137.PCB

[14-Dec-1999]

STATE OF VERMONT
PROFESSIONAL CONDUCT BOARD

In Re: PCB File No. 99.105

Decision No. 137

A hearing on this matter was held before the Board on 9 July 1999. Attorney Jessica G. Porter was present as Bar Counsel. Respondent was present and represented by Douglas Richards, Esq. Respondent's husband, was also present.

Before the Board for its consideration were the Bar Counsel's Recommendations as to Conclusions of Law and Sanctions and the Report and Recommendation of the Special Hearing Panel. Further, the Board considered the pleadings, took testimony from the Respondent and heard oral argument.

STANDARDS FOR IMPOSING LAWYER DISCIPLINE

In considering the appropriate sanctions to recommend, we consider the duty violated, the lawyer's mental state, the actual or potential injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors. Standard 3.0, Standards for Imposing Lawyer Sanctions, American Bar Association (1991 ed.).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board accepted in part the Stipulation of Facts of the parties, as filed with the Board as follows:

1. Respondent is an attorney licensed to practice in the State of Vermont and was admitted to the Vermont Bar on 4 April 1987.

2. For six years, the Respondent served as a volunteer on the Professional Conduct Board; during the last three of those years she served as its Chair.

3. As Chair, Respondent's duties included presiding over meetings of the Board and reporting decisions and actions of the Board under her signature. Respondent oftentimes participated in the Board's discussion of particular matters, however, as Chair of the Board, Respondent did not participate in voting unless there was a tie among the other Board members.

4. If a matter came up which involved one of the Respondent's clients, Respondent either recused herself or abstained from participation in the discussion. Respondent did not leave the room.

5. This same protocol was followed by other Board members and other Board Chairs when conflicts arose.

6. In early 1994, Respondent began representation of a client in a post-divorce proceeding; the client had matters under investigation by Bar

Counsel.

7. At a meeting of the Board on 17 June 1994, the Board received a report from then Bar Counsel, Attorney Shelley Hill, recommending that a 1989 Complaint against Respondent's client be dismissed. After discussion by members present, Respondent called for a vote on this recommendation, but she did not participate in the discussion and abstained from voting. The stated reason for Respondent's abstention was that the matter pending involved a conflict.

8. As was the custom and practice, Respondent did not leave the room or hand the matter over to the vice-chair or some other Board member to handle the call of the vote.

9. The Board voted to go no further with the matter involving Respondent's client. As was customary, counsel to the Board drafted a letter to Respondent's client to inform the client that the Board had dismissed the Complaint.

10. The letter, which was drafted by Counsel to the Board, indicated that the Board was "greatly disturbed by the lack of judgment exhibited . . ." by the client but also informed the client the Board's decision to dismiss the matter due to the age of the underlying facts. The letter did not indicate that Respondent had not participated in the decision.

11. It was custom and practice for counsel to the Board, whose office was in Montpelier, to forward multiple, post-dated letters to Respondent, in Manchester, for her signature as Chair. For each matter considered by the Board, counsel would forward as many as eight letters. At the June 17, 1994 meeting, the Board made decisions on several matters. All of these letters were forwarded by counsel to the Board to Respondent for her signature.

12. Each letter was marked "Confidential" pursuant to Administrative Order 9 § 20.

13. Respondent signed and mailed all of the letters drafted by counsel to the Board including the letter, as drafted, to her client. As indicated by the date stamp, these letters were received by the Board in Montpelier, Vermont on July 1, 1994.

14. On June 23, 1994, Respondent had represented this same client in a contempt hearing. The matter was decided favorably to Respondent's client at the hearing, and on June 24, 1994, Respondent sent the client a bill for the matter closing her file.

15. Respondent has cooperated fully with the Office of Bar Counsel during its investigation of the Complaint.

16. Respondent has expressed remorse for signing the letter and wished that another member of the Board had handled this matter.

