PCB 7

[10-May-1991]

STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

REVERSED BY SUPREME COURT

In Re: PCB File No. 88.125

NOTICE OF DECISION

NO. 7

Procedural History

This matter was heard by a hearing panel of the Professional Conduct Board consisting of Richard L. Brock, Esq., Chair, Nancy Corsones, Esq., and Mr. Donald Marsh. Present at the hearing were Bar Counsel Wendy S. Collins, Esq., Respondent, and Respondent's counsel. The hearing panel heard testimony from the complainant and the Respondent.

The hearing panel issued findings of fact and recommended certain conclusions of law to the Board. A hearing was held before the full Board pursuant to Rule 8D wherein both bar counsel and Respondent, represented by counsel, appeared.

Upon consideration of the arguments and briefs of counsel, as well as upon consideration of the hearing panel's report, the Board adopted the findings of fact, conclusions of law and recommendations as proposed by the hearing panel. Set forth below for publication are these findings of fact

and conclusions of law.

FINDING OF FACTS

1. Respondent is an attorney who handles a number of domestic relations matters.

2. Respondent represented one "W" in a hotly contested divorce action against "H". The divorce matter involved a full range of emotional and legal difficulties.

3. Complainant is the daughter of "H".

4. Through a sequence of facts not important to the determination of the merits of this case, it happened that complainant advanced money to Respondent's client, "W". The terms of that advancement were the subject of a disagreement between "W" and complainant.

5. Complainant became concerned about the money and sued her stepmother, "W", in small claims court.

6. Complainant lives outside Vermont and although she apparently consulted an attorney in her home jurisdiction regarding this matter, she acted pro se in filing the small claims matter.

7. The small claims complaint alleged essentially that the money advanced was a loan and sought return of the money.

8. "W" brought the small claims complaint to Respondent. "W" asked Respondent to file an answer. Respondent relied upon her client's representations and made no independent investigation of the facts or circumstances surrounding this disagreement. Respondent wrote to complainant the following letter, which has been redacted in part to preserve confidentiality.

> Our office represents your stepmother, "W", in her divorce action against your father. "W" has received a complaint that you filed against her in small claims court.
>
> I regard your action filing this baseless lawsuit to be especially cruel and vicious. You are well aware that "W" is terminally ill with cancer and that her condition is fragile. Receiving notice of this lawsuit was very upsetting to her and is jeopardizing her health, which is, of course, probably your intended result.
>
> The $2,000 loan you made to "W" and [your father] was deposited into their joint checking account and was used to pay their joint bills. [Your father] has all the financial records and checks to document this.
>
> If you do not immediately dismiss your lawsuit, I

will file a counterclaim against you seeking money damages for "W" for abuse of process, intentional infliction of emotional distress and for defamation. I will ask for punitive damages and request that the Court award "W" her attorney's fees and costs.

Unless I receive confirmation by ...that you have dismissed your complaint, I will proceed with all available legal remedies.

9. The Board finds that Respondent knew or should have known that the allegations of the complaint have qualified privilege.

10. Respondent had no grounds for believing that the filing of the small claims action constituted abuse of process or the intentional infliction of emotional distress. Although there was emotional distress involved, it was ancillary to a contested divorce. There was no evidence upon which Respondent could reasonably have believed that complainant intentionally inflicted mental distress upon "W". Indeed, Respondent's reference in the letter that the distress was "probably" the complainant's intended result indicates Respondent's lack of information on this point.

11. Although Respondent testified that she believed there was ulterior motive for the small claims action, the panel concluded that there was no evidence upon which Respondent could accurately use the terms "cruel and vicious" to characterize complainant's small claims action, or that complainant had a bad faith intent to use the legal process to cause

emotional and personal harm. The Board adopts the panel's findings in this regard.

12. Respondent showed no contrition and testified that her sole regret was that the letter referred to the advance as a loan rather than as a "gift" which she testified was the way her client had characterized the transaction.

