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[23-Dec-2004]

STATE OF VERMONT

PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2004.007

Decision No. 72

Respondent, a public defender, is charged with using inappropriate language in a courtroom exchange with an acting judge in the context of a status conference in violation of Rule 3.5(c) of the Vermont Rules of Professional Conduct. Respondent failed to file a formal answer to the charges. Disciplinary Counsel's Motion to Deem the Charges Admitted was granted and the matter was heard on the issue of sanctions on November 29, 2004, before Hearing Panel No. 7, Richard H. Wadhams, Jr., Esq., Chair, Keith Kasper, Esq. and Sam Hand. Disciplinary Counsel Michael Kennedy was present as was Respondent and Respondent's attorney Defender General, Matthew Valerio. Respondent is admonished for violation of Rule 3.5(c) and is placed on probation for one year on the terms set forth below.

Facts

Respondent was admitted to practice in Vermont in 1995, and since 1997 has been working as a public defender, beginning as a part time contract defender, then as a part time defender, and since August of 2003 as a full time public defender. The office in which Respondent works is generally staffed with three attorneys. At the time of the incident leading to the charges, there were only two attorneys due to a state hiring freeze and Respondent was then carrying twice the ABA recommended case load.

On the day of the incident, Respondent had been working in court since 8:30 in the morning with no lunch and no opportunity for a break. The last case of the day was a juvenile represented by Respondent. The juvenile, who was at the time incarcerated at Woodside, had problems with comprehension, limited language skills and a substance abuse problem. The case had been set for a status conference, but Respondent had entered into negotiations with the State's Attorney and had hoped to enter a change of plea and get the juvenile into a rehabilitation program. The proposed plea agreement involved a blended sentence, something which Respondent believed would be difficult to explain to the juvenile and something Respondent believed might be unfamiliar to the acting judge. Respondent had not had an opportunity to discuss the details of the change of plea with the juvenile at the time that the case was called.

Respondent entered the courtroom for the status conference without the client and informed the court that they would not be going forward. Respondent told the acting judge that due to the way he had handled another one of Respondent's matters earlier in the day, that Respondent was not confident the acting judge was competent to handle the status conference. The acting judge responded that "the judge is lousy" is not a valid reason for not going forward with a hearing. He reminded Respondent that the fact that he would be sitting had been on the calendar for at least a week and asked Respondent to bring the juvenile into the courtroom. Respondent again refused with words to the effect that the acting judge did not have knowledge and information in the law to render a competent decision. The acting judge reminded Respondent that this was a status conference and that he was going forward. Respondent acknowledged that it was a status conference but that Respondent would not be going forward. The acting judge told Respondent to bring the client into the courtroom. Respondent refused stating "I'm not bringing him in and that's the status." Once again the acting judge asked Respondent to bring the client into the courtroom. Respondent replied "No, I just gave you the status. Set this for a merits hearing." The acting judge then asked the deputy state's attorney for a status report. He replied that it was ready for trial and asked that Respondent's client remain in custody. The acting judge gave Respondent one last chance to participate. Respondent declined.

The day following the incident Respondent called the State's Attorney, the court, the client and S.R.S. to apologize. Respondent did not

initially contact the acting judge, thinking that it would be inappropriate to do so, but later wrote him a letter of apology. Disciplinary Counsel informed the hearing panel that the acting judge has accepted the apology, has observed Respondent since that time and believes that this was an isolated incident. Respondent continues to express remorse for the exchange with the acting judge which Respondent freely acknowledges was inappropriate. Respondent acknowledged to the Panel that there were other ways to deal with the situation. Respondent could have asked for a chambers conference, or could have asked for relief from the office supervisor or the Defender General.

Respondent suffers from a serious and chronic illness which causes fatigue among other serious symptoms and which has impacted heavily on Respondent's day to day life. Respondent receives periodic treatments which lessen the fatigue. At the time of the incident Respondent was due for a treatment and so the fatigue level was high. In addition to the normal stress of the work of a public defender, Respondent was carrying an even higher case load due to the loss of the attorney in the office. All of these factors caused severe stress to Respondent on the day in question.

Conclusion of Law

Rule 3.5(c) of the Vermont Rules of Professional Conduct prohibits lawyers from engaging in "undignified or discourteous conduct which is degrading or disrupting to a tribunal." The comment to the rule states

that

> [t]he advocates function is to present evidence and arguments so that the cause may be decided according to law. Refraining from abusive or obstreperous language is a corollary of the advocate's right to speak on behalf of litigants. . . . An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

As Respondent has acknowledged, the courtroom outburst was disrespectful of the court and unwarranted. It did not advance the cause of the juvenile and brought disrespect on the court.

