PCB 50

[29-Jan-1993]

STATE OF VERMONT
PROFESSIONAL CONDUCT BOARD

In re: PCB File 90.50

NOTICE OF DECISION
NO. 50

This matter was heard before a hearing panel consisting of Nancy Corsones, Nancy Foster, and Deborah Banse. At issue before the panel was whether respondent violated DR 1-102(A)(4)(engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), DR 1-102(A)(7)(engaging in conduct adversely reflecting on fitness to practice law), and DR 2-lOl(making a false communication about himself and his legal services).

Based upon the hearing panel's report to the Board, the Board finds that respondent violated DR 2-101 and dismisses the remaining charges. The Board has imposed a private admonition.

The Board adopts the following findings of fact and conclusions of law based upon the hearing panel's report to the Board.

FACTS

1. Respondent is a solo practitioner who has been a member of the Vermont Bar for more than 20 years.

2. In 1983, a real estate developer contacted respondent and asked if he would be interested in representing prospective purchasers of condominium units being offered by the developer.

3. Respondent and the developer met to discuss the project. The developer said that he was interviewing other attorneys as well as respondent. The developer said that he wanted one attorney to handle substantially all of the closings of these units because he wanted the sales closed by the end of the year. The developer felt that if each purchaser had separate counsel, the closings would be delayed.

4. At this meeting, the developer told respondent that his company was working hand in hand with a certain bank, which had provided the construction loan on the project, and that this bank would be offering financing to purchasers of the condominium units.

5. The developer asked respondent to quote him a price that respondent would charge each buyer for the closing. Respondent told him he would think about it and get back to the developer with an answer.

6. Thereafter, respondent met with the vice-president of the bank and discussed the mortgage loans which the bank expected to be making to the purchasers. Based upon their meeting, respondent believed that, in instances where buyers chose different counsel, the bank would nevertheless designate respondent to review the closing documents.

7. During this meeting, respondent explained to the vice-president that the purchasers had a legal right to hire their own attorney for these closings. The vice-president said that he probably would retain respondent to review al purchaser's documents when those documents were prepared by separate counsel. It is essentially from this conversation that respondent came to believe that he would be representing the bank in those situations. In fact, the bank never did subsequently retain respondent for this purpose.

8. The respondent told the developer that he would represent the buyers at a cost of $300 per condominium unit. The developer agreed.

9. The developer retained a marketing agency to handle the sales on its behalf. Respondent met with a representative of the marketing agency who asked respondent to prepare and deliver to the agency a letter which the agency could distribute to potential purchasers of these units when the purchase and sales contracts were signed.

10. Respondent prepared a letter addressed, "Dear Prospective Unit Owner." The letter states, in pertinent part,

> The ... Bank has designated the undersigned to conduct a complete review of all the documentation essential to finalize the purchase of your unit...and the mortgaging thereof to the bank.

The letter also states that if the buyer chooses another attorney to represent the buyer at the closing, "it will, nevertheless, be essential for me to review all of the closing documentation for the Bank at your expense."

11. Respondent did not believe that the letter constituted a misrepresentation at the time it was written. He admits that, in retrospect, the letter is confusing and could lead someone to believe that he represented the bank. He candidly admits now that it is a "terrible" letter, viewed in hindsight .

12. Respondent delivered this letter to the marketing agency and to the bank, but did not personally distribute it to any prospective purchasers.

13. In October of 1983, respondent became aware that there was some confusion as to whether he represented the bank, the developer, or the purchasers. At that time, respondent told the marketing agency to stop giving out the "Dear Prospective Unit Owner" letter. From that time on, when called by a prospective purchaser, respondent advised each purchaser that he did not represent the bank or the developer, and that he was representing only the purchaser.

14. The complainant, a prospective purchaser, telephoned respondent on December 12, 1983 and retained respondent to represent the complainant and his partners who were purchasing two condominium units. This was respondent's first contact with these particular buyers.

15. On December 23, the bank issued a loan commitment to complainant and his co-owners. The next day, respondent sent by express mail to the complainant all of the closing documentation on the purchase and mortgaging of the two units, along with a letter explaining each document and instructions as to how to proceed. On January 3, 1984, respondent closed the purchases of these two units.