13. The Panel and the Board find that Respondent was influenced by her client's emotional and physical distress.

14. The Panel and the Board do not doubt that Respondent was deeply involved and zealously representing her client. However, Respondent did not treat complainant with common courtesy and consideration.

CONCLUSIONS OF LAW

An attorney in the circumstance of a hotly contested domestic relations case has a duty to pursue matters on a professional level. The strictures of VRCP 11, DR 1-102(A)(7), DR 7-102(A)(l) and EC 7-10 apply even in a divorce case. This includes an obligation to preserve decorum and encourage fair process, treating all involved persons with dignity.

This case involves a mix of several different elements of the responsibility of an attorney. This case is a little unusual in that the alleged misconduct related to a pro se litigant, was not directly a part of a contested divorce but was clearly, within the minds of the involved

individuals, a part of that divorce, and relates not to a pleading or court action but to a letter of response to a small claims complaint. All of these facts lead to areas of inquiry not clearly delineated by existing Vermont rules, statute, or case law.

Nevertheless, the Board believes that the basic principles of LaPlaca v. Lowery, 134 VT 56 (1975) are applicable. Although obiter dicta, LaPlaca purports at page 57-58 to apply to attorneys and therefore to Respondent. Reading that case in connection with the situation presented here, the Board believes that there is a qualified immunity which applies to pleadings. If those pleadings are part of an ongoing litigation, and if the pleader's allegations are made in good faith, there is immunity from the types of claims alleged in Respondent's letter to the complainant. This immunity would apply to complainant and her signature on the small claims correspondence.

Although the answer made by Respondent was by letter, this being a pro se litigant and small claims litigation, the panel believes that VRCP 11 and DR 7-102(A) are applicable. Therefore, in connection with this letter, the Board believes that the qualified privilege which complainant had must be taken into consideration as well as Respondent's obligation to respond in a way which zealously preserved the rights of her client and yet preserves the requirements of good faith response and decorum and courtesy.

The inclusion of the defamation, intentional abuse of process, and intentional infliction of emotional distress ideas in the letter in question went beyond anything that Respondent had reasonable grounds to

pursue given the information which was available to her at the time. Respondent apparently raised these very serious allegations against complainant based on the unconfirmed and uninvestigated representations of her client, W. W was an older woman involved in a very serious divorce action. The Bar is not well served when its members blindly adopt the emotional climates created by their clients. Balancing the obligation of zealous representation against the obligation to be fair will always be, to some extent, a subjective judgment. Nevertheless, the Board believes that in this particularly situation Respondent crossed the line of propriety.

The Board is particularly concerned that Respondent's letter was sent to a pro se litigant whom she had met personally and had reason to believe was not learned or particularly sophisticated. The Board is also concerned that Respondent continues to feel that the letter was an appropriate response to the situation.

Respondent's counsel raised a constitutional argument that the disciplinary rule in question, DR 1-102(A)(7), is unconstitutionally vague. The Board would be reluctant to rule on constitutional claims, even under ideal circumstances. The grant of jurisdiction to an administrative agency is normally strictly construed. Nowhere in Administrative Order No. 9 is there express authority conveyed to this Board to rule on questions of constitutional law. Furthermore, this matter was not raised in response to the petition nor was any evidence presented on this point. Under these circumstances, the Board declines to rule on whether or not DR 1-102(A)(7) is unconstitutionally vague.

Conclusion

The Board concludes that Respondent violated DR 1-102(A)(7). Because of the difficulty in balancing the competing interests here, and the therefore subjective nature of this conclusion, and because it appears that no significant harm has occurred, the Board agrees with the panel's recommendation that a private admonition is the appropriate sanction in this matter. Consequently, an admonition pursuant to Administrative Order No. 9, Rule 7(A)(5) shall issue from this Board.

Dated at Montpelier, Vermont this l0th day of May, 1991.

/s/

By:_____

J. Eric Anderson, Chair

/s/ /s/

_____ _____

Anne K. Batten Leslie G. Black, Esq.

/s/ /s/

_____ _____

Richard L. Brock, Esq. Joseph F. Cahill, Jr., Esq.