17. Respondent had no dishonest or selfish motive in signing the letter.

18. Respondent was privately admonished in 1987 in unrelated circumstances.

19. Since this matter was reported to the Office of Bar Counsel, the Office has not received any other complaints about the Respondent.

20. Respondent's client was Gerald P. Cantini, Esq. who resigned in the course of a Professional Conduct proceeding against him and was disbarred. In re Gerald P. Cantini, Esq., 167 Vt. 572.

CONCLUSIONS OF LAW

1. Bar Counsel charges that Respondent violated DR 9-101 generally, but alleges no conduct which violates any of the specific subsections in DR 9-101. Those subsections are as follows:

> (A) A lawyer shall not accept private employment in a matter upon the merits of which he or she has acted in a judicial capacity
>
> (B) A lawyer shall not accept private employment in a matter in which the lawyer has substantial responsibility while he or she was a public employee
>
> (C) A lawyer shall not state or imply that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or a public official.

In the instant case, the Complaint against the Respondent's client was dismissed by the Board, not because there had been any determination by the Board on the merits of the Complaint, but due to the length of time that had passed since the events underlying the Complaint. Had that Board dismissed the Complaint after hearing, this Board might be persuaded that the acts of the Respondent were more serious than it believes they were. The Special Panel argues that the Board itself bore some responsibility for the staleness of the facts since the matter had been pending before the Board for over five years. It is unclear why the Panel chose to note that circumstance unless it believed that the Board itself had violated the spirit, if not a specific provision, of DR 9-101 as it may imply or refer to the prohibition against acts which would tend to erode the public trust and confidence and would be detrimental to the administration of justice.

RULE 1E: FAILURE TO REFRAIN FROM TAKING PART IN PROCEEDING

The custom and practice of the Board, and of past Board Chairs at the time of this Complaint was that a member or Chair who had any conflict of interest, or felt a conflict of interest would be perceived, would recuse him or herself from the discussion and decision making process, although that member would remain in the room for those discussions. The Respondent in this case followed that custom and practice. The Board was unaware of the nature of the conflict of interest of the Respondent and therefore could not have been influenced by the Respondent's interest in the matter. While it might not have been wise for the Respondent to have participated even to the small extent of calling for a vote and performing the purely ministerial function of signing the notice to the Respondent in the underlying case, who was her client, the Board does not find that these actions rise to the level of a violation of DR 9-101.

However, the Respondent's signing of the notice to her client in the

underlying case was not, this Board finds, "purely ministerial" as the Respondent argues. The language in the letter goes beyond a mere statement of dismissal. The letter does not reflect the fact that Respondent had not taken part in the decision nor does it indicate that the matter was dismissed, not because it was without merit, but because of its age and the staleness of the facts. Further, the letter stated that the Board was "greatly disturbed by the lack of judgment exhibited", language which to the reader would necessarily be beyond ministerial. By signing this particular letter of dismissal, the Respondent participated, however inadvertently, in the PCB proceeding against a client whom she had represented in court between the Board meeting a week earlier and the date of the letter. Rule 1E states that "Board members shall refrain from taking part in any proceeding in which a judge, similarly situated, would be required to abstain. The chair shall rule on any motion to disqualify." For the above reasons, the Board believes the actions of the Respondent constitute a basis for discipline.

DR 9-101: FAILURE TO AVOID EVEN THE APPEARANCE OF IMPROPRIETY

DR 9-101 is a Disciplinary Rule entitled "Avoiding Even the Appearance of Impropriety". DR 1-102 states: "A lawyer shall not violate a disciplinary rule." Bar Counsel charges that Respondent violated DR 9-101 by her participation in the proceeding involving her client. The majority of the Board concludes that the Respondent did not fail to avoid an appearance of impropriety and recommends that this aspect of the complaint be dismissed.

