45 PRB

[29-Oct-2002]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File Nos. 1999.065 and 2000.122

Decision No 45

On September 6, 2002 the parties filed a stipulation of facts, conclusions of law and recommendations on sanctions. Respondent, who was represented by counsel, also waived certain procedural rights including the right to an evidentiary hearing. The panel accepts the facts, conclusions and recommendations and orders that the Respondent be admonished by Disciplinary Counsel for actions taken on behalf of a client when it should have been obvious that such action would only serve to harass another, and for filing pleadings which contained intemperate language which was unprofessional, uncivil and intended solely to harass and embarrass the opposing party and her counsel in violation of DR 7-102(A)(1).(FN1)

Facts

In 1996, Mr. and Mrs. P filed petitions for relief from abuse on behalf of their grandchildren against their daughter, the mother of the children. In January of 1997, the Family Court ordered Dr. X to perform a psychiatric evaluation and testing of the mother. The order stated that the results of the evaluation, and all related reports and documents, would be made available to counsel for the grandparents, counsel for the defendant-mother, counsel for the children, and the guardian ad litem. In conjunction with the psychiatric evaluation, a psychologist, Dr. Y, performed a psychological evaluation and testing of the mother.

After a hearing in June of 1997, the Family Court issued a final relief from abuse order that awarded temporary custody of the children to the grandparents. At that point, the mother, who had appeared pro se, hired the Respondent who moved to vacate the final order. The motion was denied and Respondent appealed.

While the relief from abuse order was pending, Respondent wrote to Dr. Y and requested copies of her notes, data, and all other documents relating to the psychological evaluation of the mother. Respondent included a release from the mother with the request.

Dr. Y engaged Attorney J to represent her. He responded that Dr. Y had simply done an evaluation, not provided treatment, and, therefore, the mother was not a "patient" entitled to the requested information.

Respondent moved the Family Court to compel Dr. Y to produce the requested information. Attorney J opposed the request, arguing that the mother's release and motion to compel had no basis in law. He suggested that the Family Court require the Respondent to follow the appropriate

discovery procedures. Respondent filed a response in which he characterized Dr. Y's position as "ludicrous," and argued that Dr. X and Dr. Y were "indispensable parties" who could be joined in the litigation. He alleged that the doctors were "supposed mental health experts [who were] busy playing symantical {sic} games", and that Dr. Y's position "reeks of bias and un-professionalism." The Respondent cited V.R.C.P 19 in support of his contention that the doctors could be joined as indispensable parties. He cited 3 V.S.A. 129(a) in support of his claim that their position reeked of bias and un-professionalism.

In response, Attorney J moved for sanctions pursuant to V.R.C.P. 11 (b). He argued that Respondent's motion to compel had no basis in law; that Respondent's position that the doctors could be joined as "indispensable parties" was frivolous and unsupported by the law, and that the personal attacks against Dr. Y were reckless and unwarranted.

Respondent replied to the motion for sanctions calling Attorney J's motion "vexatious and inane." He added legal arguments in support of his positions. Attorney J responded with a motion arguing among other things, that "blind, personal attacks" merited sanctions under Rule 11. Again, Respondent filed a response, stating that he would not "bore the Court with the all too easy attacks that it could launch against Attorney J and this insidious motion for sanctions." He went on to argue that since his original request that Dr. X provide certain information was a discovery request, Rule 11 did not apply.

At a hearing in March of 1998, the Family Court admonished the Respondent for the tone of his pleadings and stated that there was no place in court for such language. The court stated that it would not tolerate "repeated filings of pleadings that really get down to name-calling." The court also indicated that Respondent's "lack of civility [was] going to be punished." The court found that the materials sought by Respondent were available through proper discovery procedures and urged Respondent to avail himself of those procedures. At the end of the hearing, the court denied the motion to compel and granted Attorney J's motion for sanctions but deferred ruling on the amount of sanctions. During the hearing, the Respondent apologized to the court, Dr. Y and Attorney J.

In August of 1998, the Family Court issued its order regarding sanctions. The court found that Respondent had resorted to personal attacks and name-calling in motions that had no other purpose than to harass Dr. Y and Attorney J. Finally, after concluding that Rule 26 applied, the court found that Respondent violated Rule 26(g) by signing the various pleadings and, in so doing, certifying that they were "warranted by existing law" and "not interposed for any improper purpose, such as to harass." The court ordered the Respondent to pay attorney's fees and to remit to the court a substantial fine.

On appeal, the Supreme Court reviewed the "intemperate language" that the Respondent used in his various filings. The Court upheld the Family Court's decision that the Respondent's use of the language in question violated Rule 26(g) of the Rules of Civil Procedure. The Court stated that "the record amply supports the court's finding that [the language] was unprofessional, uncivil, and intended solely to harass and embarrass the opposing counsel and party ." The Court affirmed the sanction of legal fees, but overturned the imposition of a fine.