/s/

_____ _____

Nancy Corsones, Esq. Christopher L. Davis, Esq.

/s/

_____ _____

Hamilton Davis Rosalyn L. Hunneman

/s/ /s/

_____ _____

Donald Marsh Deborah S. McCoy, Esq.

_____ _____

Karen Miller, Esq. Joel W. Page, Esq.

/s/

_____

Edward Zuccaro, Esq.

ENTRY ORDER

SUPREME COURT DOCKET NO. 91-246

MARCH TERM, 1992

In re PCB File No. 88-125 APPEALED FROM:

Professional Conduct Board

DOCKET NO. 88-125

In the above entitled cause the Clerk will enter:

Appellant attorney appeals from a Professional Conduct Board conclusion

that appellant violated the Code of Professional Responsibility (DR 1-102(A) (7)) by sending a letter to complainant threatening her with counterclaims. We disagree with the Board's conclusion and dismiss the complaint.

The instant controversy arises out of appellant's representation of the wife in a divorce action. The wife informed appellant that the marriage had been an extremely unhappy one, that her husband had physically and emotionally abused her, that she had terminal cancer and only a short time to live and that she did not wish to die married to him. The wife also told appellant that she had earlier resolved to leave her husband but, after he had suffered a stroke, she stayed with him to nurse him back to health. She had given up her job and used her accumulated sick leave and vacation time to provide him with care. Following his recovery, the wife left the marital home and appellant instituted an action for divorce. The early stages of the divorce were bitterly contested.

While the divorce was pending, the wife informed the appellant that a daughter of the husband by a prior marriage had instituted an action against her. The daughter alleged that she had loaned the sum of $2,000 to the husband and wife to be used by them to help with their living expenses, that the wife had since left the father and filed for divorce, and that none of the money was used for the father's benefit but had been "deposited elsewhere" or "given away" by the wife. The wife informed appellant that the daughter had in fact given her the $2,000, that it had been used for the joint debts of the wife and husband during his illness and that the daughter had indicated there was no need to pay back the money. Appellant knew that

the lawsuit had so upset the wife that she could not eat and her physical condition was deteriorating. The wife also informed appellant that the daughter knew that the wife had been told by her doctor that she had only one half a year to live. Based upon wife's representations, appellant believed the action brought by the daughter to be groundless and wrote a letter to the daughter, which stated in part:

> I regard your action filing this baseless lawsuit to be especially cruel and vicious. You are well aware that [my client] is terminally ill with cancer and that her condition is fragile. Receiving notice of this lawsuit . . . is jeopardizing her health, which is, of course, probably your intended result.
>
> . . . .
>
> If you do not immediately dismiss your lawsuit, I will file a counterclaim against you seeking money damages for [my client] for abuse of process, intentional infliction of emotional distress and for defamation. I will ask for punitive damages and request that the Court award [my client] her attorney's fees and costs.
>
> Unless I receive confirmation . . . . that you have dismissed your complaint, I will proceed with all available legal remedies.

In response to this letter, complainant filed a grievance with the Professional Conduct Board. The full Board adopted the findings and conclusions of a hearing panel that appellant's letter violated DR 1-102(A)(7), which provides that "[a] lawyer shall not [e]ngage in any other conduct that adversely reflects on the lawyer's fitness to practice law." The Board recommended that we affirm its conclusion and impose a private letter of admonition pursuant to Administrative Order No. 9, Rule 7 (A) (5).

The Board's recommendation rests in part upon the assumption that complainant's pleadings were cloaked with a "qualified immunity" which would bar the assertion of the claims made in the letter. While such an immunity could extend to a suit for defamation, Torrev v. Field, 10 Vt. 353, 414-15 (1838), the defense is an affirmative one and does not bar the institution of the action. In this case, the threatened actions might well lie if the facts related by the client were believed by the trier of fact. Appellant, on behalf of her client, filed counterclaims for intentional infliction of emotional distress and abuse of process which were eventually dismissed in connection with the settlement of the divorce action. The Board, however, did not find that the actual filing of these claims violated the canons. We cannot agree, therefore, that the threat to institute these actions under these circumstances adversely reflected upon the applicant's fitness to practice law.