DR 1-102(A)(5): CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE

DR 1-102(A)(5) states: "A lawyer shall not engage in conduct that is prejudicial to the administration of justice." For the reasons set forth above, the majority of the Board does not believe that when considering the lawyer's mental state, the actual or potential injury caused by the lawyer's misconduct and the existence of aggravating or mitigating factors, that the Respondent has violated DR 1-102(A)(5) and recommends dismissal of this aspect of the complaint.

MITIGATING FACTORS

The signing of the letter to her client was an isolated incident on the Respondent's part in a long period of voluntary service to the Professional Conduct Board. The Respondent has been fully cooperative during the investigation of the complaint and has been consistently remorseful about having signed the dismissal letter.

AGGRAVATING FACTORS

None.

RECOMMENDATION

For the foregoing reasons, the Board recommends that the Vermont Supreme Court find that the Respondent has violated Rule 1E which is grounds for discipline under Rule 6C and that the sanction be a private admonition.

MEMBERS OF THE BOARD:

/s/ 11/22/99

_____
Steven A. Adler, Esq. Date

/s/ 12/02/99

_____
John Barbour Date

/s/ 11/27/99

_____
Barry E. Griffith, Esq. Date

/s/

_____
Joan Loring Wing, Esq. Date

/s/ 11/30/99

_____
Toby Young Date

STATE OF VERMONT
PROFESSIONAL CONDUCT BOARD

Re: PCB 99.105

CONCURRING AND DISSENTING

The majority of the Board has concluded that Respondent's conduct is grounds for discipline in that she violated the Rule requiring her to refrain from taking part in a proceeding in which a judge, similarly situated, would be required to abstain. The undersigned agree with the conclusion, although on a slightly different basis as stated below.

Furthermore, the undersigned members of the Board dissent from the majority conclusion on the other two grounds for discipline alleged by Bar Counsel.

In addition, the undersigned disagree with the recommended disposition.

Rule 1 E: Failure to Refrain from Taking Part in Proceeding

The majority concludes that Respondent violated the Rule on the basis that she signed a letter on behalf of the Professional Conduct Board disposing of the complaint against her current client. We agree that Respondent had the obligation to refrain from participating in the signing and issuing of the letter disposing of the complaint against her client, and that she violated the Rule by doing so. We also conclude that she was required by this Rule to refrain from taking part in the proceeding in any

manner, including being present at the discussion of the complaint against her current client, and particularly by chairing the proceeding.

At the Board meeting on June 17, 1994, Respondent served as chair. The complaint against her client was before the Board. She did not step down as chair or leave the room. She remained present, serving as chair. Although she did not participate in the discussion, it is not unusual for a chair not to participate in discussion while serving as chair. She called for the vote. We cannot conclude that she was not taking part in the proceeding. Indeed, she was conducting the proceeding.

She took part in the proceeding by being physically present, and especially by her exercise of chair responsibilities in the case, which included calling for the vote. Her mere physical presence at the conference table or in the boardroom could have exerted a subtle influence over the Board's deliberations during discussion of the case. The fact that she was in a position of leadership and influence as chair heightens the likelihood that her presence affected the course of the discussion. In any event, she was there serving a critical function conducting the proceeding. A disqualified judge would be required to leave during any consideration of the case in which the judge is disqualified. We conclude that she violated the Rule by being present and conducting the proceeding, as well as signing the letter disposing of the complaint.

DR 9-101: Failure to Avoid Even the Appearance of Impropriety

DR 9-101 is a Disciplinary Rule entitled "Avoiding Even the Appearance of Impropriety." DR 1-102 states: "A lawyer shall not violate a disciplinary rule." Bar Counsel alleges that Respondent violated DR 9-101 by her participation in the proceeding before the Board involving her client. Respondent argues that none of the subsections of DR 9-101 are pertinent to her conduct. She argues that it is improper to be disciplined for a violation of the general rule contained in the heading, and further that discipline cannot be grounded in the Ethical Considerations alone.