Sanctions

Our decision to impose the least severe sanction, admonition, is not because we believe that this is a trivial matter, but because of the presence of significant mitigating factors.

Rule 8 of Administrative Order 9 provides that "[o]nly in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system or the profession, and where there is little likelihood of repetition by the lawyer should admonition be imposed."

While we believe that it is unlikely that Respondent will repeat this behavior, it is not minor and there is injury. Respondent's client was injured by the loss of opportunity to present a plea agreement to the court, and there is real injury to the legal system and the profession when they are degraded by an attorney's discourteous behavior.

The need for courteous and respectful behavior has been recognized not just by the adoption of V.R.P.C. 3.5(c) but by the Vermont Bar Association. While not binding on this Panel, it is important to note that in 1989 the Vermont Bar Association adopted Guidelines of Professional Courtesy, one of which provides that: "Lawyers should treat each other, their clients, the opposing parties, the courts, and members of the public with courtesy and civility and conduct themselves in a professional manner at all times." The importance of these guidelines is reflected in the fact that they continue to be published in the front of the bar directory as a reminder to the bar of the importance of its obligations under Rule 3.5.

It is well settled that it is appropriate to refer to the ABA Standards for Imposing Lawyer Sanctions in determining the sanction to be imposed. In general admonition is reserved for cases in which the misconduct was negligent, ABA Standards §2.6. While Respondent's outburst may have been, at least at the beginning, closer to negligence, the fact that Respondent continued the inappropriate interchange with the judge, having been given several opportunities to reverse direction, persuades us that this was more than mere negligence. Thus, the fact that there was

harm to the client and the profession and the fact that the behavior was knowing, could lead to the imposition of public reprimand.

We must, however, consider the mitigating factors present. As the Defender General stated in his argument, there were personal factors, office factors and institutional factors that impacted heavily on Respondent's behavior. Respondent's serious health problems and her struggles to accommodate her life to dealing with chronic illness, are a mitigating factor, ABA Standards §9.32(h), as is the difficulty of working in a stressful position made more so by the state's failure to fully staff the public defender system. Respondent has expressed sincere remorse, ABA Standards §3.32(l), has fully cooperated with the disciplinary system, ABA Standards §3.32(e), and made a timely and good faith effort to rectify the consequences of the behavior by apologizing to all present, ABA Standards §3.32(d). We believe that these mitigating factors are of sufficient weight to bring this matter clearly within the realm of admonition.

While we believe that Respondent will not repeat this behavior, we are concerned that the underlying job and health factors which have caused stress to Respondent remain. They are not transitory, but are something that Respondent must learn to deal with effectively in order to continue to work as a public defender. Respondent testified that an Employee Assistance Program is available for state employees to assist in dealing with job stress issues. Respondent has made some minimal inquiries into the program and agrees that it would be beneficial. In order to ensure

that Respondent makes full use of this program and its services, we place Respondent on probation for one year from the date of this opinion under the following conditions:

Probation

1. Respondent shall be placed on probation for one year as provided in Administrative Order 9, Rule 8A(6).

2. Respondent's probation shall be monitored by a probation monitor selected by Respondent and acceptable to Disciplinary Counsel.

3. Respondent shall promptly contact and enroll in the State's Employee Assistance Program and follow the recommendations of the program providers with respect to stress and job management and other areas addressed by the program which bear on Respondent's ability to effectively manage multiple stressors on a daily basis.

4. The sole purpose of probation shall be to ensure that Respondent enrolls in the Employee Assistance Program and participates in its programs, and the sole responsibility of the probation monitor shall be to monitor such participation.

5. Respondent shall contact the probation monitor on a monthly basis to report compliance with the recommendations of the Employee

Assistance Program.

6. Respondent and the probation monitor shall promptly and fully respond to requests from the Office of Disciplinary Counsel that relate to compliance with the terms of probation.

7. Any costs associated with probation shall be borne by Respondent.

8. In the event that the probation monitor shall be unable to continue s/he shall give notice to Disciplinary Counsel and Respondent shall select another monitor acceptable to Disciplinary Counsel.

9. Respondent's probation shall be for one year and may be terminated after that time in accordance with A.O.9 Rule 8A(6)(b). If at some earlier time the providers under the Employee Assistance Program determine that Respondent no longer needs to participate in the program, probation may be terminated at that earlier time, upon filing of the required affidavits by Respondent and the probation monitor.

Order

Respondent is hereby admonished for violation of Rule 3.5(c) of the Vermont Rules of Professional Conduct and is placed on probation in

accordance with the terms set forth above.

Dated: FILED: 12/23/04

Hearing Panel No. 7

/s/

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Richard H. Wadhams, Jr., Esq.

/s/

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Keith Kasper, Esq.

/s/

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Samuel Hand