

18 PRB

[31-May-2001]

STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

In re: PCB Docket No. 97.11

HEARING PANEL DECISION NO. 18

The above matter was considered by the undersigned hearing panel on stipulated facts presented by Special Bar Counsel, William Dorsch, and Peter W. Hall, Esq., counsel for Respondent. Based on those facts, the panel concludes that Special Bar Counsel has failed to establish by clear and convincing evidence that Respondent has violated the Vermont Code of Professional Responsibility, and we hereby dismiss this case.

Stipulated Facts

1 . The Respondent was admitted to practice law in the State of Vermont in 1988.

2. In 1996, the Complainant represented a defendant in a sexual assault criminal complaint.

3. In his role as a Deputy States Attorney, Respondent was one of the prosecutors.

4. In determining the workload, it was decided that the Respondent would handle any objections or issues during the defense deposition of the alleged victim, although both counsel for the State were present at the deposition to confer.

5. On October 2, 1996, the Complainant deposed the alleged victim in the sexual assault case.

6. The alleged victim arrived for her deposition with her mother and another person.

7. The Respondent discussed preliminary matters with the alleged victim and her mother in the presence of this other person.

8. The alleged victim requested that the other person attend the deposition with her as a support person.

9. The Respondent indicated to the alleged victim that he would have

to check with opposing counsel, the Complainant.

10. The Respondent advised the Complainant of the role of this other person, as explained by the alleged victim, and asked if he had any objections. The Complainant indicated he did not.

11. During the deposition, the Complainant asked the Respondent to identify each person attending the deposition. The Respondent identified the alleged victim's mother and also stated that the other person was a friend of the alleged victim. In so answering, the Respondent told the Complainant what he understood to be true at that time.

12. A number of breaks were taken during the deposition. Prior to the last break, the Complainant asked the alleged victim whether she had spoken to anyone other than the police about the alleged sexual assault. At that point, the alleged victim requested a break in the deposition, which was taken.

13. During the last break, the alleged victim informed the Respondent that her "friend" present at the deposition also was her therapist for matters involving the alleged sexual assault. The alleged victim did not want this role disclosed.

14. The deposition then resumed and the Complainant again asked whether the alleged victim had spoken to anyone other than the police. The

alleged victim indicated she had spoken to her school counselor, who was a family friend, and named that person. She also indicated she had recounted the events to her therapist.

15. When the Complainant asked the name of the therapist, the Respondent objected and indicated that matter was privileged and would not be disclosed. The Respondent contended and believed the information sought was not subject to discovery.

16. The Respondent did not amend his earlier identification of the "friend" who he now had come to know was also the therapist.

17. The therapist/family friend continued to be present through the remaining approximately ten minutes of the deposition with the Complainant not being told of her therapeutic role after the Respondent became aware of it.

18. The Complainant sought the name and address of the alleged victim's therapist before the Vermont District Court in which the criminal matter was pending. Review was promptly granted.

19. In Vermont District Court, the presiding judge ordered the State to produce the name and address of the therapist.

20. The same day as the Court Order, the State disclosed the

therapist's name - that of the "friend" at the deposition.

21. The Respondent invited the Complainant to depose the therapist, and the Complainant never did so.

22. The Complainant re-deposed the alleged victim on the issue of disclosure of the other person/therapist.

23. During that second deposition, the alleged victim implicitly confirmed that she did not want to disclose the additional role of her support person present at the initial deposition. She took the last break in that first deposition "[t]o ask about whether [she] had to tell them [Complainant] about my therapist."

24. In that second deposition, the alleged victim did not confirm any allegations or suspicions of the Complainant that there had been any so-called coaching or attempts to influence her undertaken by the therapist or by any of the prosecutors or the alleged victim advocate.

Conclusions of Law

Special Bar Counsel asserted that the above facts established violations of DR 1-102(A)(5) and DR 7-102(A)(5). We disagree. The facts establish that Respondent believed his statement that the third party in

the room was a friend there to support the witness at the deposition.

Therefore, he did not "Knowingly make a false statement of fact in violation of DR 7-102(A)(5). While there may be circumstances under which a lawyer has a duty to correct a previously made false statement which the lawyer believed to be truthful when she made it, Special Bar Counsel has failed to establish that this is such a case. In fact, it is not clear that the statement was incorrect. The person was there to support the witness through the difficult time of testifying about her sexual assault. The real complaint is that Respondent instructed the witness not to answer the question requesting the identification of the therapist the witness had seen.

Furthermore, the Panel concludes that Respondent did not engage in "conduct that is prejudicial to the administration of justice in violation of DR 1-102(A)(5). The parties stipulated that Respondent believed that the identity of the therapist was privileged. Pursuant to that belief, Respondent prevented Defense counsel from obtaining the name of the therapist at that time. Rather, defense counsel was required to file a motion to compel which was granted. As far as the record discloses, the trial court did not award sanctions for Respondent's conduct. In view of that fact and the stipulated facts, Special Bar Counsel has not established that the instruction was prejudicial to the administration of justice. The panel is sensitive to the short time frames for making decisions in depositions or at trial and its decision does factor the lack of time for research and reflection into its decision.

In reaching these conclusions, we are bound by the stipulated facts. Nevertheless, the panel would like to stress that it has the following concerns:

1. It is difficult to believe that a lawyer with seven years practice at the time of the incident believed the objection was appropriate.

2. Furthermore, in making the objection, as the prosecutor, Respondent is not counsel for the victim. His independent judgment may have been clouded by the witness' requests for non-disclosure. Were the objection to have been made frivolously, Bar Counsel might make the case for violation of DR7-102(A)(1) and (8).

Dated this 14th Day of May, 2001

FILED MAY 31, 2001

SS

Paul S. Ferber, Esq.

Chair

SS

Robert Bent, Esq.

SS

Toby Young