It is true that the Vermont Supreme Court has held that the Disciplinary Rules, and not the Ethical Considerations, provide the compulsory minimum standard which attorneys must observe. Swanson v. Lange, 159 Vt. 327, 331(1992). In that case, however, the Court found no pertinent Disciplinary Rule. Id. This case is different in that the Disciplinary Rule itself, DR 9-101, sets forth the compulsory minimum standard which attorneys must observe: avoiding even the appearance of impropriety. DR 1-102 (A)(1) states: "A lawyer shall not... Violate a Disciplinary Rule." The Rule set forth in DR 9-101 is to "Avoid[] Even the Appearance of Impropriety."

The Ethical Considerations help to give meaning to the Rule requiring avoidance of the appearance of impropriety so that it may be understood.(FN1) This is necessary because otherwise it would be impossible to catalogue and include as separate Rules all of the many ways in which a lawyer could fail to meet the standard.

This case is a good example. DR 9-101(A) provides that a lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity. Under the facts of this case, the Respondent did the opposite: she acted in a judicial capacity concerning a person from whom she had accepted private employment. It does not make sense to

conclude that discipline may not be imposed in one situation and not in the other when they both involve the same rule: avoiding even the appearance of impropriety. It is the standard itself, set forth in DR 9-101, that must be upheld, and for which discipline may be imposed. An interpretation that excludes substandard conduct from discipline simply because it is not precisely defined in a subsection, even though it violates the basic Rule, is too narrow and will not contribute to public confidence in the process whereby attorneys uphold their own professional standards through discipline.

In this case, an appearance of impropriety was created when Respondent chaired the discussion of the complaint against her client, called for the vote, then represented him in court and signed the letter dismissing the complaint against him, all within a few days. The appearance could easily have been avoided by her refusal to participate in the proceeding in any way.

The appearance of impropriety is exacerbated by the content of the dismissal letter that Respondent signed. It is not a form letter. Its content addresses the specific conduct of the complaint against her client, and suggests that the conduct may have involved a violation of professional conduct standards. The letter specifies that the dismissal is not based on lack of merit of the complaint, but due to the staleness of the facts. Although Bar Counsel, not Respondent, drafted the letter, and did so based on the discussion at the Board meeting in which Respondent did not join, no reader of the letter would have any way of knowing that the content was not Respondent's own statement as Chair of the Board, or that Respondent had not been a part of the discussion leading to the statements made in the letter. This creates a clear appearance of impropriety: on behalf of the Board, she issued a letter in which she was dismissing a possibly meritorious complaint against her own client.

We conclude that this conduct constitutes a violation of DR 9-101. We do not believe that Respondent had any improper motive, or that she was seeking to gain any advantage for herself. In chairing the meeting, she was apparently following a pattern set by previous chairs. It is quite plausible that she signed the letter unwittingly in the course of signing a number of letters prepared for her signature, and she simply failed to appreciate the significance of signing such a letter. The issue is not her intent, but her conduct. An attorney has a duty to avoid, at all times, even the appearance of impropriety in the conduct of professional roles. If an attorney undertakes the responsibilities of Chair of the Professional Conduct Board, she accepts the duty as it pertains to that role: acts that might have insignificant consequences in one context have a different meaning when an attorney acts as Chair of the Professional Conduct Board. Avoiding even the appearance of impropriety can require a heightened sense of awareness of effect on others on the part of a PCB Chair. Respondent's conduct fell below the standard, even if she had no unprofessional intent. It is the conduct itself that is measured by the standard, not the person or the motivation. We cannot escape the conclusion that however guileless Respondent was, she failed, in chairing the proceeding and in participating in the letter disposing of the complaint, to avoid even the appearance of impropriety. Therefore, we conclude that in chairing the proceeding as well as signing the letter, she violated the standard required by the disciplinary rule.

