership only when there is one in fact) because he had implied a partnership and yet claimed, in his defense, that there was none. The panel also concluded that respondent violated DR 9-102(B)(3), 9-102(C), and 1-103(A) due to the irregularities in the trust account and his failure to report Cantini earlier. Moreover, the panel found a violation of DR 9-101 (lawyers must avoid even the appearance of impropriety) because there had been an appearance of impropriety in his handling of the Cantini matter while chair of the Board. The panel recommend a public reprimand. Pursuant to A.O. 9, Rule 8(D), (FN2) the Board then reviewed and modified the panel's recommendations, finding no violation of DR 9-101 or DR 2-102(D), but otherwise agreeing with the panel's conclusions and recommending the sanction of a public reprimand. This appeal followed pursuant to A.O. 9, Rule 8(E) and V.R.A.P. 3.

It is only this Court that may impose a public reprimand, A.O. 9, Rule 7(A)(4). The Board's findings, whether purely factual or mixed law and fact, are upheld if they are "clearly and reasonably supported by the evidence." In re Berk, 157 Vt. 524, 527, 602 A.2d 946, 947 (1991); accord In re Karpin, 162 Vt. 163, 165, 647 A.2d 700, 701 (1993) (Court accepts Board's findings unless clearly erroneous). In addition, although this Court does not "review" Board recommendations on sanctions, but rather makes its own determination as to which sanctions are appropriate, we nevertheless give deference to the Board's recommendation. Berk, 157 Vt. at 527-28, 602 A.2d at 948; In re Pressley, 160 Vt. 319, 322, 628 A.2d 927, 929 (1993).

Respondent first argues that the Board erred in concluding that he took too long to report the mishandling of the client trust account by Cantini. He claims that the stipulation of facts does not support a finding that he learned of the trust account misconduct before July, 1994. We disagree. The stipulation of facts disclosed a conflict between the recollection of respondent and that of his secretary and bookkeeper, and the Board was necessarily required to resolve the conflict. Indeed, the stipulation states that respondent "was again told about trust account irregularities" (emphasis added) in 1994, making it clear that respondent had notice of trust account irregularities earlier, but

does not now recall that notice. Thus, there was evidence to support the Board's finding that respondent was warned that there was a problem with the trust account nine months before he reported the irregularities to the Board. On this point, we discern no error.

Respondent's second argument is related to his first; he argues that the Board erred in concluding that he had a duty to investigate the irregularities in the trust account in November 1993. Consistent with the Board's finding, however, it could conclude that respondent knew or should have known that there were irregularities in Cantini's handling of the client trust account as early as November 1993. Thus, it was not error for the Board to conclude that DR 9-102(B)(3) and 9-102(C) imposed a duty on respondent to investigate Cantini's activities and take whatever steps were necessary to protect client funds and property.

Finally, respondent argues that the Board impermissibly sanctioned him on the ground that he was a former Board member. Respondent stipulated that he was a former member and chair of the Board, and never argued that this fact was irrelevant to the Board's deliberation on any of the charges. In any event, we find nothing in the record to support a contention that the Board held respondent to a higher standard than it would hold any other lawyer. Instead, the Board used this fact in considering what sanction to recommend. The Board merely noted respondent's background to support its view that his actions negatively impacted the public and the profession.

Having upheld the Board's findings and conclusions, we now address the question of the appropriate sanction. The Board looked to A.O. 9, Rule 7, and noted that a private admonition is the minimum sanction under the rule, and may be imposed only if all three of the following conditions are met: (1) it is a case of minor misconduct, (2) there is little or no injury to a client, the public, the legal system, or the profession, and (3) there is little chance of repetition. Although the Board agreed there was little chance of repetition of the misconduct by respondent, it concluded that a private admonition was not warranted in this case. It concluded that the misconduct here was not minor because protecting client property is a fundamental principle, and the misconduct at issue was not an isolated incident but instead evinced a pattern of failing to meet the minimum standards. Moreover, the board determined that there was injury to the public and the profession that, although "intangible," was still "significant." The Board then specified the aggravating and mitigating factors as called for under A.O. 9, Rule 8(D), and determined that because respondent had practiced for twenty-five years with no prior violations, had shown remorse, cooperated with bar counsel, and had eventually reported Cantini, there was no need for a sanction stronger than a public reprimand.

We adopt the Board's recommendation. Our A.O. 9, Rule 7 language on when a private admonition is appropriate is identical to that of the American Bar Association Standards for Imposing Lawyer Sanctions 1.2 (ABA Standards). We have consulted these standards before when considering which sanction was appropriate. E.g., Pressly, 160 Vt. at 325, 628 A.2d at 931. ABA Standard 4.13 states that public reprimand is the appropriate sanction where a lawyer's negligence in handling client property causes injury or potential injury to a client. Although the Board pointed out

that there was no actual pecuniary injury caused by respondent's misconduct, there is a potential for client injury when warnings of misuse of client funds are ignored and tardily reported. Here, as in Pressly, we agree that the appropriate sanction is a public reprimand. Notwithstanding the fact

<Page 4>

that here there is no actual pecuniary injury to a client, lawyer misconduct in handling and protecting client trust accounts does injure both the public at large and the profession by increasing public suspicion and distrust of lawyers. See In re Wool, 169 Vt. 579, 582, 733 A.2d 747, 751 (1999) (public reprimand with 18-month probation for multiple violations where monetary amounts small and scope of actual injury unknown); In re Fucetola, 499 A.2d 222, 224 (N.J. 1985) (failing to keep proper records a "serious act of misconduct" because it reflects adversely on profession and potential for injury to clients is great). Thus, we agree with the Board that a private admonition would be an insufficient sanction in this case.

J. Eric Anderson is hereby publicly reprimanded for violations of DR 9-102(B)(3), 9-102(C), and 1-103(A).

BY THE COURT:

_____
Jeffrey L. Amestoy, Chief Justice

_____
John A. Dooley, Associate Justice

_____
James L. Morse, Associate Justice

_____
Denise R. Johnson, Associate Justice

Footnotes

FN1. The references are to the Code of Professional Responsibility rather than the Rules of Professional Conduct because the conduct at issue predates our adoption of the Rules of Professional Conduct.

FN2. The references to A.O. 9 are to the 1996 version because the complaint originated in 1996.