The Board further rests its recommendation on the fact that appellant relied upon her client's representations and made no independent investigation of the facts or circumstances. The circumstances surrounding

the advance of the money, however, were witnessed only by the complainant and the client. While the complainant accused the client of diverting money intended for her ill husband to her own use, the client unequivocally denied the accusation. The Board does not suggest what further investigation was required or what it would have disclosed.

Finally, the Board's conclusion cannot be justified solely on comply appellant's duty to comply with the "strictures of . . . . EC 7-10" and the "obligation to . . . treat [] all involved persons with dignity." Both Disciplinary Rules (DRs) and Ethical Considerations (ECs) are found under each Canon in the Code of Professional Responsibility. Sanctions, however, may be imposed only for the violation of DRs. See Model Code of Professional Responsibility, Preliminary Statement. The ECs, on the other hand, are "aspirational in character and represent the objectives toward which every member of the profession should strive." Id. EC 7-10 establishes, as a laudable objective, the obligation "to treat with consideration all persons involved in the legal process." Neither DR 1-102(A) (7), however, nor any other DR, contains such a standard. While ECs may furnish guidance to clarify the lack of precision in the term "fitness to practice law," the arguably discourteous inference expressed in the letter does not rise to the level of sanctionable conduct. The Board also erred by focusing on the pro se status of the letter's recipient. The code does not suggest that pro se litigants are due any special measure of courtesy.

While we agree with the Board that the letter was discourteous and an inappropriate response, we do not agree that it violated DR 1-102(A)(7).

Writing a letter that threatens legal action in response to a suit filed by another does not adversely reflect on a lawyer's ability to practice law where the writer has, as here, some basis for asserting the threatened claim. The letter in this case differs from the letter in In re Rosenfeld, because in Rosenfeld there was no legal basis to threaten the witness with retaliation. _ Vt. _, _, 601 A.2d 972, 976-77, cert. denied, 112 S.Ct. 1968 (1991).

Because appellant's conduct did not fall within the proscription of DR 1-102(A) (7), we need not reach the argument that the provision is unconstitutionally vague and overbroad.

Complaint dismissed.

DOOLEY, J., dissenting. The majority opinion improperly rejects the Board's fact finding and ignores an important use of the Ethical Considerations to the Code of Professional Responsibility. Accordingly, I dissent.

As the Board found, appellant's actions were based solely on an interview with the client, without any independent examination. The Board found that appellant had no well-grounded-in-fact reason for believing that the filing of the small claims action by complainant was an abuse of process or intentional infliction of emotional distress. It found that there was insufficient reason for appellant to term complainant's actions "cruel and vicious," or to conclude that such actions were taken in bad faith and intended to cause emotional and personal harm. The Board further found that appellant knew that her letter would intimidate complainant, that

appellant intended this effect, and that the letter had such an effect. This finding was based in part on the fact that appellant had met complainant and knew she was not learned or particularly sophisticated. These findings are clearly and reasonably supported by the evidence and must be upheld. See In re Rosenfeld, 157 Vt. , , 601 A.2d 972, 975 (1991).

I emphasize these facts to highlight my disagreement with the majority's characterization of the proceeding as involving a finding only that "the letter was discourteous and an inappropriate response" and that appellant had "some basis for asserting the threatened claims." In fact, it is central to the Board's reasoning that there was no basis for the letter, other than to intimidate complainant, and appellant's actions went beyond discourtesy.

Although the Board mistakenly assumed that complainant's pleadings were covered by a "qualified immunity," this error does not invalidate the remainder of the Board's findings or taint its ultimate decision. The absence of a qualified immunity does not supply appellant with a legitimate basis for threatening the lawsuit. The fact that appellant actually filed the suit establishes nothing, particularly in light of complainant's subsequent motion for Rule 11 sanctions against appellant. As the suit was dismissed in connection with the final settlement of the divorce proceeding, this error provides no basis for overturning the Board's findings. When we understand that this case involves the use of abusive, coercive tactics to effect the lawyer's goal, without adequate justification, the Board's conclusion is fully supported.

