[20-Aug-2001]

P.R.B. DECISION NO. 23

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2001-022

Respondent is charged with violating DR 4-101(B)(1) of the Code of Professional Responsibility, failing to maintain the confidences of a client. Respondent is represented by counsel. Disciplinary Counsel Michael Kennedy represents the Office of Disciplinary Counsel. The parties have filed a Stipulation of Facts and Conclusion of Law. They disagree as to the appropriate sanction.

A hearing on sanctions was held pursuant to A.O. 9, Rule 11(D) on May 29, 2001. Respondent was present, along with her counsel. Disciplinary Counsel Michael Kennedy and Deputy Disciplinary Counsel Beth Di Bernardi were also present. Disciplinary Counsel urges the imposition of a public reprimand; Respondent argues that a private admonition is the appropriate sanction

FINDINGS OF FACT

1. The Respondent is an attorney admitted to practice law in the State of Vermont. Respondent was admitted to the Vermont bar in 1983.

2. In May of 1998, Respondent received an unsolicited letter from a pre-trial detainee who was in prison, having been charged by the State of Vermont with murder. The detainee sought representation on the murder charge from Respondent.

3. Respondent did not respond to the letter nor did she meet with the detainee or speak with him over the telephone.

4. Respondent was a good friend of the mother of the murder victim, and had been for many years. She often had lunch with the victim's mother and shared personal conversations. Respondent also knew the victim and the victim's sister.

5. Respondent gave the letter to her friend, the victim's mother. The mother, who was also a lawyer, turned the letter over to the [deputy] state's attorney who was prosecuting the case.

6. The State initially identified the letter as evidence it might use at trial. It later withdrew this intention, and the district court has issued an order holding that the letter cannot be used as evidence in the detainee's case.

7. The panel has examined the letter, which advises that the Public

Defender cannot represent the detainee, and requests an opportunity to speak to the Respondent about the matter if she does not have a conflict of interest. The letter does not reveal what, if anything, the detainee did in connection with the victim's death, but does suggest some forensic issues with respect to the same.

8. Respondent was emotionally upset about the victim's death, and felt strongly for her friend's grief. In turning the letter over to her friend, Respondent acted as a friend rather than an attorney.

9. The detainee was upset that his letter came into the hands of the prosecution. He has since obtained other counsel. His case has yet to come to trial.

10. Respondent has never been charged with another disciplinary offense.

11. Respondent has cooperated fully with Disciplinary Counsel at all stages of the disciplinary process.

CONCLUSIONS OF LAW

The conduct complained of in this case occurred in 1998; therefore, the Code of Professional Responsibility and the rules of the former Professional Conduct Board apply. See A.O. 9, effective through 9/1/99.

The first issue before this panel is whether an attorney has a duty to hold confidential communications he or she receives from a potential client before the attorney agrees to accept the case or a retainer agreement is executed. Respondent does not seriously contest the applicability of the Code of Professional Responsibility to these circumstances; however, her counsel raised the issue in his brief and at oral argument. Because we believe it is an important issue, we first examine the scope of the duty of confidentiality required of an attorney toward a party seeking representation.

V.R.E. 502 sets out Vermont's evidentiary privilege against the disclosure of attorney/client communications. Subsection (a) of that Rule defines a "client" as anyone who "consults a lawyer with a view to obtaining legal advice from [the lawyer]." See also F.R.E. 502(a). This rule is broader than the previous case law, which held that the attorney/client privilege attached when an attorney heard the client's story but declined to bring suit on his behalf. See Reporter's Notes to V.R.E. 502(a), pp. 353-54, citing Strong, Whitney & Co. v. Dodds, 71 Vt. 383, 353 (1875).

The lawyer's duty to preserve his client's confidences under the Code of Professional Responsibility is broader than the evidentiary privilege. EC 4-4. See also EC 4-6 (attorney's obligation to preserve client's confidences survives termination of the attorney/client relationship).

Applying these standards, it is beyond dispute that if a person visits an attorney in his or her office with an eye toward retaining that attorney, any information exchanged during that meeting is confidential. This is true whether or not the attorney takes the case or whether or not a retainer agreement is signed.

The panel finds no distinction in this rule when the client communicates with the attorney by letter rather than in person. The complainant in this case was in jail; he could not visit the attorney's office nor could he make a telephone call without the attorney's help. A letter was his only means of contact. The confidential nature of his communication is not diluted simply because he is incarcerated. Accord People v. Gardner, 106 Cal.App.3d 882, 885, 887, 165 Cal. Rptr. 415 (1980) (criminal defendant's letter from prison, addressed to public defender who did not yet represent him, was a confidential communication, and its seizure by police and use as evidence against defendant at trial was a violation of attorney/client privilege requiring reversal of murder conviction).

Nor does the complainant lose the confidentiality of his communication because his letter was unsolicited. In most cases, a client seeking an attorney's advice will stop in to the attorney's office or call him or her on the telephone. Either way, the initial contact is unsolicited by the attorney. The fact that the complainant's initial contact was by letter does not change this result.

Respondent had a duty to preserve the confidences of the complainant.

The Violation

The parties have stipulated that Respondent's actions were a violation of DR 4-101(b)(1).

