

[15-Oct-2001]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

DECISION NO. 27

In re: PRB File No. 98.20

Respondent is charged with violating DR1-102(A) (5) of the Code of Professional Responsibility. Respondent was represented by Peter W. Hall, Esq. The Office of Disciplinary Counsel was represented by Michael Kennedy, Esq. The parties have filed a Stipulation of Facts and a Joint Recommendation as to Conclusions of Law & Sanctions. A formal hearing was waived by the parties. The Panel accepts the facts as set forth in the Stipulation and for the reasons set forth below imposes 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 was a deputy in the office that 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 lead prosecutor realized that, several years earlier, the Respondent had represented the defendant in a CHINS case. The lead prosecutor immediately discussed the situation with the Respondent. The Respondent had no recollection of ever representing the defendant. The lead prosecutor reviewed the paperwork and learned that the CHINS case did not involve the same children that were 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 lead prosecutor and the Respondent discussed whether they should disclose to defense counsel the fact that the Respondent had previously represented the defendant in a CHINS case. Based in large part on the fact that the Respondent neither recalled the defendant nor any details of the CHINS case, the lead prosecutor and the Respondent opted not to disclose to defense counsel the fact that the Respondent had previously represented the defendant. Rather, the lead prosecutor produced to defense counsel the paperwork that was generated in the CHINS case. As that paperwork made clear that the Respondent had represented the defendant in the CHINS case, the lead prosecutor and the Respondent assumed that opposing counsel would become aware of the Respondent's former representation.
5. At jury draw, the Respondent sat at counsel table and was

introduced by the lead prosecutor as a deputy state's attorney who would be handling other cases on the jury draw. The Respondent did not inform the Court or opposing counsel that the Respondent had previously represented the defendant in the criminal matter. The defendant was present in court but did not raise any objection to the Respondent's appearance.

6. The Respondent did not take an active role in the trial. In fact, after the jury draw, the Respondent never again appeared at counsel table. The Respondent, 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 subsequent to the trial, it was disclosed that the Respondent 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 the previous representation of 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 Respondent did not disclose to the lead prosecutor any confidences or secrets gained during the course of the Respondent's representation of the defendant in the CHINS case. Indeed, there is no evidence that the Respondent had any independent recollection of any confidences or secrets.

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

12. The Respondent does not have a prior disciplinary history.

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

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

CONCLUSIONS OF LAW

Because the conduct in question occurred in 1995, 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, DR 1-102(A)(5). The Panel concurs with the recommendations of the parties and concludes that Respondent violated DR 1-102(A)(5) by failing to disclose to defense counsel or to the Court the fact that Respondent had previously represented the defendant being prosecuted by Respondent's Office.

As the parties have acknowledged, it is well settled in Vermont that it is appropriate to refer to the ABA Standards for Imposing Lawyer Sanctions (hereinafter the "ABA Standards") in determining the proper sanction in a disciplinary case. In *Re Warren*, 167 Vt. 259, 261 (1977); 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*, supra.

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, 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, Section 5.2. Finally, lawyers also owe to the profession a duty to maintain high standards of professional conduct. See, ABA Standards, 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 Respondent 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 & Mitigating Factors

There are no aggravating factors. There are several mitigating factors: (1) the Respondent does not have a prior disciplinary history; ABA Standards, Section 9.32(a); (2) the Respondent made a full and free disclosure to disciplinary authorities; ABA Standards, Section 9.32(e) and (3) there has been a delay in bringing this matter to resolution that cannot be attributed to any fault of the Respondent's ABA Standards, Section 9.32(i).

The ABA Standards indicate that an admonition is generally appropriate when a government lawyer "engages in an isolated instance of negligence in not following proper procedures or rules, and causes little or no actual or potential injury to a party or to the integrity of the legal process," Section 5.24; accord: Section 7.4. We conclude on the facts of this case that Respondent engaged in an isolated instance of negligence in determining whether to disclose the previous representation of the defendant in an unrelated case. Neither the defendant, public, nor the legal system incurred actual injury. There was little potential for injury. Therefore, the Hearing Panel agrees with the parties that an admonition is the appropriate sanction here.

In addition to reviewing the parties' memoranda and the aforesaid authorities, the Hearing Panel has reviewed filed Decisions in other cases rendered by Hearing Panels appointed by the Professional Responsibility

Board pursuant to Administrative Order No. 9. In particular, this Hearing Panel has reviewed Decision No. 11, In Re: PRB File No. 98.21. Our decision in this case is also consistent with that previous ruling made on parallel facts.

DECISION

Based upon the above findings and conclusions, it is the decision of this Panel that Respondent shall be admonished for engaging in conduct that is prejudicial to the administration of justice.

DATED at the City of Rutland, Vermont this 13th day of October, 2001.

Hearing Panel No. 1

FILED 10/15/01

/s/

Barry E. Griffith, Esq., Chair

/s/

S. Stacy Chapman, III, Esq. *

/s/

Stephen Anthony Carbine

*Hearing Panel Member S. Stacy Chapman, III, Esq. was designated to serve on the Hearing Panel considering this case by Professional Responsibility Board Chair Robert P. Keiner, Esq. following the recusal of Martha M. Smyrski, Esq., a regularly assigned member of the Hearing Panel No. 1. Ms. Smyrski did not participate in the consideration or decision of this matter.