

[Filed 06-Oct-2006]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No 2005.123

Decision No. 95

The parties filed a stipulation of facts and recommended conclusions of law. Respondent waived certain procedural rights, including the right to an evidentiary hearing. The Panel accepts the stipulation and recommendation and orders that Respondent be admonished by Disciplinary Counsel for discussing the legal issue in a pending case with a judge when opposing counsel was not present, in violation of Rule 3.5(b)(1) of the Vermont Rules of Professional Conduct.

Facts

Respondent was retained to represent a woman in a motion to modify child support filed by the Office of Child Support. The client had received a substantial sum of money from a life insurance policy, and her ex-husband sought increased child support based on this fact.

Respondent researched the issue but found no controlling law in Vermont on the effect of receipt of life insurance proceeds on child support obligations. The ex-husband was also represented by counsel, and a hearing was commenced in September of 2004 and continued to a date in October of 2004.

Between these two dates Respondent appeared before the same judge in an unrelated matter. While waiting for the hearing, Respondent discussed the life insurance issue with opposing counsel in that case. As the two lawyers were looking at the statute together, they were called into the judge's chambers. At the conclusion of the proceeding in the unrelated matter, Respondent asked the judge how she thought the courts would handle life insurance proceeds in a child support case. Opposing counsel witnessed the discussion but did not take part.

Respondent did not inform the judge that this was an issue pending before her in another case. The judge did not immediately recognize the other case, and she discussed with Respondent the facts she considered relevant in the treatment of a lump sum life insurance payment. She also informed Respondent of a decision on the issue by another judge. As the discussion progressed, the judge eventually remembered that the issue was pending before her in another case. The judge questioned Respondent, and he confirmed that he had such a case pending before her. The judge was upset that Respondent had sought her advice on a case pending before her outside the presence of opposing counsel. Before leaving the judge's chambers, Respondent told the judge that he would promptly share the information he had received with opposing counsel. Later that day he called opposing counsel and, the next day, sent a letter conveying the substance of his discussions with the judge.

At the continuation of the child support hearing the judge first met with counsel in chambers to discuss the ex parte communication. At the hearing she offered to recuse herself if either party objected to her hearing the case. Opposing counsel indicated that her client had no objection to the judge continuing with the case. Respondent discussed the matter with his client and reported that his client did not appear to understand the issue and was not well enough to proceed with the hearing. The judge then recused herself, and the matter was assigned to a different magistrate. The parties eventually reached a settlement on the life insurance issue, and it was not necessary for the court to render a decision.

Respondent's misconduct caused only minor injury in that the case was delayed and the reassignment to another magistrate required a change of venue, thus increasing travel time and legal expense. In aggravation, Respondent has substantial experience in the practice of law. In mitigation, he has no prior disciplinary record, he made a timely and good faith effort to rectify the consequences of his misconduct, he has cooperated with Disciplinary Counsel, and he has expressed remorse for his conduct.

Conclusion of Law

Rule 3.5 of the Vermont Rules of Professional Conduct is addressed to preserving the "Impartiality and Decorum of the Tribunal," and provides that "[a] lawyer shall not . . . communicate ex parte . . . with a judge or other person acting in a judicial or quasi-judicial capacity in a pending adversary proceeding, except as permitted by law or the Code of Judicial Conduct." Rule 3.5(b)(1).

In the course of his representation of his client Respondent was presented with an issue on which he determined that there was no controlling Vermont law. He discussed the issue with opposing counsel in an unrelated case, and then carried this discussion into the judge's chambers and asked her opinion on the issue. When Respondent initiated the discussion, he knew that this was an important issue in his other matter pending before the same judge, and opposing counsel was not present. Such conduct puts the judge in a difficult situation, undermines the appearance of impartiality that is critical to the functioning of the judiciary, and violates Rule 3.5(b)(1).

Sanction

The parties' recommendation of admonition is consistent with both the ABA Standards for Imposing Lawyer Discipline, Vermont case law and Administrative Order 9 of the Supreme Court.

ABA Standards for Imposing Lawyer Discipline

The ABA Standards propose two levels of discipline for negligent ex parte communication with individuals in the legal system. Section 6.33 provides that:

Reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and

causes injury or potential injury to a party or interference or potential interference with the outcome of a legal proceeding.

Section 6.34 provides that:

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

The main difference between admonition and reprimand in this context is the extent of the injury and the nature of the interference with the outcome of the legal proceeding. In this case, Respondent was attempting to obtain information from the judge rather than providing information to the judge in an attempt to influence her decision. There was little or no injury. There was a potential for injury had Respondent intended to keep the information to himself in order to gain an advantage over his opponent. There is, however, no evidence that Respondent intended or attempted to do so. For these reasons admonition is the more appropriate sanction.

This conclusion is confirmed by the application of the mitigating and aggravating circumstances. The only aggravating circumstance is Respondent's substantial experience in the practice of law. ABA Standards §9.22(i). In mitigation, he has no disciplinary record, ABA Standards §9.32(a); he had no selfish or dishonest motive, ABA Standards §9.32(b); and he made a timely and good faith effort to rectify the consequences of his misconduct by disclosing the facts to opposing counsel. ABA Standards §9.32(d). Respondent has made full and free disclosure to disciplinary counsel and has cooperated in the disciplinary proceedings. ABA Standards §9.32(e). In addition, Respondent has expressed remorse for his ex parte communication. ABA Standards §9.32(1).

Case Law

Admonition in this circumstance is also consistent with prior Vermont disciplinary decisions. In PRB Decision No. 69, (July 26, 2004), Respondent appeared before a friend who was sitting as acting judge at a criminal arraignment. Respondent felt hurt at the way the judge addressed him at the arraignment, and that evening called the judge at his home to express his displeasure. They discussed the judge's attitude toward Respondent but did not discuss the merits of the case. Citing §6.34 of the ABA Standards for Imposing Lawyer Discipline, the Hearing Panel ordered that Respondent be admonished by Disciplinary Counsel.

Also in the context of a criminal matter, in PCB Decision No. 104, (Dec. 1, 1995), Respondent was admonished for contacting a judge to discuss sentencing issues on behalf of a victim's family. If anything, that situation was somewhat more serious than the situation here, as Respondent in this case was not attempting to influence the judge's decision in favor of his client.

Administrative Order 9

Rule 8 (A) (5) (a) of A.O.9 provides for admonition "in cases of minor

misconduct, where 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." Here there was no injury to the client. Respondent's ex parte communication was not an attempt to influence the judge, and we hope that Respondent has learned from this experience and in the future will guard against such ex parte communications.

Order

For the foregoing reasons, we accept the recommendation and order that Respondent be admonished by Disciplinary Counsel for ex parte communication with a judge in violation of Rule 3.5(b)(1) of the Vermont Rules of Professional Conduct.

Dated: October 6, 2006

Hearing Panel No. 8

/s/

Eileen Blackwood, Esq.

/s/

Peter Bluhm, Esq.

/s/

Tim Volk