75 PRB

[28-Mar-2005]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: Robert Andres, Esq.
PRB File No 2004.204

Decision No. 75

Respondent is charged with making discourteous and inappropriate remarks about a judge in pleadings filed with the District Court in violation of Vermont Rule 3.5(c) of the Vermont Rules of Professional Conduct The matter was heard on October 22, 2004, before Hearing Panel 8, Eileen Blackwood, Esq., Chair, Peter Bluhm, Esq. and Tim Volk. Disciplinary Counsel Michael Kennedy was present. Respondent was present and appeared pro se. The Panel finds that Respondent violated Rule 3.5(c) and publicly reprimands Respondent.

Facts

Respondent was admitted to practice in Vermont in 1983 and has worked for a number of years as a criminal defense attorney. In November of 2001 Respondent was charged with assault in Chittenden County. Judge Helen Toor was then sitting in Chittenden District Court. Judge Toor recused herself from Respondent's criminal case, without giving a reason on the record, and the case was transferred to Addison County. In April of 2002, a jury found Respondent guilty of simple assault. Respondent was sentenced to 3 to 12 months with all suspended except 3 months and placed on probation. He then appealed his conviction to the Vermont Supreme Court in June 2002. This appeal was denied on Jan. 27, 2003.

In March 2003, Respondent was charged with a violation of his probation, and Judge Toor, sitting in Addison District Court, presided at the hearings on that violation. In May 2003, Respondent was charged with a second violation of probation, and following Respondent's admission to that, on June 2, 2003, Judge Toor revoked Respondent's probation.

Respondent did not object to Judge Toor's presiding at those hearings. On October 29, 2003, and while incarcerated, Respondent filed a Motion to Amend Mittimus, asserting that an error had been made in calculating his scheduled release date. Judge Toor denied that motion on December 4 due to lack of documentation. On December 17, Respondent filed a Motion to Correct Mittimus, attached an affidavit, and requested a hearing. The state filed in opposition, and on January 2, 2004, the court set a hearing date of January 12. Also on January 2, however, Respondent was released from custody. When it received notice that Respondent had been released, the court cancelled the scheduled hearing as moot.

Respondent filed a Motion for Post Conviction Relief in the Superior Court. On January 8, 2004, the Superior Court remanded the case to the District Court for a hearing on Respondent's Motion for a New Trial. In

February of 2004, Judge Toor, sitting in the District Court, scheduled a status conference on this and other motions.

The day before the scheduled date of the status conference, Respondent filed a Motion to Recuse Judge Toor from hearing his Motion for New Trial. The Motion to Recuse stated three grounds: 1) that Judge Toor had previously recused herself from his criminal trial; 2) that Judge Toor had exhibited bias by allegedly improperly denying Respondent's motion to dismiss regarding an alleged probation violation and allowing the state to introduce additional evidence after resting; and 3) that Judge Toor had exhibited bias by allegedly ignoring repeated requests for hearing regarding the Motion to Correct Mittimus. This last error, Respondent asserted, had caused him to remain incarcerated between two to four weeks in excess of the statutory maximum. Judge Toor took the motion under advisement.

On March 11, Respondent filed a Request for Hearing with the Administrative Judge on the issue of Judge Toor's recusal. Respondent asserted the same grounds for recusing Judge Toor and stated that there was "no rational explanation" for her "more than two week delay" in deciding the recusal motion. In this request Respondent wrote:

> No reasonable person in [Respondent's] shoes would believe for a moment, that a fair hearing was possible with Judge Toor.
>
> I have represented crack cocaine addicts who are able to sufficiently focus to comprehend that if at one point you indicate you cannot be fair, then it would be reasonable to conclude that you could not be fair.

In this proceeding, Respondent has acknowledged that he intended this statement about crack cocaine addicts to refer to Judge Toor because she had previously disqualified herself in his 2001 criminal case in Chittenden County. Respondent stated that this language "was a stark illustration and intended to be a stark illustration" and that he was frustrated at being unable to obtain a hearing on a matter directly affecting the length of his incarceration. Respondent believes that his language was not inappropriate and that it is protected by his first amendment right of free speech.

On March 22, 2004, Judge Toor referred Respondent's Motion to Recuse to the administrative judge. She explained that her original 2001 recusal had likely occurred because Respondent was then representing a number of defendants in the same court in which he was appearing as a defendant. By 2004, Respondent was no longer practicing law, so the grounds for recusal no longer applied.

On May 10, 2004, the administrative judge denied Respondent's motion to recuse Judge Toor. He found that Judge Toor had not exhibited personal bias against Respondent, and that because Respondent was no longer appearing in Chittenden District Court, the original basis for recusal no longer existed.