DR 1-102(A)(5): Conduct Prejudicial to the Administration of Justice

DR 1-102(A)(5) states: "A lawyer shall not engage in conduct that is prejudicial to the administration of justice." Respondent, as Chair of the PCB, signed a letter dismissing a complaint against her current client, not because there had been a determination on the merits, but due to the length of time that had passed since the events underlying the complaint. Furthermore, the letter suggests that the Board thought the complaint might have merit, and in it Respondent admonishes her client to familiarize himself with pertinent sections of the Code. A particularly egregious factor is that the Board itself, for which Respondent spoke, bore some responsibility for staleness of the facts, since the matter had been pending before the Board for over five years.

It is prejudicial to public confidence in the legal profession and justice system for people to think that a PCB Chair would conduct herself or himself in such a manner, and public trust and confidence is fundamental to the administration of justice.

Respondent argues that she was not personally responsible for any disclosure to the public of any facts surrounding the PCB proceeding against her client. Therefore, she argues, she should not be disciplined for causing prejudice to the administration of justice. Even if the public at large never learned of the specifics, such conduct is prejudicial to public confidence and trust in the justice system. The complainant is a member of the public, and five of the fifteen members of the Professional Conduct Board are public members. The public thereby sees the level of conduct exhibited by board members and chairs. Furthermore, the PCB chair is in a position of leadership in setting the standard of acceptable behavior with respect to the administration of the Board, and her behavior is observable by Board staff and all members of the Board. If we were to conclude that the conduct under consideration here is satisfactory for a PCB Chair, we would be setting the bar too low, and public trust and confidence in the justice system would be justifiably damaged.

We are mindful of being careful in applying DR 1-102(A)(5), since it is potentially broad in scope, and could be at risk for being used in an arbitrary manner. That kind of risk is not present in this case. We have concluded that there are two independent grounds for discipline arising out of Respondent's conduct, and the majority of the Board has concluded that there are grounds for discipline. The fact that she engaged in this conduct while exercising responsibility as the Chair of the Professional Conduct Board means that not just her own client's or the complainant's interests are at stake, but there is an impact on the confidence of the public in the system for supervising professional conduct of attorneys. Her conduct thus affects the administration of our system of justice as a whole.

The Vermont Supreme Court has upheld the application of DR 1-102(A)(5) to conduct not otherwise specifically prohibited in a disciplinary rule, and in a case that did not involve as pervasive an impact on public confidence in the system of justice as this case does. In re Illuzzi, 160 Vt. 474 (1993). In that case, an attorney repeatedly contacted an insurer to discuss settlement negotiations, without consent of or notice to the insurer's counsel, after having been informed both orally and in writing that the insurance company was represented by an attorney. The Court upheld the Board's conclusion that this conduct was a violation of DR

1-102(A)(5) as prejudicial to the administration of justice. The conduct in that case had far less impact on the administration of justice than the conduct of a Professional Conduct Board chair in participating in a proceeding to dismiss a conduct complaint against a client whom she is currently representing.

The conduct in this case has the potential to prejudice the administration of justice by promoting public distrust in the legal profession. It shows a failure to meet professional standards on a critical issue on the part of the one person charged with special responsibility for maintaining professional standards in the profession, the Chair of the Professional Conduct Board. We conclude that Respondent has violated DR 1-102(A)(5).

SANCTIONS

Bar Counsel recommends a private admonition, and the majority agrees. In considering this recommendation, we are guided by the Rule setting forth disciplinary sanctions: "Only in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer, should an admonition be imposed." A.O.9, Rule 7(A)(5). The Rule establishes a public reprimand as the expected minimum sanction, with a private admonition available for those cases in which a minor violation occurred but in isolation and without impact. See the structure and terms of A.O. Rule 7(A).

Thus, before a private admonition is imposed as the sanction for a violation, three elements must be found: (1) the misconduct is minor, (2) there is little or no injury to any of the following:

--a client
--the public
--the legal system
--the profession, and

(3) there is little likelihood of repetition by the lawyer. The Rule provides that unless all of these elements are present, a private admonition is unwarranted.