The Respondent is an attorney licensed to practice law in the State of Vermont. The Respondent was admitted to practice law in Vermont in 1996. He has no prior disciplinary history and has cooperated with disciplinary authorities throughout the investigation of these complaints. The delay in resolving these complaints cannot be attributed to the Respondent.

Conclusions of Law

DR 7-102(A)(1) provides that

> In his representation of a client, a lawyer shall not:
> (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of a client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

There are two relevant ethical considerations to be found under this rule. EC 7-36 states that

> Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings. . . .

EC 7-37 states that

> In adversary proceedings, clients are litigants and though ill feelings may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude and demeanor towards opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

While the ethical considerations are merely advisory, they offer amplification of the disciplinary rules and are helpful as aids to the disciplinary process as well as to the practicing bar.

It is clear that Respondent's conduct in this Family Court matter went beyond the bounds of "zealous representation" contemplated by the rule. Respondent was involved in a multi-generational Family Court dispute. In these situations, attorneys must guard against being co-opted by strong emotional positions of their clients. Zealous representation requires commitment to the client's goals while maintaining an objective view of both the process and the participants. This the Respondent failed to do. He engaged in behavior which violated the provisions of the rule both by engaging in conduct intended to harass and embarrass and by the use of intemperate language in his pleadings.

Sanctions

The panel accepts the parties' recommendation that admonition by disciplinary counsel is the appropriate sanction in this matter. It meets the standards of both the ABA Standards for Imposing Lawyer Sanctions (FN2) and Administrative Order 9 of the Vermont Supreme Court.

Section 6.24 of the ABA Standards indicates that an admonition "is generally appropriate when a lawyer engages in an isolated instance of negligence in complying with a court order or rule, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with a legal proceeding." By contrast, a reprimand is appropriate when the lawyer's negligent failure to comply with a court order or rule causes injury or potential injury to a client or party, or causes interference or potential interference with a legal proceeding. ABA Standards, § 6.23. In this case, Respondent negligently failed to comport with proper decorum. Such actions always have the potential for wider harm by damaging the stature and dignity of the court and straining relationships with other professionals who provide needed services to courts and litigants. His comments certainly drew the ire of those to whom they referred and caught the court's attention. However, there is no evidence that they caused injury to a party or interfered with the legal proceeding to which they were related.. While there is no question that the nature and content of his pleadings were intentional, the evidence does not support a conclusion that he intentionally violated the Code. Rather, he negligently crossed the line during a dispute in Family Court.

We believe that the facts taken alone might justify a reprimand. However, in view the mitigating factors, we conclude that an admonition is appropriate. Most importantly, Respondent has no prior disciplinary record (FN3) and had been admitted the year before the misconduct took place.(FN4) In addition, Respondent was sanctioned by the Family Court, sternly criticized by the Supreme Court (FN5) and expressed remorse to the court and to the parties involved.(FN6) The fact that these disciplinary cases have been pending for approximately four years cannot be attributed to the Respondent.(FN7) Finally, there are no aggravating factors.

The facts also meet the criteria for admonition under A.O.9 Rule 8(A)(5) which provides that an admonition is only appropriate when three factors are present: (1) the misconduct is minor; (2) little or no injury results; and (3) there is little likelihood that the lawyer will make the same mistake again.(FN8) The second and third criteria of the rule are more
easily dealt with here. There was little or no injury to the parties. The fact that Respondent apologized to the court and the parties and was subsequently admonished by the Supreme Court, lead the Panel to believe that this behavior will not be repeated.

In accepting the recommendation for admonition the Panel does not wish to imply that the Respondent's behavior is minor in the sense of being of little consequence. Rather the Panel believes that, taking all of the other factors into consideration, it is not so serious as to take this case out of the realm of an admonition.

Conclusion

For the above reasons, the Panel approves the imposition of an ADMONITION by Disciplinary Counsel.

Dated 10/29/02
FILED 10/29/02

Hearing Panel No. 4

/s/

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Paul Ferber, Esq

/s/

_____
Robert M. Butterfield, Esq.

/s/

_____
George Coppenrath

Footnotes

FN1. The Code of Professional Responsibility applies to this case since the misconduct occurred prior to September 1, 1999.

FN2. It is appropriate to refer to these standards in determining sanctions. In re Warren, 167 Vt. 259, 261 (1997); In re Berk, 157 Vt. 524, 532 (1991).

FN3. ABA Standards, § 9.32(a).

FN4. ABA Standards, § 9.32(f).

FN5. ABA Standards, § 9.32(k).

FN6. ABA Standards, § 9.32(1).

FN7. ABA Standards, § 9.32(i).

FN8. A.O. 9, Rule 8(A)(5).