In September of 2004, Respondent was suspended from the practice of law for three years for violation of Rule 8.4(h) of the Vermont Rules of Professional Conduct. In re Andres, PRB Decision No. 52 (April 2003), affirmed by Supreme Court Entry Order, Sept. 29, 2004. In August of 2004,

Respondent was suspended for two months for failing to act with reasonable diligence in his representation of a client. In re Andres, PCB Decision No. 41, Sept. 2003, affirmed by Supreme Court Entry Order, August 6, 2004. In 1999 Respondent was publicly reprimanded for neglecting a client's matter and for engaging in criminal behavior. In re Andres, PCB Decision No. 140 (Dec. 1999).

Conclusions of Law

Rule 3.5(c) of the Vermont Rules of Professional Conduct prohibits lawyers from engaging in "undignified or discourteous conduct which is degrading or disrupting to a tribunal." We find that Respondent's written remark was intended to suggest to the Administrative Judge that Judge Toor did not have the perceptual or reasoning ability of a crack cocaine addict. This comparison was disrespectful, discourteous and degrading to the tribunal. Attorneys have an obligation to preserve decorum and encourage fair process, treating all involved persons with dignity. In re PCB File 88.125, PCB No. 7 (May 10, 1991). This duty extends to both oral and written communications. In this case, Respondent's disrespectful comments were in writing. While this limits public exposure and harm to the courts, it also allows the attorney greater time for reflection and greater opportunity to moderate intemperate remarks.

Precedent under Rule 3.5 (c) emphasizes the importance of maintaining respectful discourse in all legal proceedings. In a recent case a hearing panel found a violation of Rule 3.5 (c) when, in an exchange in court with an acting judge, an attorney expressed the opinion that "the acting judge was not competent to handle the status conference." In re File No. 2004.007, PRB Decision No. 72, (Dec. 23, 2004) at 2. A Delaware court found a violation when an attorney referred to a judge's proposed jury instructions as "unwise, preposterous and ridiculous." Christopher v. Delaware, 824 A.2d 890, 893 (Del. 2003).

A lawyer can appeal to common sense without being disrespectful. It would not be unethical for a lawyer to assert that a legal issue should be decided on basic or obvious principles of law. Similarly, it is usually proper - although not ordinarily persuasive - to assert that a legal point is so meritorious or obvious that it would be accepted by a reasonable person untrained in the law. This, Respondent attempted by asserting that "no reasonable person in [Respondent's] shoes would believe for a moment . . .." That argument, although unlikely to be persuasive, was not unethical.

Respondent's statement went too far, though. His remark was unnecessarily degrading to the tribunal because it was insulting and undignified to compare a judge to a crack addict.

Respondent makes two arguments to support his use of what he himself characterizes as "colorful" language. First, Respondent believes Judge Toor and other members of the Vermont judiciary to be biased against him and incapable of treating him fairly. He presented no evidence of this bias, and the administrative judge has specifically found that Judge Toor was not biased. Even if there were evidence of bias or other misconduct on the part of the judge, it would not constitute an affirmative defense to a charge of violation of Rule 3.5(c). The Comment to the rule makes it clear that an attorney may not reciprocate when faced with inappropriate judicial conduct.

> The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Courts have also rejected Respondent's argument that a judge's actions can justify attorney behavior that degrades a tribunal. In a Tennessee case in which that attorney filed a pleading referring to the judge as a "lying, incompetent ass-hole," the court wrote:

> Respondent appears to believe that truth or some concept akin to truth, such as accuracy or correctness, is a defense to the charge against him. In this respect he has totally missed the point. There can never be a justification for a lawyer to use such scurrilous language with respect to a judge in pleadings or in open court. The reason is not that the judge is of such delicate sensibilities as to be unable to withstand the comment, but rather that such language promotes disrespect for the law and for the judicial system. Kentucky Bar Association v. Waller, 929 S.W.2d 181, 183 (Ken. 1996).

It is important to note, as did the Waller court, that the rules are for the protection of the integrity of the judicial system, not the judge.

We also reject Respondent's argument that he enjoys a first amendment protection to comment on a judge without regard to the constraints of Rule 3.5(c). Respondent offers no legal support for his position, and the law is clearly to the contrary. A Texas court, in response to an attorney's claim of first amendment protection for her inappropriate remarks to the court, stated that:

> an attorney's right to free speech and her obligation to zealously represent her client are limited in the formal judicial setting where the State has a substantial interest in preserving the integrity of the judicial process and the public's confidence therein." In re Maloney, 949 S.W.2d 385, 387 (Tex. 1997).

