

11 PRB

[21-Jul-2000]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

DECISION NO. 11

In re: PRB File No. 98.21

The Panel, on May 15, 2000, received a Stipulation of Facts ("Stipulation") and Joint Recommendation as to Conclusions of Law from the parties in this matter. After receiving verification that neither party was seeking a hearing in this matter, the Panel convened a conference to review the Stipulation of Facts and Joint Recommendation. The Board accepts the facts as set forth in the Stipulation, which are set forth below, and for the reasons discussed in the Conclusions of Law section, the Panel imposed the sanction of an admonition in this matter.

FINDINGS OF FACT

1. The Respondent is an attorney licensed to practice law in the State of Vermont. The Respondent was admitted to Vermont's Bar in 1986.

2. In 1995, the Respondent prosecuted a criminal case in which the defendant was charged with multiple counts of aggravated sexual assault upon the defendant's minor children.

3. At some point prior to trial, the Respondent realized that a deputy in Respondent's office had, several years earlier, represented the defendant in a CHINS case. The Respondent immediately discussed the situation with the deputy. The deputy had no recollection of the earlier representation. The Respondent and the deputy then reviewed the paperwork and learned that the CHINS case did not involve any of the alleged victims in the criminal case. Nonetheless, the CHINS case was somewhat involved and resulted in the generation of reports that provided a substantial history of the defendant's family history and relationship with the children.

4. The Respondent and the deputy discussed whether they should disclose to defense counsel the fact that the deputy had previously represented the defendant in a CHINS case. Based in large part on the fact that the deputy neither recalled the defendant nor any details of the chins case, the Respondent and the deputy opted not to disclose to defense counsel the fact that the deputy had previously represented the defendant. Rather, the Respondent produced to defense counsel the paperwork that was generated in the CHINS case. As that paperwork made clear that the deputy had represented the defendant in the CHINS case, the Respondent assumed

that opposing counsel would become aware of the deputy's former representation.

5. At jury draw, the Respondent introduced the deputy (who had previously represented the defendant) as the lawyer who would draw other juries scheduled for that day. The Respondent did not inform the Court or opposing counsel that the deputy had previously represented the defendant in the criminal matter. The defendant was present in court but did not raise any objection to the deputy's appearance.

6. The deputy who had previously represented the defendant did not take an active role in the trial. In fact, after the jury draw, the deputy never again appeared at counsel table. The deputy, however, did conduct mock cross-examinations of some of the State's witnesses.

7. Upon conclusion of the trial, the defendant was found guilty of one count of aggravated sexual assault.

8. At some point, defendant's counsel learned that the Respondent's deputy had previously represented the defendant in the CHINS case. On appeal, defense counsel argued that the conviction should be reversed, among other reasons, due to the Respondent's failure to disclose that the deputy had previously represented the defendant in the CHINS case.

9. The Supreme Court reversed the conviction, and entered a

judgment of acquittal, after finding that there was no valid basis to support the verdict.

10. The deputy did not disclose to the Respondent any confidences or secrets gained during the course of the deputy's representation of the defendant in the CHINS case. Indeed, there is no evidence that the deputy had an independent recollection of any confidences or secrets.

11. The Respondent's failure to disclose the deputy's previous representation of the defendant did not affect the criminal trial.

12. The Respondent has cooperated with disciplinary authorities throughout the course of this investigation.

13. The delay in bringing this matter to conclusion cannot be attributed to the Respondent.

CONCLUSIONS OF LAW

The Code of Professional Responsibility applies to this case. The Code prohibits an attorney from engaging in conduct that is prejudicial to the administration of justice. See DR 1-102(A)(5).

Rule 8 of Administrative Order 9 sets out the types of sanctions that may be imposed in disciplinary cases. Two types of admonitions may issue.

A.O. 9, Rule 8(A)(5). An admonition by disciplinary counsel may be imposed with the respondent's consent and the panel's approval. A.O. 9, Rule 8(A)(5)(a). A panel may impose an admonition but only after formal charges have issued. A.O. 9, Rule 8(A)(5)(b). Formal charges have not issued in this case.

In Vermont, it is appropriate to refer to the ABA Standards for Imposing Lawyer Sanctions in determining the appropriate sanction in a disciplinary case. In *Re Warren*, 167 Vt. 259, 261 (1997); In *Re Berk*, 157 Vt. 524, 532 (1991) (citing In *Re Rosenfeld*, 157 Vt. 537, 546-47 (1991)). The ABA Standards recommend sanctions for particular types of violations and enumerate four factors relevant to the determination of whether the recommended sanction is appropriate. Those factors are: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury; and (4) any mitigating and/or aggravating factors. In *Re Warren*, 167 Vt. at 261.

1. The Duty. As officers of the court, lawyers have a duty to avoid conduct that is prejudicial to the administration of justice. DR 1-102(A)(5); ABA Standards for Imposing Lawyer Sanctions, Section 6.0. Public attorneys have a duty to maintain the public trust and, as part of that duty, to avoid conduct that is prejudicial to the administration of justice. ABA Standards for Imposing Lawyer Sanctions, Section 5.2. Finally, lawyers also owe to the profession a duty to maintain high standards of professional conduct. See ABA Standards for Imposing Lawyer

Sanctions, Section 7.0. In this case, the Respondent violated the duty to maintain a standard of conduct that was not prejudicial to the administration of justice.

2. Mental State. The Respondent's mental state was one of negligence. That is, the Respondent did not intend to prejudice the administration of justice when the Respondent chose not to disclose to defense counsel that the deputy had previously represented the defendant in a CHINS case.

3. Injury. The defendant was not injured. However, there was the potential for injury and the Respondent's failure to disclose created an appearance of impropriety.

4. Aggravating and Mitigating Factors. There are no aggravating factors. There are several mitigating factors: (i) the Respondent does not have a prior disciplinary history; ABA Standards for Imposing Lawyer Sanctions, Section 9.32(a); (ii) the Respondent made a full and free disclosure to disciplinary authorities; ABA Standards for Imposing Lawyer Sanctions, Section 9.32(e); and (iii) there has been a delay in bringing this matter to resolution that cannot be attributed to any fault of the Respondent's. ABA Standards for Imposing Lawyer Sanctions, Section 9.32(i).

The ABA Standards recommend that the panel approve disciplinary

counsel's imposition of an admonition. This recommendation finds support in a review of the ABA Standards for Imposing Lawyer Sanctions.

For instance, an admonition is usually appropriate when a government lawyer "engaged in an isolated instance of negligence in not following proper procedure or rules, and causes little or no actual or potential injury to a party or to the integrity of the legal process." ABA Standards for Imposing Lawyer Sanctions, Section 5.24. An admonition is also appropriate "when a lawyer engages in an isolated instance of negligence in determining whether the lawyer's conduct violates a duty owed to the profession, and causes little or no actual or potential injury to a client, the public, or the legal system." ABA Standards for Imposing Lawyer Sanctions, Section 7.24.

In this case, the Respondent engaged in an isolated instance of negligence in determining whether to disclose that the deputy had previously represented the defendant in a CHINS case. Neither the defendant, the public, nor the legal system incurred actual injury. There was little potential for injury.

RECOMMENDATION

The panel hereby recommends that Respondent violated DR 1-102(A)(5) of the Code of Professional Responsibility by engaging in conduct prejudicial to the administration of justice. In addition, imposition of an admonition

is also recommended by the panel.

Dated, at _____, Vermont, this 21st day of July, 2000.

/s/

Robert F. O'Neill, Esq., Chair

/s/

S. Stacy Chapman, III, Esq.

/s/

Ruth S. Stokes