

PCB 80

[06-Jan-1995]

STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

In re: PCB FILES 92.07 AND 92.07.1

DECISION NO. 80

This matter came before us by way of a stipulation to certain facts and violations of the Code of Professional Responsibility. Bar Counsel and Respondent appeared before us and presented argument in favor of their various positions on sanctions. We have considered all of the above in reaching our decision.

FACTS

Respondent, a member of the Vermont Bar for more than 15 years, represented a farmer in a long and complicated law suit against an out-of-state lessor of farm silos for allegedly fraudulent marketing practices.

The case eventually settled for an undisclosed amount and included a proviso that prohibited the parties or their attorneys from disclosing "the nature, substance and terms of [the] Settlement Agreement and Release" with certain exceptions not here relevant.

Thereafter, Respondent sent an open letter to other farmers and published it in a New England journal. In his letter, Respondent described his client's problems with the leasing company, which he identified by name, and his successful efforts in a "major law suit" which "successfully challenged" the leasing firm and established legal precedent for others to follow. The letter concluded by exhorting other farmers similarly situated to contact Respondent or his client for information about how they might solve their own problems with the leasing company.

This letter revealed the nature, substance and terms of the settlement agreement. Although this was not Respondent's purpose in writing the letter, he was negligent in not ensuring that the letter conformed to the non-disclosure agreement.

When local counsel for the leasing company learned of the published letter, he wrote a letter to Respondent expressing his concern that Respondent may have violated the Code of Professional Responsibility by distributing untrue statements about his legal services in violation of DR 2-101. Opposing counsel also wrote that Respondent's recent demand letter on behalf of another client raised the possibility of unethical fee arrangements. Counsel wrote that he felt constrained to report this matter to the Professional Conduct Board unless his understanding was incorrect. He requested a written

response.

Respondent telephoned opposing counsel to discuss these concerns. Opposing counsel was satisfied with Respondent's explanations but asked for a written response.

Respondent complied with a letter which, at the beginning, contained a professionally stated, point by point refutation of concerns raised by opposing counsel. The second page of the letter, however, is of a different tone and content. It reflects an emotional reaction by Respondent to his perception that the leasing firm was attempting to manipulate or subdue his efforts to help farmers by accusing him of ethical violations. Respondent threatened to take a number of retaliatory, albeit legal, steps against the leasing company if the leasing company continued its attempts to "muzzle" him. He concluded with the suggestion that by "pursuing this matter", the leasing company appeared to be waiving the confidentiality provisions of the settlement agreement.

The leasing firm filed suit against Respondent and his client in federal district court to enforce the confidentiality provisions of the settlement agreement. In the course of that proceeding, the court issued a preliminary injunction enjoining Respondent from violating the confidentiality portion of the settlement agreement. The presiding judge also filed a complaint against Respondent which led, in part, to the instant proceedings.

The lawsuit was eventually settled with Respondent foregoing, as damages, a large portion of his attorney's fees still owed to him by the leasing firm

from the previous lawsuit.

The form letter and article prepared by Respondent did not produce any new claims by farmers or others against the leasing firm.

CONCLUSIONS OF LAW

We begin our analysis by noting that although the Board will accept the stipulated facts and be bound by them, it will not be bound by the statements in the stipulation that Respondent violated certain provisions of the Code. That is a conclusion of law solely within the purview of the Board - and ultimately the Supreme Court - to make. Therefore, the Board is construing the statements in the stipulation that Respondent violated certain Disciplinary Rules as merely recommendations to the Board that it so find. The Board does not agree with these recommendations.

The parties recommend that the Board find Respondent in violation of the Code of Professional Responsibility for two reasons: first, because the letter is rude, threatening, and unprofessional in violation of DR 1-102(A)(7) and, second, because the letter might reasonably be interpreted as an attempt to discourage the recipient from filing a Professional Conduct Board complaint in violation of DR 1-102(A)(5) and (7). A third issue, upon which the parties did not agree, is whether the publication of the letter violated DR 1-102(A)(7) because it was in violation of the terms of the settlement.

In addressing the first issue, we must necessarily consider the Vermont Supreme Court's decisions in *In re Rosenfeld*, 157 VT 537(1991) and in *In re*

PCB File 88-125, an unpublished decision in Supreme Court Docket No. 91-246 (October 8, 1992).