This public confidence in the integrity of the judiciary is maintained and enhanced by the respect which lawyers show for judges and for the judicial process. When those closest to the system, the practicing bar, fail to treat the judicial system with respect, it erodes public confidence in the judiciary and the integrity of its process.

Respondent's comparison of Judge's Toor's judgment to that of a crack cocaine addict was disrespectful and discourteous to the court, degraded the judicial system and violated Rule 3.5(c).

Sanction

In determining the sanction in this matter we have considered prior case law and the ABA Standards for Imposing Lawyer Sanctions.

An admonition is not a sufficient sanction here. Admonition is appropriate only in cases of minor misconduct where there is little or no injury and little likelihood of repetition. A.O.9 Rule 8(A)(5). Respondent was representing himself in criminal proceedings, and thus he had an unusually direct and compelling interest in the outcome While Respondent's discourteous statement did not harm a client's prospects, other than his own, the remark did injure the judicial system. We cannot find, however, that there is "little likelihood of repetition" by Respondent. Respondent has failed to acknowledge that his statements about Judge Toor were inappropriate, and in fact asserts that his statements were consistent with his generally aggressive or "stark" style of advocacy. This prevents us from concluding that repetition is unlikely, and thus, that admonition is not the appropriate sanction.

The ABA Standards for Imposing Lawyer Sanctions set forth several aggravating factors which it is appropriate for us to consider. In re Andres, Supreme Court Docket No. 2002.428, (Aug. 2004), In re Warren, 167 Vt. 259 (1997). Most troubling to the Panel is Respondent's failure to acknowledge that there is anything wrong with his conduct. He continues to believe that his characterization of Judge Toor was appropriate under the circumstances as he perceives them. ABA Standards § 9.22(g). In addition, Respondent has substantial experience in the practice of law, ABA Standards § 9.22(i), and several cases of prior discipline, ABA Standards § 9.229(a). A Hearing Panel recently admonished a lawyer for violation of this same rule. In re File No. 2004.007, PRB Decision No. 72, (Dec. 23, 2004). That panel found, as do we, that public disrespect to a tribunal creates an injury to the judicial system. The lawyer's conduct in that case had created a risk of injury to the client, but that panel also found little likelihood of repetition, as well as other mitigating factors not present here. Considering all of the factors, we find that a more severe penalty is appropriate in this case.

Based upon the evidence presented to us, our consideration of precedent and the aggravating factors present, we conclude that public reprimand is the appropriate sanction in this matter.

Order

Robert Andres is PUBLICLY REPRIMANDED for violation of Rule 3.5 (c) of the Vermont Rules of Professional Conduct.

Dated March 28, 2005

Hearing Panel No. 8

/s/

_____

Eileen Blackwood, Esq., Chair

/s/

_____

Tim Volk

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

Robert Andres, Esq.
PRB File No 2004.204

Concurring Statement by Peter Bluhm, Esq.

I concur with the panel's conclusions of law, assessment of mitigating factors and sanction. However, because we are imposing a sanction for overly zealous advocacy, I would have provided a more complete explanation. An imprecise disciplinary rule poses the sharpest threat to legitimate advocacy when, as with Respondent's motion to recuse, the belief of the reasonable person (or another person) is the issue actually before the court. See, State v. Lincoln, 165 Vt. 570, 571 (1996); State v. Putnam, 164 Vt. 558 (1996).

Respondent did not directly assert that the judge was unqualified. Rather, in the course of a written argument supporting a motion to recuse, Respondent made an invidious comparison. By asserting that a crack cocaine addict would understand his point, he "compared" the judge to a crack addict and implied a lack of qualification.

I would have preferred the majority to state explicitly that not all implicit comparisons with a person of low status are inherently disrespectful and worthy of discipline. In the heat of argument, a lawyer might argue, for example, that a legal point is so fundamental as to be understandable to "my ten year old child." The argument may be irrelevant (depending on the context) and unpersuasive, but it would not, in my view, be per se disrespectful and a violation of the rules. Where a lawyer has stated that a legal point can be understood by a person of limited ability or low social status, I believe professional discipline should occur only where the statement itself, or additional facts, clearly establish an overall tone of disrespect.

I concur in the panel's decision because Respondent's remark violated even this liberal standard. Respondent admitted his words were "a stark illustration." I agree with the panel that they were also disrespectful and violated the rule.

Dated March 28, 2005

/s/
_____
Peter Bluhm, Esq.

FILED MARCH 28, 2005