As described above, we conclude that the behavior is significant, not because of the motivation of the Respondent, but because of its effect on public trust: public trust in the profession, in the system for enforcing professional responsibility on the part of attorneys, and in the system of justice. This effect takes place whether a large number of people learn of it, or whether it is only a handful of people, including a complainant, public members of the Board, and others involved with the proceeding. While we have no doubt that there will be no repetition by Respondent, the gravity of the effect of the conduct on public perception renders the conduct ineligible for a private admonition.

The majority notes that signing the dismissal letter was an isolated incident on Respondent's part, and it had been the practice of the PCB for some time that neither the chair nor members left the room during discussions of cases in which they had a conflict. The majority also notes that Respondent has been fully cooperative during the investigation of this complaint, and has been consistently remorseful about having signed the

dismissal letter.

Nonetheless, we conclude that a private admonition would be insufficient. The harm in this case is to the public and public confidence in the legal profession and the administration of justice. Therefore, the sanction must involve the public in a manner that will further the restoration of public confidence. In addition, a public sanction is needed in order for the case to be effective in setting the standard for future conduct. In other words, the attorneys need a public result so that they will know what the standard is, and so they will know that it is enforced in a manner that is meaningful. At the same time, the public needs a public result so that it can be reassured about the capacity of the justice system to maintain standards worthy of public trust. For the foregoing reasons, a public sanction is warranted.

Despite the seriousness of the conduct and its impact on members of the public involved, a public reprimand is sufficient for two reasons. First is the fact that Respondent has been both cooperative and remorseful, especially about having signed the dismissal letter, and the likelihood of repetition is minimal. Second arises from the fact that it would be unfair to single out Respondent for a harsher sanction when she was apparently not the only member who remained at Board meetings when she had a conflict, or who presided over Board meetings on matters involving cases in which she had a conflict. This pattern had been in place for some time prior to the events in this case.

The fact that it was routine practice does not justify or excuse the conduct, or suggest that it meets professional standards. In fact, it makes it more important for the sanction in this case to be a public one in order to set a higher standard. A public reprimand will assure that the practice is not resumed in the future.

In this context a public reprimand is sufficient to address past conduct by Respondent and others, and to set the standard for others in the future. It should be clear that in our view it is not just the signing of the dismissal letter that falls below the standard with respect to all three grounds for discipline. The conduct of remaining in the room and presiding over the Board proceedings when Respondent's client's matter was under consideration is, by itself, sufficient to warrant a public reprimand.

For these reasons, we dissent from the majority opinion, and we recommend that Respondent be disciplined for violations based on the three grounds set forth above, and that the sanction be a public reprimand.

/s/	12/02/99
Stephan A. Morse	Date
/s/	11/30/99
Hon. Mary Miles Teachout	Date
/s/	12/04/99
Hon. Wynn Underwood	Date

Footnotes

FN1. Several of the Ethical Considerations under Canon 9 are pertinent: EC 9-1 concerning promoting public confidence in the legal system and the legal profession; EC 9-2 concerning guarding against behavior that has a tendency to diminish public confidence in the legal system and legal profession; EC 9-4 concerning matters being decided solely on the merits in an impartial manner; and EC 9-8 concerning the "solemn duty to uphold the integrity and honor of the manner; and EC 9-8 concerning the "solemn duty to uphold the integrity and honor of the profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility," and concerning conduct that reflects credit on the legal profession, inspires the confidence, respect, and trust of the public, and avoids impropriety and the appearance of impropriety. There would be no point to all of these Ethical Considerations illuminating the Rule if an attorney could only be disciplined for one of the specific subsections, and not the Rule itself. The subsections apply to narrowly described circumstances. The other three Disciplinary Rules under Canon 9 pertain only to funds and property held by an attorney in trust for a client.