PCB 61

[10-Sep-1993]

STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

In re: Andrew Lichtenberg, Esq.

PCB File 91.08

DECISION NO. 61

FINAL REPORT TO THE SUPREME COURT

The hearing panel submitted its report in this matter to the Board on or about June 4, 1993. A Rule 8D hearing was duly noticed and occurred on September 10, 1993. The Board received a written brief from respondent and entertained oral argument from both respondent and bar counsel.

Upon consideration of the hearing panel's report, respondent's brief and oral argument, the Professional Conduct Board hereby affirms the recommendations of the hearing panel and adopts as its own the panel's findings of fact and conclusions of law with one modification: in addition to the recommended three months suspension, the Board recommends that respondent also be placed on probation for a term of one year. During that term of

probation, respondent shall retake the Multistate Professional Responsibility Examination (MPRE) and achieve a passing grade under the prevailing Vermont standards. Violation of this condition of probation would constitute contempt of the Supreme Court's final disciplinary order imposing such probation and would result in issuance of a show cause order as to why respondent should not be immediately and indefinitely suspended from the Vermont bar unless and until he successfully passes the MPRE.

As to sanctions, the Board is cognizant of the Supreme Court's reluctance to impose a suspension of less than six months. However, the Board notes that Administrative Order 9 allows for imposition of a suspension of less than six months. For the reasons contained in its hearing panel's report, the Board believes that a suspension of only three months - along with a term of probation - is sufficient to protect the public interest.

Dated at Montpelier September 10, 1993.

PROFESSIONAL CONDUCT BOARD

/s/

Deborah S. Banse, Chairman

/s/

Anne K. Batten

Robert P. Keiner, Esq.

/s/ /s/

Joseph F. Cahill, Jr., Esq. Donald Marsh

/s/ /s/

Nancy Corsones, Esq. Karen Miller, Esq.

/s/ /s/

Ruth Stokes Rosalyn L. Hunneman

/s/ /s/

Paul S. Ferber, Esq. Jane Woodruff, Esq.

/s/

Nancy Foster Edward Zuccaro, Esq.

STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

IN RE: ANDREW LICHTENBERG) Case No. 91-08

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HEARING PANEL'S REPORT

The above entitled case came on to be heard before a Professional Conduct Board hearing panel comprised of Nancy Corsones, Esquire, Chair, Donald Marsh, and Deborah Banse, Esquire on April 30, 1993 at the Law Offices of William Dorsch, 29 Pine Street, Burlington, Vermont, 05402. Present were William Dorsch, bar counsel, and participating by telephone, was Andrew Lichtenberg.

Based upon the evidence adduced at the hearing on this matter, the panel makes the following findings of fact:

l. Respondent is an attorney who was first admitted to practice law in the fall of 1989, in Vermont. At that time, he was 43 years old. Respondent was unable to locate employment with an established law firm, and he accordingly established a solo law practice shortly after being admitted.

2. John Kessler is an Assistant Attorney General, who, during the relevant timeframe, represented the Department of Corrections.

3. Respondent represented James P. Daignault in a civil rights case against the Department of Corrections arising out of Mr. Daignault's treatment at the Chittenden County Correctional Center in June of 1988. The case was filed sometime in late 1989 or early 1990.

4. The complaint alleged that Mr. Daignault was physically abused by correctional center guards.

5. Raymond Foy was a guard at the correctional center in June of 1988. With respect to the litigation arising out of Mr. Daignault's treatment at the correctional center in June of 1988, Mr. Foy was named by the defense in late spring or early summer of 1990 as a potential witness. His name was revealed in connection with discovery responses filed by the defense in late spring or early summer of 1990.

6. In September, 1990, Raymond Foy consulted with Respondent on a legal matter involving landlord/tenant issues. He was referred to Respondent through the Lawyer Referral Service of the Vermont Bar Association. Prior to this initial consultation, Foy had no knowledge that Respondent represented James Daignault in the correctional center case.

7. In the course of that initial consultation with Respondent, Raymond Foy revealed to Respondent that he had suffered substantial disabling emotional problems that had recently led him to take a medical leave of absence from his employment at the correctional center.

8. The Respondent knew, or should have known, at the time of the interview with Raymond Foy that Mr. Foy was a potential witness in the Daignault case. Prior to his actual face to face meeting with Respondent, Mr. Foy had filed out an intake form provided by Respondent on which Mr. Foy set forth his name, address, telephone number and place of employment.

