PCB 72

[15-Jul-1994]

STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

In re: PCB File No. 93.26

NOTICE OF DECISION

DECISION NO. 72

This matter came before us by way of a stipulation entered into by bar counsel and respondent appearing pro se. We accepted the stipulated facts which are summarized as follows.

Respondent has been a member of the bar for over twenty years.

In 1991, Respondent represented Client in the sale of some real estate to a trust and related matters involving the trust. One issue was Client's

granting of a right of first refusal on a related parcel to the trust. The Trustee was represented by counsel.

The conveyances were accomplished and the right of first refusal was recorded at the appropriate town clerk's office. There remained unresolved, however, a land gains tax issue in which both Client and Trustee had an interest. Respondent and Trustee's counsel corresponded and conversed about the tax issue on several occasions through at least 1993.

In the fall of 1992 Client found a buyer for the subject real estate and, per the right of first refusal, notified Trustee of the impending sale. Trustee informed Client that she did not intend to exercise her right of first refusal.

At Client's request, Trustee executed a handwritten release of her right of first refusal. However, a formal quit claim deed or release was necessary for proper recording with the town clerk's office.

A couple of months later, Respondent called the Trustee directly regarding the required document. Trustee maintains that she initially asked Respondent to pass the required document to her lawyer for review. Respondent does not recall such a comment but does not dispute the sincerity of Trustee's representation of her recollection.

Respondent did not send the document to Trustee's counsel. Instead, Respondent sent directly to Trustee a proposed quit claim deed along with a transmittal letter asking that she execute the document and return it to

Respondent. Trustee felt pressured by Respondent to sign the document which she did, in fact, sign.

Trustee asked that the quit claim deed be sent to her lawyer to be held in escrow pending the closing. Respondent told Trustee that he also could perform the escrow function and would do so to her satisfaction. Trustee agreed.

Although Respondent was aware that Trustee was represented by counsel on the tax issue related to the real estate transaction out of which the right of first refusal originally emanated, Respondent did not connect opposing counsel's continuing representation on that isolated issue with the issue of the release of the right of first refusal. In Respondent's mind, the fact that Trustee had informally released the trust's right of first refusal on her own, without benefit of counsel, suggested that she was not represented by counsel and did not wish to be.

Respondent should not have made such assumptions and should have consulted with opposing counsel to obtain permission to deal with the Trustee directly. Failure to do so resulted in Respondent violating DR 7-104(A)(1) which states, in relevant part:

During the course of his representation of a client a lawyer shall not communicate ... on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has prior consent of the lawyer representing such other party or is authorized by law to do so.

Respondent was negligent in failing to recognize that Trustee was represented by counsel "in that matter". Particularly in light of Respondent's extensive experience, an aggravating factor here, Respondent should have been far more cautious in evaluating the ethical issues presented by direct contact with an opposing party. Fortunately, Respondent's misconduct did not cause any injury to the Trustee or to the outcome of the real estate transaction.

In mitigation, we find that Respondent has no disciplinary record, acted without a dishonest or selfish motive, and co-operated fully with these disciplinary proceedings.

In light of these aggravating and mitigating factors, the majority feels that Section 6.34 of the ABA Standards for Imposing Lawyer Discipline is applicable here. That provision states, in pertinent part:

Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in improperly communicating with an individual in the legal system, and causes little or no actual or potential interference with the outcome of the legal proceeding.

The majority is mindful of the minority's concern that this sanction is inappropriate, in light of the more severe sanction imposed in the Illuzzi case, PCB File 89.47, for violating this same provision of the Code.

The majority feels that while the same disciplinary rules were violated in

both cases, the circumstances were very different as were the aggravating and mitigating factors. The Respondent here acted negligently, not wilfully. The circumstances here are more akin to the violations which occurred in PCB Decision #1 (File 89.34, August 3, 1990), PCB Decision #13 (File 89.43, June 7, 1991), Decision #23 (PCB File 91.38, December 6, 1991) and Decision #34 (PCB File 90.30, June 6, 1992), all of which resulted in imposition of private discipline.

Finally, because this case involved minor misconduct, little or no injury to a client, the public, the legal system, or the profession, and because there is little likelihood that this lawyer will repeat this misconduct, we feel that a private admonition is appropriate. See A.O. 9, Rule 7(A)(5), amended November 1, 1993.

The chair is directed to transmit a private letter of admonition to Respondent.

Dated at Montpelier this 15th day of July, 1994.

PROFESSIONAL CONDUCT BOARD

/s/

Deborah S. Banse, Chair

/s/ /s/

Joseph F. Cahill, Esq. Karen Miller, Esq.

/s/ /s/

J. Garvan Murtha, Esq. Ruth Stokes

/s/

Rosalyn L. Hunneman Jane Woodruff, Esq.

/s/

Robert P. Keiner, Esq.

DISSENTING OPINION

While the stipulated facts in this matter certainly do not rise to the level of misconduct in the Illuzzi case (PCB 89.47), there remains the issue of repeated contact by Respondent with a person he knew or should have known was represented by counsel. At the most, a letter to opposing counsel would have

alleviated the situation; at the least, a phone call. The facts do indicate that Respondent was in contact with opposing counsel regarding this same parcel at or near the same time the right of refusal became an issue. Respondent had reason to believe that opposing counsel remained involved in the matter.

While there was no injury to the Trustee, the wide discrepancy between sanctions in these two cases concerns us. The conclusions of law would seem to demand a harsher sanction.

Dated this 15th day of July, 1994.

/s/ /s/

Donald Marsh Nancy Corsones, Esq.