In *Rosenfeld*, the responding attorney was found to have violated DR 1-102(A)(5) and (7) by sending a letter to an expert witness implicitly threatening her with a civil suit unless she changed her opinion, which was unfavorable to Respondent's client. In *In re PCB File 88-125*, the Board had imposed a private admonition on an attorney who wrote a rude and intimidating letter on behalf of her client to a pro se plaintiff in a small claims action. Although the Board specifically found that the responding attorney had no well-grounded-in-fact reason for asserting the threats of a retaliatory law suit, the Supreme Court held that the letter was written with "some basis for asserting the threatened claim". It, therefore, reversed the Board's decision and dismissed the case.

The Court's opinions in these two cases appear to be irreconcilable. The concerns raised by lawyers writing discourteous and intimidating letters to laymen are more serious than those involved in written communications between lawyers. In that instance, there is a more level playing field and the recipient lawyer has the ability to weigh the tone of the writer's remarks. While we do not intend by our decision to in any way condone unprofessional, discourteous written communication between lawyers, we cannot find that the improvident language used by Respondent here adversely reflects on his fitness to practice law in violation of DR 1-102(A)(7).

The second issue is whether Respondent wrongfully attempted to preclude the filing of a Professional Conduct Board complaint in violation of DR

1-102(A)(5). We have previously held that attorneys who request parties to drop ethical complaints as a condition of settlement of legal malpractice claims do so in violation of their duty to ensure that the disciplinary system is not compromised. In all of these cases there is clear intent by the responding attorney to foreclose an inquiry by this Board. See, e.g., In re PCB File 91.42, 1 PCB Rptr 331, Decision #44 (1992); In re PCB File 91.41, 2 PCB Rptr 96 (1994). This position has been upheld by the Vermont Supreme Court. In re Karpin, Sup. Ct. Docket 92-570, Slip op. at 7 (May 21, 1993).

There are no facts in the stipulation showing that Respondent here intended to squelch an investigation into his professional conduct. The stipulated facts state only that Respondent used words which "may reasonably be interpreted as attempting to discourage" the filing of a complaint with the Professional Conduct Board. No stipulated facts were presented to show that this was Respondent's intent in writing the letter. Therefore, we cannot find this to be a violation of DR 1-102(A)(5) and (7).

The third issue concerns the propriety of publishing the open letter in the first place. Respondent argues that the publication of the letter, contrary to the non-disclosure agreement, did not violate DR 1-102(A)(7). We believe that it did.

Respondent agreed to keep the terms of the settlement confidential and then violated that agreement. Although it is stipulated that he did not intend to violate the agreement, his lack of care in broadcasting the results of the litigation reflect poorly on his judgment and caused his client the further expense and inconvenience of defending an action for enforcement of the

settlement. Given the Respondent's experience at the bar and the deliberateness of his decision to publish his open letter, his decision to publish evidences an excess of zeal which reflects poorly on his judgment and belies a lack of detached professionalism.

In considering sanctions, we conclude that Respondent's negligent conduct damaged his client by precipitating an enforcement action in U.S. District Court. In aggravation, we find that Respondent has been privately disciplined, although that occurred nearly 10 years ago, and that he is a lawyer of considerable experience.

In mitigation, we note that Respondent voluntarily reimbursed his client for the financial expenses incurred in defending himself in the enforcement action. This occurred without any intervention by bar counsel. We also find that Respondent has cooperated fully with the disciplinary proceedings and promptly made all documents available to Bar Counsel. Respondent sincerely regrets his actions. Finally, Respondent's misconduct reaped other significant penalties in the form of lost attorney fees.

Given all of these circumstances and, most significantly, the lack of danger to the public and the little likelihood of repeated misconduct, we find that a private admonition is the appropriate sanction.

Dated at Montpelier, Vermont this 6th day of January, 1995.

/s/

Deborah S. Banse, Chair

/s/

/s/

George Crosby

Donald Marsh

/s/

/s/

Joseph F. Cahill, Esq.

J. Garvan Murtha, Esq.

/s/

/s/

Paul S. Ferber, Esq.

Robert F. O'Neill, Esq.

/s/

Nancy Foster

Ruth Stokes

/s/

/s/

Rosalyn L. Hunneman

Jane Woodruff, Esq.

/s/

Robert P. Keiner, Esq.

Edward Zuccaro, Esq.

DISSENTING OPINION

It is inconceivable to us that the letter in question "revealed the nature, substance and terms of the settlement agreement."

We would dismiss.

/s/

/s/

Nancy Corsones, Esq.

Karen Miller, Esq.