Mr. Foy observed Respondent review this form while Respondent was on a telephone call with a third person unrelated to this matter. After that telephone call was completed, several minutes of conversation between Mr. Foy and Respondent ensued, before Respondent raised an issue of conflict of interest. It was in this conversation that Mr. Foy revealed his emotional and medical conditions.

9. Even prior to this initial consultation, Respondent had a conversation with John Kessler perhaps two or three days before the initial consultation with Mr. Foy, in which Mr. Lichtenberg raised with Mr. Kessler the possibility that this Raymond Foy was the same Raymond Foy who was a witness in the Daignault matter. Respondent indicated to Mr. Kessler that the person coming in to see him had an Essex exchange to his telephone number, whereas both Mr. Kessler and Respondent knew that the Raymond Foy who was a witness in the Daignault matter had a Burlington exchange. Mr Kessler trusted Respondent to take necessary steps to determine whether or not this Raymond Foy was the same Raymond Foy who was a witness in the Daignault matter. Respondent did not do this.

10. There is a dispute in the testimony as to the timing and content of Respondent's statements concerning potential conflict of interest. Respondent asserts that he told Mr. Foy there was a potential conflict immediately upon his conversation with Mr. Foy. Respondent testified that Foy told Respondent that he (Foy) didn't have a problem with Respondent representing him in the landlord/tenant matter as long as Respondent would represent him effectively. The panel finds Respondent's testimony not credible.

11. Mr. Foy testified that after about 10 minutes of conversation Respondent turned to him and said "Do you know who I am?" Foy responded no, and indicated that the Lawyer Referral Service sent him to Respondent. Foy testified that Respondent then informed Foy that he was the attorney for James Daignault. As Foy testified, he felt uncomfortable and felt like he had been led into a trap. Respondent assured Foy that he was comfortable representing Foy on a landlord/tenant matter. Foy was not sure of the situation, and left shortly thereafter. He told Respondent he would have to think things over and get back to Respondent. The panel finds Mr. Foy's testimony to be completely credible and incorporates this testimony as part of its findings.

12. The next day, Respondent called Mr. Foy and asked Foy whether or not Respondent would be representing him in the landlord/tenant matter. He also inquired about a $125.00 retainer fee. Foy responded that he would not be hiring Respondent to represent him in the landlord/tenant matter. There was no discussion in either conversation as to whether Respondent would reveal the information regarding Mr. Foy's emotional and medical problems. Mr. Foy felt that it would be kept confidential. The panel finds Mr. Foy's testimony to be completely credible and incorporates this testimony as part of its findings.

13. Respondent did not attempt to prevent Raymond Foy from revealing his emotional problems nor did he warn Mr. Foy that such revelation could provide useful information for the plaintiff in the Daignault case.

14. In the Daignault case, the Respondent used the confidential information provided by Raymond Foy during the initial consultation in the following specific manners:

(1) Respondent had originally asked, prior to meeting Mr. Foy, about whether or not any correctional center guards had any emotional disorders. (See Question 24 of First Set of Interrogatories dated Spring, 1990, referred to in Bar Counsel's Exhibit #3, Page 2). Mr. Kessler had originally responded in the negative.

However, after meeting with Mr. Foy, Respondent again asked Mr. Kessler to respond to that question, number 24. In fact, after meeting with Mr. Foy, Respondent filed a motion to compel that answer, which motion was denied by Judge Mahady. (See Bar Counsel Exhibit #2). Even after that motion to compel was denied, Respondent promulgated a second set of discovery. Some of this discovery was duplicative of earlier questions that had been the subject of the motion to compel which was denied. Other questions in this second set of discovery were brand new questions. (See Bar Counsel Exhibit #4). Not only did Respondent duplicate the very question which was the subject of the motion to compel which was denied by Judge Mahady, Respondent also specifically asked: "Why is Raymond Foy on leave from the correctional facility? Who are his present physicians and psychotherapists?" (See Bar Counsel Exhibit #4).

John Kessler appropriately responded with an objection, citing Judge Mahady's denial of plaintiff's earlier motion to compel pertaining to Mr. Foy's present health status.

