

134 PRB

[Filed 03-Dec-2010]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In Re: PRB File No. 2009.213

Decision No. 134

The parties filed a Stipulation of Facts and Joint Recommendations as to Conclusions of Law and Sanctions. The Hearing Panel accepts the stipulated facts and the recommendations and orders that Respondent be admonished by Disciplinary Counsel for failure to ensure that a paralegal, over whom he had direct supervisory authority, did not have direct contact with an opposing party who was represented by counsel, in violation of Rules 4.2 and 5.3 of the Vermont Rules of Professional Conduct.

Facts

Respondent is an associate with a law firm which represents a large number of creditors in collection cases. In 2007, Respondent's firm filed a complaint against a debtor on behalf of a

collection agency. An attorney contacted Respondent's firm asking for an extension of time to file an answer to the complaint. The request was granted, and in her confirming letter, opposing counsel indicated that she was involved only in securing the extension and would not be entering an appearance for the debtor.

Respondent's firm eventually obtained judgment against the debtor, and in February of 2009, Respondent served post-judgment interrogatories on the debtor. At that point, the debtor engaged opposing counsel to represent him. Opposing counsel's paralegal called Respondent and obtained an extension of time to answer the interrogatories.

On February 24, 2009, opposing counsel's paralegal spoke with Respondent's paralegal and arranged that the interrogatories be sent to her electronically.

On March 4, 2009, Respondent's paralegal sent a letter directly to the debtor instructing the debtor to respond to the interrogatories "and/or contact our office immediately to discuss any issues that you might have." The letter went on to state "[o]nce again, I would offer you the opportunity to call me at the number listed above to give me the information requested by telephone if you prefer." The letter was not copied to opposing counsel, and Respondent did not have opposing counsel's permission to contact the debtor directly.

Opposing counsel called Respondent on March 10, 2009. During the conversation, Respondent indicated to opposing counsel that he did not consider the debtor to be represented by counsel. This conclusion was based on the fact that opposing counsel had never entered an appearance and had stated that she would not be in her letter of March, 2007.

Opposing counsel eventually filed an ethics complaint against Respondent. In January of 2010, while the ethics complaint was under investigation, Respondent's paralegal sent another letter directly to the debtor conveying an offer of settlement. The letter was not copied to opposing counsel, and at that time Respondent did not have opposing counsel's permission to have direct contact with the debtor.

In January of 2010, Respondent's firm was representing creditors in many collection cases. Respondent's firm sent settlement offers to large numbers of debtors in connection with the tax refund season. Respondent's paralegal failed to notice that the debtor was represented by counsel.

Respondent has no prior disciplinary history. The debtor did not suffer any injury as a result of the letters that were not sent to opposing counsel.

Conclusions of Law

In 2009, the Vermont Supreme Court approved amendments to the Vermont Rules of Professional Conduct. The amendments took effect on September 1, 2009. The Rules that apply to this case did not substantially change when the Rules were amended.

The present Rule 5.3 of the Rules of Professional Conduct provides as follows:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm; shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of a lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”

Rule 4.2 of the Vermont Rules of Professional Conduct provides as follows:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Respondent had direct supervisory authority over his paralegal, and after opposing counsel filed the first ethics complaint, he failed to ensure that there was a reasonable system in place to ensure that his paralegal did not have direct contact with the debtor without the permission of opposing counsel. By his failure, Respondent violated Rules 4.2 and 5.3 of the Vermont Rules of Professional Conduct.

In Vermont, an admonition is appropriate “[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 when there is little likelihood of repetition by the lawyer....” *A.O. 9. Rule 8 (A) (5)*. Respondent's misconduct did not cause injury to a client the public, the legal system or the profession and is not likely to be repeated.

Admonition is also consistent with the ABA Standards for Imposing Lawyer Sanctions. In cases of violation of Rule 4.2, the ABA Standards provide that

admonition is generally appropriate when the 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. *ABA Standards §6.34*.

Order

Based upon the foregoing, the Hearing Panel orders that Respondent be admonished by Disciplinary Counsel for violation of Rules 4.2 and 5.3 of the Vermont Rules of Professional Responsibility.

Dated: **December 3, 2010**

Hearing Panel No. 5

/s/

Robert Keiner, Esq. Chair

/s/

Elizabeth H. Miller

/s/

Kim Montgomery DMD