

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2013.194

Decision No. 160

The parties have filed a Stipulation of Facts, proposed Conclusions of Law and a Recommendation for Sanctions. The Respondent waived certain procedural rights including the right to an evidentiary hearing. The panel accepts the stipulated facts and recommendations and orders that Respondent be admonished by Disciplinary Counsel for failing to promptly identify a conflict of interest in his representation of a criminal defendant in violation of Rule 1.7 of the Vermont Rules of Professional Conduct.

Facts

Respondent was admitted to the practice of law in Vermont in 2006. He is a sole practitioner and a portion of his practice is devoted to the representation of indigent defendants as assigned counsel.

In February of 2012 Respondent was assigned to represent Client A who was charged with disorderly conduct. On March 12, 2012 he filed a motion to appear by phone which was granted, and on March 30, 2012 he represented Client A at the calendar call.

In June of 2012 Respondent was assigned to represent Client B in the same county on a charge of cultivating more than 10 marijuana plants. Client A was one of the individuals who informed the police that Client B was growing marijuana.

Between the time Respondent was assigned to represent Client B and March of

2013, Respondent appeared in court three times for Client A; a calendar call and two status conferences. During the same period he appeared for client B five times; two calendar calls, a status conference and a pre-trial conference.

On March 6, 2013 Respondent again appeared for client B at a pre-trial conference and at this point discovered that Client A was a witness in Client B's case; thereby creating a potential conflict of interest.

When this was discovered, Client B asked Respondent to withdraw and he did so. With the court's knowledge and permission, he returned Client B's entire file to him on the same day.

Respondent did not obtain any information from Client A which would have been detrimental to Client B. In fact, Respondent does not recall obtaining any information regarding any relationship between the two individuals until moments before the March 2013 pre-trial conference.

Client B did not suffer any actual injury as a result of the conflict of interest. Any delays in the resolution of his case were the result of Client B's attempts to become a cooperating witness in order to seek a reduction in the charges against him.

The following mitigating factors are present: Respondent has no prior disciplinary record, he had no selfish or dishonest motive, he made a timely effort to rectify the consequences of his misconduct, he has cooperated with the disciplinary proceedings and has expressed remorse that he did not discover the conflict sooner.

There is one aggravating factor. Respondent was previously admonished for violating a different rule in circumstances that are dissimilar to the present case.

Conclusions of Law

Rule 1.7 of the Vermont Rules of Professional Conduct provides that “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

When an attorney undertakes the representation of a client, it is incumbent on the attorney to take positive steps to insure that no conflict of interest exists between the new client and other present or former clients. If a conflict is determined to exist, the attorney must either decline the representation or, if representation has already commenced, must promptly disclose the conflict and withdraw from representation unless the conflict is one covered by the exceptions. *Rule 1.7(b)*. Since Client A was the complaining witness in Client B’s criminal matter, the Panel does not believe that the exceptions could apply.

When Respondent discovered the conflict, he took all the appropriate actions. He withdrew from representing client B, he informed the court and returned the file. The problem, and why we find a violation of Rule 1.7, is that it took Respondent more than eight months to discover the conflict.

Sanction

The parties have recommended that Respondent be admonished by disciplinary counsel for this violation. In determining the appropriate sanction it is appropriate to look to the *ABA Standards for Imposing Lawyer Sanction (ABA Standards)*, *In re*

Warren, 167 Vt. 259, 261 (1977); *In re Berk*, 157 Vt. 524, 532 (1991), (citing *In re Rosenfeld*, 157 Vt. 537, 546-47 (1991)).

In applying the ABA Standards, we look to the duty violated, the lawyer's mental state and any actual or potential injury to determine a presumptive sanction. In this case Respondent violated his duty to avoid conflicts of interest. His actions were negligent, rather than intentional or knowing and there was no actual injury to Client B.

Under the ABA Standards, admonition is "appropriate when a lawyer engages in an isolated instance of negligence in determining whether the representation of a client . . . will adversely affect another client, and causes little or no injury to a client." §4.34.

Here we have a single act of negligent failure to discover a conflict without any actual injury. Respondent did not obtain any information from Client A that would be detrimental to Client B, and any delay in the proceedings were caused by Client B's efforts to seek a reduction of his charges by cooperating with the prosecution.

In addition the presence of several mitigating factors lend more weight to our decision to accept the recommendation of the parties. Respondent did not act from a selfish or dishonest motive, *ABA Standards*, §9.32(b); he made a timely effort to rectify the conflict as soon as it was discovered, *ABA Standards*, §9.32d); he has cooperated with the disciplinary proceedings, *ABA Standards*, §9.32(3), and has expressed remorse for his actions, *ABA Standards*, §9.32(l). The one aggravating factor, prior discipline for an unrelated violation, is not sufficient to increase the sanction here. *ABA Standards* 9.22(a).

Admonition is also consistent with prior Hearing Panel decisions involving conflicts of interest. In *In re PRB Decision No. 123* (2009), the attorney was admonished "for failure to withdraw from representing an individual charged with a crime when he

had previously consulted with the victim and her family about the same crime.” As in the present case, the attorney had failed to recognize the conflict, but there was no evidence that the attorney had divulged any confidences of the victim and her family while representing the charged individual.

Admonition was also imposed in *In re PRB Decision No. 11* (2000). As in the present case, it was an isolated act of negligence. The attorney, a prosecutor in a case involving sexual assault of minor children, failed to disclose that a deputy in his office had previously represented the defendant in a CHINS case. As in the present case, there was no actual injury and there were a number of mitigating factors.

Order

Based upon the foregoing, the Hearing Panel accepts the recommendation of the parties and orders that Respondent be admonished by Disciplinary Counsel for violation of Rule 1.7 of the Vermont Rules of Professional Conduct.

Dated: **June 27, 2013**

Hearing Panel No. 1

/s/

R. Joseph O’Rourke, Esq., Chair

/s/

John J. Kennelly, Esq.

/s/

Joanne Cillo