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[20-Nov-2002]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2001.165

Decision No 46

On July 31, 2002 the parties filed a stipulation of facts as well as conclusions of law and recommendations on sanctions. The Respondent, who was represented by counsel, also waived certain procedural rights including the right to an evidentiary hearing. The panel accepts the facts and recommendations and orders that the Respondent be admonished by Disciplinary Counsel for discussing a client's case with an unrepresented party who did not understand that the Respondent was contemplating suit against that party, in violation of Rule 4.3 of the Vermont Rules of Professional Conduct.

Facts

In December of 1998 EC was struck by a car and seriously injured while crossing an intersection in one of Vermont's larger municipalities (hereinafter referred to as the Town). EC and her husband retained a New Hampshire attorney who asked the Respondent to work with him so that they could bring suit in Vermont. The Respondent agreed, and in November of 1999 began representing EC and her husband in Vermont.

A theory of the case is that the pedestrian control signal in the crosswalk where EC was injured had been knocked askew so that she could not see it. Prior to the Respondent's involvement, the New Hampshire attorney hired a private investigator who interviewed severa1 people, including AR who was the Town Engineer at the time of the accident. Based on the investigator's report, the Respondent decided that they would most likely name AR as an individual defendant if they could not sue the Town.

In August of 2000 Respondent learned that they could not sue the Town because, by law, its policy did not operate to waive the Town's municipal immunity.

In February of 2001 the Respondent visited the Town offices. He spoke to the receptionist and told her that he was representing EC and her husband in connection with injuries EC had received in the accident. He indicated that he would be bringing suit, but that the suit would not be brought against the Town.

The Respondent met with AR who was at the time Interim Town Manager. The Respondent explained who he was and why he was there. He told AR that if his client sued, that the suit would not be filed against the Town. He never revealed to AR the fact that his clients were probably going to sue him. If AR had asked, the Respondent would have told him that his clients

would likely sue him. The Respondent asked AR for maps and other diagrams of the crosswalk where EC was struck by a car. He also asked AR about the pedestrian control signal. AR told him that "having the signal knocked askew by tractor trailers turning right was a chronic problem."

In April of 2001 Respondent filed suit on behalf of EC and her husband. naming AR as one defendant. The complaint alleged that AR "was responsible for the maintenance of a pedestrian crossing signal that would have warned Plaintiff EC that it was unsafe to cross if it had been properly maintained, however, due to the negligence of Defendant AR said signal had not been properly maintained."

AR has been a Town employee for thirty-two years and is familiar with lawsuits against the Town. In his mind, if the suit did not involve the Town, it did not involve him. He had no problem responding to the Respondent's requests for maps and drawings since these are public records. If he had known that he would be named as a defendant, he would not have answered any of the Respondent's questions and would have referred him to the Town's attorney. He would not have told the Respondent that the Town frequently had to replace crossing signals that had been struck by trucks. The suit against AR and the other defendants remains pending.

The Respondent has cooperated with Disciplinary Counsel's investigation. Disciplinary Counsel's investigation was completed in February at which time he filed a Request for Review for Probable Cause. The Panel to which the Request was assigned did not issue a decision until May. Thus, the delay in resolving this matter cannot be attributed to the Respondent.

The Respondent is an attorney licensed to practice law in Vermont. He was admitted in 1973 and has never been disciplined by bar authorities.

Conclusions of Law

Rule 4.3 of the Vermont Rules of Professional Conduct reads as follows:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

This rule, adopted in 1999, goes beyond the provision in the former Code which provided that a lawyer shall not "[g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel." (FN1). As the Reporter's Notes point out, the new rule goes beyond this and places an affirmative duty on the lawyer "to make it clear to an unrepresented person that the lawyer is acting on behalf of a client, when the lawyer has reason to know that the unrepresented person misunderstands the lawyer's role.(FN2)

In this case, the Respondent violated Rule 4.3 during his conversation with AR The Respondent told AR that the suit did not involve the Town. Technically, that was true, however, at the time, the Respondent was well

aware the he might sue AR in his individual capacity. Thus, while the Respondent was clear that he represented EC and her husband and that they would not sue the Town, he did not make it clear that they might very well sue AR. AR is not a lawyer, and it certainly was not unreasonable for him to infer that since the suit would not involve the Town, he would not be sued himself.

Once AR started talking about the Town's problems with crossing signals, the Respondent should have stopped him. These statements should have alerted the Respondent that AR did not realize that he was making statements that EC and her husband would use against him in the future. The Respondent should have known that AR misunderstood the purpose of the Respondent's inquiry. Specifically, he should have known that AR understood the phrase "this suit will not involve the Town" to mean that it would not involve him. Instead, the Respondent let AR speak and eventually used his statements against him.

For these reasons, the Panel concludes that the Respondent violated Rule 4.3 of the Vermont Rules of Professional Conduct.

Sanctions

The Panel accepts the recommendation that admonition by Disciplinary Counsel is the appropriate sanction in this matter. It is in accord with A.O. 9 of the Vermont Supreme Court (FN3) and with the ABA Standards for Imposing Lawyer Sanctions.(FN4)

ABA Standards

Section 6.34 states that an

> 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 injury to a party, or causes little or no actual or potential interference with the outcome of the legal proceeding.

The Respondent's interaction with AR was an isolated instance of negligence. Moreover, even though the Respondent should have known that AR misunderstood the purpose of Respondent's questions, little, if any, injury resulted. Much of the information provided to the Respondent was public information. AR did not provide the Respondent with any information that would not have been discoverable once the complaint was filed. The conversation did not interfere with the outcome of the suit that the Respondent eventually filed on behalf of EC and her husband.

The only aggravating factor present is the Respondent's substantial experience. This is mitigated by the fact that the Respondent cooperated with Disciplinary Counsel and has no prior disciplinary record.(FN5)

A.O.9

An admonition is only appropriate when the misconduct is minor, little or no injury results, and there is little likelihood that the lawyer will make the same mistake again. A.O. 9, Rule 8(A)(5). Viewed in context, the Respondent's misconduct was relatively minor. As stated above, little or no

injury ensued. Finally, given that this case has served to educate the Respondent, there is little likelihood that the situation will repeat itself. For these reasons, an admonition is appropriate.

Conclusion

For these reasons the Panel approves the imposition of an Admonition by Disciplinary Counsel.

Dated November 20, 2002
FILED NOVEMBER 20, 2002

Hearing Panel No. 5

/s/
_____
Mark Sperry, Esq.

/s/
_____
Jane Woodruff, Esq.

/s/
_____
Sara Gear Boyd

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Footnotes

FN1. DR 7-104(A)(2).

FN2. Vermont Rules of Professional Conduct, Reporter's Notes, Rule 4.3

FN3. This sanction may only be imposed if the respondent consents to the sanction, the hearing panel approves and no formal charges have been filed. A.O.9, Rule 8(5)(a). All of these criteria are met here.

FN4. It is appropriate to refer to these standards in determining sanctions. In re Warren, 167 Vt. 259, 261 (1977); In re Berk, 157 Vt. 524, 532 (1991).

FN5. ABA Standards for Imposing Lawyer Sanctions provide that aggravating and mitigating circumstances may be considered. §9.1-9.3.