16. Contrary to complainant's assertion before the hearing panel, at no time did respondent send the "Dear Prospective Unit Owner" letter to complainant or his partners. At no time did respondent represent to the complainant that he represented the bank.

17. Subsequently, complainant discovered that the condominium units could not be resold because they had very little value. The bank foreclosed the mortgages and complainant and his partners lost their investment. They have filed fraud suits against the bank and the developer in U.S. District Court.

18. There is no credible evidence that complainant herein or anyone else was injured in any way by respondent's actions as an attorney, whether in, connection with the letter or otherwise in his representation of purchasers in this transaction. The complainant's claims to the contrary are not credible. Complainant's testimony was inconsistent and his demeanor indicated a lack of candor. His testimony reflected strong bias arising out of anger over his lost investment in the condominium units.

19. Respondent worked diligently to represent his clients in these closings and did his best to ensure that the attorney for the developer completed his end of the work in a timely fashion.

20. Respondent, upon receiving notice of the complaint filed against him with the Professional Conduct Board, travelled to Montpelier to meet with the investigator. Respondent co-operated fully with the investigation of this matter.

CONCLUSIONS OF LAW

The Board finds that the letter was factually incorrect and led to conclusion. The respondent admits and the Board finds that the letter constitutes a violation of DR 2-101. The Board finds that respondent acted negligently in preparing this letter. Respondent did not intend to deceive or defraud any purchaser with a false or misleading statement.

The Board concludes that respondent did not violate DR 1-102(A)(4). The hearing panel found and the Board agrees that respondent made an innocent mistake in preparing a very confusing letter.

Bar counsel argued that respondent's representation of the buyers at the instigation of the seller raised a conflict of interest which adversely reflected on respondent's fitness to practice law in violation of DR 1-102(A)(7). We do not agree.

Respondent was not charged with violating any of the conflict of interest provisions under Canon 4 and Canon 5. It would be inappropriate, under the facts of this case, to sanction respondent under the catch all "fitness to practice" violation when more specific conflict of interest violations were not charged in the petition.

Even if such allegations had been made, however, the Board finds that there was no actual or apparent conflict of interest when the circumstances are viewed as a whole. There was confusion created by the bank's vice-president when he indicated that he would retain respondent to represent the bank when purchasers had obtained separate counsel. There was confusion created by respondent's letter. However, there is no evidence that in this particular situation dealing with complainant that there was any actual or potential conflict of interest. Complainant always understood that respondent represented him, and respondent never led complainant to any different conclusion. Indeed, complainant never even received the "Dear Prospective Owner" letter until after he filed his federal lawsuit.

The Board concludes that respondent is, and has been, quite fit to practice law, and this transaction does not rise to the level necessary to challenge his abilities to practice law in this state. Indeed, it appears that his history in the practice of law in this state, absent this one error, is a standard to which other practitioners should aspire.

SANCTION

The Board has imposed a private admonition in accordance with Standard 7.4 of the ABA Standards for Imposing Lawyer Sanctions. There are no aggravating circumstances available. Mitigating factors include absence of a prior disciplinary record, absence of a dishonest or selfish motive, full and free disclosure to the disciplinary board and a co-operative attitude toward these proceedings, good character and reputation, and candor in admitting his error.

Dated at Montpelier this 29th day of January, 1993.

PROFESSIONAL CONDUCT BOARD

/s/

J. Eric Anderson, Chairman

/s/

Deborah S. Banse, Esq.

/s/

Nancy Foster

/s/

Anne K. Batten

/s/

Joseph F. Cahill, Jr., Esq.

/s/

Rosalyn L. Hunneman

/s/

Nancy Corsones, Esq.

/s/

Robert P. Keiner, Esq.

/s/

Christopher L. Davis, Esq.

/s/

Donald Marsh

Hamilton Davis

Karen Miller

Paul S. Ferber, Esq.

/s/

Edward Zuccaro, Esq.

Ruth Stokes

Jane Woodruff, Esq.