(2) Even after Kessler's objections, Respondent subpoenaed Mr. Foy to attend a deposition. This deposition was held on December 13, 1990. Respondent again tried to ask Mr. Foy about his mental health status. Mr. Kessler appropriately cited Judge Mahady's denial of the motion to compel and instructed Mr. Foy not to answer questions posed along those lines. After the initial dialogue on the record between Mr. Kessler and Respondent, Mr. Foy felt that Respondent would not be allowed to further inquire about his mental health. However, at least seven times during the deposition, Respondent persistently inquired along these lines. Mr. Foy grew increasingly upset. The repeated questioning caused Mr. Foy substantial emotional distress. He was continuing his medication at that time. Mr. Foy felt directly threatened by Respondent's statements to the effect that Respondent would find a way to make the defendant pay for the deposition. Mr. Foy took this to mean he, Mr. Foy, would have to pay.

Thereafter, the Daignault case was scheduled for a status conference, in January of 1991. At that time Judge Mahady informed Respondent that he (Respondent) was in a difficult position, and advised Respondent that if it were he (Judge Mahady) in Respondent's position, he would withdraw as counsel.

The case was again statused, several weeks later, presided over by Judge Katz. Judge Katz, on the same facts, granted defendant's motion to disqualify Respondent. (See B.C #6)

15. The panel affirmatively finds that, at least during the deposition of Mr. Foy, Respondent was cautioned by John Kessler regarding the attorney-client privilege as specifically concerns confidentiality. It is clear from the transcript of the deposition that Respondent "just didn't get it":

"Q. (by Respondent) During that conversation at my office, do you recall telling me that you were on leave from the correctional facility?

A. (Mr. Foy) Yes, I do.

Q. And what were those reasons?

A. I think that's privileged information. I told you why I was on medical leave in strict confidence, and that's where I'd like to have it remain.

Q. Are you still on leave--

A. Yes, I am.

Q. --from the correctional facility for that reason?

A. Yes, I am.

Q. Did you ever suffer from those maladies before this medical leave?

MR. KESSLER: This has been asked and answered.

A. Yeah, that question's been answered.

MR. KESSLER: He's already asserted his privilege.

Q. What privilege is that?

A. Lawyer-client confidentiality.

MR. LICHTENBERG: We can overcome that at the right point in time.

MR. KESSLER: Who is "we," Andy?

MR. LICHTENBERG: I will.

MR. KESSLER: You will overcome the privilege?

MR. LICHTENBERG: Yeah.

MR. KESSLER: Okay. Go ahead.

MR. LICHTENBERG: I just want to say one more time, for the record, I'll be asking the court for the defendant to pay for this deposition."

The panel is also concerned regarding the timing of when the Respondent actually knew that Mr. Foy was a material witness in the Daignault matter. At the very least, Respondent's own intake form should have resulted in an immediate declination of representation. The panel is even more troubled by Bar Counsel Exhibit #3, which is plaintiff's motion in opposition to defendant's motion for sanctions, in which Respondent expressly asserts that he subpoenaed Mr. Foy to a deposition in the Daignault matter in July of 1990, nearly two months before the initial office consultation with Mr. Foy in the landlord/tenant matter. This issue was not raised by the testimony of any of the witnesses at the hearing on April 30th. The panel finds Respondent is not credible on the issue of when he first actually knew that Mr. Foy was a material witness in the Daignault matter. The panel relies heavily on Exhibit 3, where Respondent states that he attempted to subpoena Foy in July of 1990 and then asserted that "Five months have passed and plaintiff still has not produced Mr. Foy, because Mr. Foy claims to be unavailable because of illness." (See Bar Counsel Exhibit #3). (Emphasis added.)

16. The panel is seriously concerned with Respondent's blatant disregard of Mr. Foy's confidences, and blatant disregard for the effect of these disclosures upon Mr. Foy's health. This is compounded by

Respondent's implied accusation that Foy was faking an illness to avoid a deposition, when he was certainly in a position to know that Mr. Foy was ill.

17. The panel also expressly finds that Mr. Kessler and Mr. Foy are credible witnesses in this matter.

18. With respect to the question of injury to Mr. Foy, the panel finds that Mr. Foy was actually harmed by the conduct of Respondent. The disclosure of confidences seriously harmed Mr Foy. Most egregiously, Mr. Foy was very upset at the disclosure of confidences at the December 13, 1990 deposition. Mr. Daignault was physically present in the room during the deposition. Mr. Foy testified that he was upset because "a lawyer [he] had shared private information with brought it up in front of the plaintiff."