Sanction

The Vermont Supreme Court has held that the ABA's Standards for Imposing Lawyer Sanctions are applicable when determining an appropriate sanction for lawyer misconduct in this state. In re Warren, 167 Vt. 259, 261 (1997); In re Berk, 157 Vt. 524, 531 (1991); In re Rosenfeld, 157 Vt. 537, 546-47 (1991). In the Warren case, the Court set out the factors to be considered in making that determination. Those factors are: 1) the nature of the duty violated; 2) the attorney's mental state; 3) the actual or potential injury to the client and/or the judicial system; and 4) any mitigating or aggravating circumstances. Id., 167 Vt. at 261. We will address each of those factors separately.

1. The nature of the duty violated

The confidentiality of client information is a "core component of the attorney-client relationship." In re Pressly, 160 Vt. 319, 325 (1993). The rule that an attorney protect the confidences of his client plays an important role in our judicial system, as it encourages laymen to seek early legal advice and increases the public's trust in the profession. See Code of Professional Conduct, EC 4-1. Because it is a fundamental tenet of the attorney-client relationship, an attorney's unwarranted disclosure of client information is always considered major misconduct. ABA Standards for Imposing Lawyer Sanctions (1991 ed.), Commentary to §4.24.

2. Respondent's mental state

The ABA Standards distinguish between those situations in which an attorney knowingly reveals confidential client information and when he does so negligently. Compare ABA Standards 4.22 & 4.23.

An attorney acts "knowingly" when he is aware that the information he is about to reveal is a protected attorney/client communication, but reveals it anyway. See In re Pressly, 160 Vt. at 323. He acts "negligently" when he acts out of good faith, or is not aware that the information is confidential. In re Billewicz, 161 Vt. 631, 632 (1994)(memorandum decision).

In this case, Respondent acted negligently in disclosing the complainant's letter to her friend. Respondent had known the victim's mother for years prior to the victim's death, and considered her a good friend. She was aware of the depth of her friend's grief over her daughter's death. Respondent also knew the victim personally, and was herself emotionally distressed. Respondent had never met the complainant and had had no conversations with him. Respondent's attorney argued, and the panel finds, that for a few minutes, Respondent forgot she was an attorney, and acted as a friend. Although this does not excuse her act, Respondent's state of mind at the time of her disclosure was negligence.

3. Actual or potential injury to the client

Respondent turned complainant's letter over to her friend who, in turn, turned it over to the prosecution. The prosecution initially listed that letter as evidence it intended to introduce against the complainant at trial. Although they later withdrew their intention, and the district court issued an order precluding use of the letter at trial, the complainant was understandably upset that the letter had found its way into the prosecution's hands. Respondent's acts caused at least potential injury to the client.

4. Mitigating and aggravating factors

The ABA Standards list several mitigating and/or aggravating factors that may be considered in determining the appropriate sanction for attorney misconduct. Stds. 9.1, 9.2 & 9.3. We find several mitigating factors applicable here.

First, at the time she disclosed the letter, Respondent was acting under the influence of emotional distress. Her close friend's daughter had been recently killed and she was grief-stricken. Respondent was emotionally upset, both for her friend and because of her own relationship with the victim. Second, Respondent did not act with a selfish or dishonest motive; instead, for a few moments, she forgot she was an attorney and "acted as a friend rather than as an attorney." Although an attorney is never relieved of her responsibilities toward a client, the panel can understand her lapse of judgment may have occurred under these facts. Third, Respondent has expressed a deep and genuine remorse. Respondent addressed the panel at the hearing and the panel is convinced that there will be no repetition of such actions in the future. Fourth, Respondent has no record of prior disciplinary actions, and enjoys a good reputation among the bar. Finally, Respondent fully cooperated with Disciplinary Counsel throughout the disciplinary process.

Respondent's substantial experience as a lawyer is an aggravating factor. ABA Standards, Std. 9.22. At the time of the events, she had practiced law for more than 17 years.

The ABA Standards suggest the imposition of a public reprimand when an attorney negligently reveals the secrets of her client, and causes potential injury. Those recommendations are just guidelines, however, not hard and fast rules. See In re Warren, 167 Vt. at 261 (ABA Standards provide "guidance"); In re Berk, 157 Vt. at 532 and In re Rosenfeld, 157 Vt. at 546 (ABA Standards "helpful" in establishing appropriate sanction). The goal of attorney discipline is to protect the public and insure the integrity of the judicial system, not to punish the offender. See e.g., In re Warren, 167 Vt. at 261; In re Berk, 157 Vt. at 532. We cannot think of a reason, nor was one made known to us, of why a public reprimand would more fully accomplish this goal. Although we consider it a close decision, in light of the several mitigating factors in this case, it is the panel's decision that a private admonition be imposed.

DECISION

Based on the above Findings and Conclusions, Respondent shall be privately admonished for negligently disclosing a client's communications.

DATED at Montpelier, Vermont this 20th day of August, 2001.

/s/

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Barry E. Griffith, Esq.
Chair, Hearing Panel No. 1

/s/

_____
Steven Anthony Carbine

/s/

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Martha M. Smyrski, Esq.

FILED AUGUST 20, 2001