PCB 78

[07-Oct-1994]

STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

In re: PCB File No. 93.22

DECISION NO. 78

This matter was submitted to the Board by stipulated facts presented by Bar Counsel and Respondent. We have accepted those stipulated facts and adopted them as our own.

This matter involves the difficult ethical issues presented when a lawyer suspects that his client might commit perjury.

Respondent here has been a member of the Vermont bar for ten years. He represented a client in a criminal felony matter. The client eventually filed a complaint with this Board, which led to the instant disciplinary matter.

Respondent began representing Complainant in the criminal felony case in early 1992. In the fall of that year, the prosecution offered a plea agreement. Complainant initially indicated to Respondent that he was going to accept the offer in order to avoid perjury and to prevent the misuse of witnesses. Respondent assumed that Complainant meant by these statements that, if the case went to trial, his client would commit perjury himself and arrange for his own witnesses to do the same.

Subsequently, Complainant changed his mind about pleading guilty and decided he wanted to go to trial. About the same time, Respondent became suspicious about his client's claim of innocence to the pending charges.

One of the issues involved an allegation that Complainant had forged some receipts. When Respondent told him that their own expert witness had formed the belief that the Complainant had, in fact, forged the receipts, the Complainant responded, "Not all of them."

Respondent also began to suspect that his client had stolen some of the prosecution's evidence during a discovery examination. Complainant denied removing the evidence, and Respondent took him at his word.

About a month before the trial was to begin, Respondent informed Complainant in forceful terms that he could not participate in any defense that involved perjury and that Complainant would have to convince him that there would be no perjury. When Complainant failed to do so, Respondent told him he had two options: plead pursuant to the plea agreement or proceed to trial without

testifying. Respondent told Complainant that if Complainant did not select one of the options, he had no choice but to withdraw. They agreed that Complainant would have ten days to think it over.

In the meantime, Respondent conducted additional research at the library on the ethical issues and sought guidance from other, more experienced attorneys.

About two weeks before the trial, the two spoke on the telephone, but Complainant had not yet made a decision. The two agreed to meet at the courthouse two days later, at which time Complainant said he would talk to Respondent "man to man."

In preparation for the meeting, Respondent drafted a motion to withdraw. However, his client never appeared for the meeting. Instead, the client sent a letter to the Professional Conduct Board, alleging that his lawyer was not prepared to go to trial, had coached him to commit perjury, and was forcing him to take a plea bargain in which he was not interested. Complainant also sent a copy of these accusations to the presiding judge.

The presiding judge showed the Complainant's letter to Respondent. Upon seeing the accusations against him, Respondent filed the motion to withdraw.

In the motion, Respondent stated that he believed that if his client testified at trial, he would not testify truthfully. Respondent summarized "hours of conversation" he had had with his client in an effort to persuade him not to so testify and to accept the plea offer instead. Respondent also

detailed his own struggle with the ethical dilemma in which he found himself. He cited his duty to protect the secrets of his clients, his duty to present a zealous defense, and his duty to refrain from participating in any fraud upon the court.

When he filed this motion, Respondent knew that it then became a public document. He knew that it contained confidences and secrets of his client. He also knew, as he stated in the motion, that revealing this information to the court might prejudice his client by leading the court to impose a more severe sentence due to his client's failure to accept responsibility for his criminal acts.

By filing this motion, Respondent violated DR 4-101(B)(1) (a lawyer shall not knowingly revealing a confidence or secret of his client). To be sure, Respondent was endeavoring to avoid other ethical violations including DR 7-102(A)(4)(a lawyer shall not knowingly use perjured testimony). However, it was not necessary for Respondent to violate one ethical rule in order to adhere to another.

At the time Respondent filed his motion, all he knew was that, two weeks in the future, his client might testify falsely at a trial. He followed the dicta in Nix v. Whiteside, 475 U.S. 157, 177 (1986) by attempting to dissuade his client from an illegal course of conduct.

However, the possible perjury was sometime in the future and was still inchoate. At what point an attorney may reveal to a tribunal a client's intention to commit perjury is not precisely nor uniformly identified by the

case law. But it is clear that Respondent here was not at that point.

In United States v. Long, 857 F.2d 436 (8th Cir. 1988) (cert. denied 112 S. Ct. 98) the Court held that "a clear expression of intent to commit perjury is required before an attorney can reveal client confidences." Id. at 445. That court went on to say that "even a statement of an intention to lie on the stand does not necessarily mean the client will indeed lie once on the stand." Id. The solemnity of the proceeding may induce a defendant to change his/her mind. "[D]efense counsel must use extreme caution before revealing a belief of impending perjury. It is, as Justice Blackmun noted, `the rarest of cases' where an attorney should take such action." Id. at 447.

In this case, Respondent had other options that he did not pursue before divulging confidential information. The most obvious option was to move to withdraw, citing irreconcilable differences without further detail. This is the approach sanctioned by at least one court in Colorado v. Schultheis, 638 P.2d 8 (Colo. 1981). The circumstances under which the motion was filed are of concern to the Board. We do not accept Respondent's argument that the disclosure was justified under DR 4-101(C)(3).

In determining an appropriate sanction, we are mindful that Respondent at least attempted to research the law and follow the correct path to protect competing ethical principles. In that sense, this case differs markedly from In re Pressly, S. Ct. Docket No. 92-135 (June 4, 1993) where a more experienced practitioner was publicly reprimanded for knowingly revealing confidential information.

In mitigation, we find that Respondent co-operated fully with the investigation, acted without a dishonest or selfish motive, and regrets the misconduct. In aggravation, we note that Respondent has been privately admonished in the past.

We find no injury to the client resulted from this disclosure. Complainant eventually received the minimum sentence. There was, however, the potential for great injury, not just to the client but to the profession.

Finally, we find little likelihood that Respondent will repeat this misconduct.

In light of all these factors, we believe a private admonition is appropriate here and consistent with A.O. 9, Rule 7 (A). The Chair will issue a letter of private admonition.

Dated at Montpelier, Vermont this 7th day of October, 1994.

PROFESSIONAL CONDUCT BOARD

s/

Deborah S. Banse, Chair

s/ s/

George Crosby Donald Marsh

s/ s/

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

s/

Nancy Corsones, Esq. Garvan Murtha, Esq.

s/

Paul S. Ferber, Esq. Robert F. O'Neill, Esq.

Nancy Foster Ruth Stokes

Rosalyn L. Hunneman Jane Woodruff, Esq.

s/

Robert P. Keiner, Esq. Edward Zuccaro, Esq.