19. Another reason we doubt Respondent's credibility is his assertion that the Lawyer Referral Service did not in fact refer Mr. Foy to Respondent for the landlord/tenant matter. Respondent's assertion is directly contradicted by the testimony and evidence of Pat Blake, the Lawyer Referral Service coordinator (See B.C #1). The record clearly shows that the Lawyer Referral Service made this referral to Respondent. Mr. Foy also testified regarding the referral. His testimony was totally consistent with that of Ms Blake, and inconsistent with the testimony of Respondent.

20. At the hearing, Respondent expressed apologies and contriteness

for his actions in this case. However, the panel notes that until the conclusion of the hearing, Respondent refused to accept responsibility for his actions.

CONCLUSIONS OF LAW

The panel concludes that bar counsel has established by clear and convincing evidence that Respondent violated the following provisions of the Code:

(1) DR4-101(B)(l): a lawyer shall not knowingly reveal a confidence or secret of his client;

(2) DR4-101(B)(2): a lawyer shall not knowingly use a confidence or secret of his client to the disadvantage of the client;

(3) DR4-401(B)(3): a lawyer shall not knowingly use a confidence or secret of his client for the advantage of himself or for a third person.

The fourth charge brought by bar counsel, violation of DR2-104(A)(l) (communication with a party known to be represented by counsel) was not proven, therefore the panel recommends this charge be dismissed.

Although Mr. Foy did not "retain" Respondent, this is a distinction without a difference. See EC 4-1: ". . . The proper functioning of the

legal system require(s) the preservation by the lawyer of confidences and secrets of one who is employed or sought to employ him."

The ABA standards call for disbarment when a lawyer with the intent to benefit the lawyer or another person knowingly reveals information related to the representation of a client, and this disclosure causes injury or potential injury to a client. (See ABA Standards at 28).

Suspension is appropriate when a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client. Id.

The ABA standards, taken literally, would dictate disbarment in this case. However, in mitigation, Respondent was newly admitted at the time these violations occurred. He was very inexperienced. In aggravation, Respondent had several indications from Attorney Kessler, Judge Mahady and Judge Katz that there was a conflict of interest in this matter. Yet Respondent aggressively pursued the confidential information to the actual injury of Mr. Foy.

The panel concludes that suspension is warranted under the circumstances. We note that Respondent did not intend to act with a "bad heart." However, his conduct appears to be very ill-advised, even reckless, keeping in mind the regular input from Attorney Kessler, Judge Mahady and Judge Katz. His reckless conduct is exacerbated by the actual injury suffered by Mr. Foy. Respondent used the information to benefit

Mr. Daignault, and potentially himself, as he testified he had a contingency fee agreement in the Daignault matter.

Taking all factors into consideration, the panel recommends that the Respondent be suspended from the practice of law for a period of three months.

The panel has struggled with the exact length of suspension in this matter. It is clear that a six month suspension, with the resultant efforts the Respondent must undergo for reinstatement, would likely result in an actual suspension of possibly up to a year. This is too harsh.

On the other hand, one month is felt to be too minimal a punishment for a significant breach of a major tenet of the legal profession. We also reject the notion that public reprimand is appropriate in this case. This is not consistent at all with the ABA standards for imposition of sanctions. Also, the imposition of a public reprimand would certainly not impress the seriousness of this violation upon other members of the bar.

Dated this 4th day of June, 1993.

/s/

Nancy Corsones, Esquire

/s/

Deborah Banse, Esquire

/s/

Donald Marsh

APPENDIX TO DECISION #61

ENTRY ORDER

SUPREME COURT DOCKET NO. 93-430

NOVEMBER TERM, 1993

In re Andrew Lichtenberg, Esq. } Original Jurisdiction

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} Professional Conduct Board

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} Docket No. 91-08

In the above entitled cause the Clerk will enter:

The recommended sanction is not approved. The violations found warrant a six-month suspension, and respondent Andrew Lichtenberg is suspended from the practice of law for six months, commencing on January 1, 1994. In addition, the respondent shall also be placed on probation for a term of one year, commencing on July 1, 1994. During that term of probation, respondent shall retake the Multistate Professional Responsibility Examination (MPRE) and achieve a passing grade under the prevailing Vermont standards.

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/

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John A. Dooley, Associate Justice

/s/

_____

James L. Morse, Associate Justice

[x] Publish /s/

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[ ] Do Not Publish Denise R. Johnson, Associate Justice