My second major disagreement with the majority involves its conclusion that the Board erred in using an Ethical Consideration to define the standard of permissible conduct under Disciplinary Rule 1-102(A)(7). That rule is broad, prohibiting a lawyer from engaging in conduct "that adversely reflects on the lawyer's fitness to practice law." The term "fitness," as used in the Rule, does not refer only to a lawyer's ability to practice law, but also to whether the lawyer possesses the requisite degree of character and judgment that the legal profession demands. See In re Berk, Vt. , , 602 A.2d 946, 949-50 (1991). A lawyer's fitness to practice may be called into question by conduct that "reflect[s] negatively on his professional judgment and detract[s] from public confidence in the legal profession." Id.

At best, it is difficult to apply these broad standards to specific conduct. The Code provides a method to narrow the interpretive burden. The Preliminary Statement provides that "in applying the Disciplinary Rules, [an enforcing agency] may find interpretive guidance in the ... objectives reflected in the Ethical Considerations." Other Courts have drawn on the Ethical Considerations in interpreting the Disciplinary Rules. See, e.g., Matter of Rabideau, 102 Wis. 2d 16, 28 n.7, 306 N.W.2d 1, 7 n.7 (1981). There are a number of Ethical Considerations that are helpful in this case. EC 1-5 states that lawyers should be "temperate and dignified," and EC 7-37 provides that "[h]aranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system." The latter provision, despite being located in the section attached to Canon 7, "states a fundamental principle applicable to all parts of the Code." In re Vollintine, 673 P.2d 755, 758 (Alaska 1983). Further,

EC 7-10 states that the duty of zealous advocacy does not relieve an attorney from an obligation to be considerate and "avoid the infliction of needless harm." These ECs reinforce my conclusion that actions constituting intimidation and abuse, of which appellant's letter is an example, adversely reflect on a lawyer's fitness to practice law.

The majority not only fails to use the Ethical Considerations in a meaningful manner; it finds error in their appropriate usage. I find this holding particularly ironic in a case where the lawyer involved has challenged the Disciplinary Rule as unconstitutionally vague. I agree with the Supreme Court of Iowa that the Disciplinary Rule is not unconstitutionally vague, in part because of the presence of the Ethical Considerations to give interpretive guidance. See Committee on Professional Ethics v. Durham, 279 N.W.2d 280, 284 (Iowa 1979) ("It is only in light of the remainder of the Iowa Code of Professional Responsibility, more specifically EC 1-5 and EC 9-6, that we do not find DR 1-102(A) (6) [which is identical to Vermont DR 1-102(A) (7)] to be unconstitutionally vague as applied to the facts of this case").

Finally, I do not believe that our decision in In re Rosenfeld can be so readily distinguished. See 157 Vt. at _, 601 A.2d at 976-77. As in this case, the attorney disciplined in Rosenfeld attempted to influence the disposition of an opponent's suit by improperly threatening civil litigation. Here, two features of appellant's letter make it more egregious than the one sent in Rosenfeld: the threats included in the letter were made in a more direct, bullying manner, and the letter included a serious, offensively worded accusation. It is inconsistent with our holding in

Rosenfeld to reverse the Board's decision in this case.

The Board's action in this case was fully supported by the facts and the law. Many of the arguments made by appellant and accepted by the majority really go to the severity of the sanction. The Board appropriately responded to them by imposition of the lightest sanction possible, a private admonition. I would affirm the Board.

BY THE COURT:

/S/

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Frederic W. Allen, Chief Justice

/S/

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Ernest W. Gibson III, Associate Justice

/S/

_____

James L. Morse, Associate Justice

/S/

_____

Denise R. Johnson, Associate Justice

Dissenting:

/S/

_____

John A. Dooley, Associate Justice