

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2015.022

Decision No. 190

The parties have filed a Stipulation of Facts together with Recommended Conclusions of Law and a Recommendation for Sanctions. The Respondent has waived certain procedural rights including the right to an evidentiary hearing. The panel accepts the stipulated facts, and recommended conclusions of law and orders that Respondent be admonished by Disciplinary Counsel for communicating with a person known to be represented by counsel without the other lawyer's consent, in violation of Rule 4.2 of the Vermont Rules of Professional Conduct.

Facts

Respondent was admitted to practice law in Vermont in 1998. In the case giving rise to the violation, she served as court-appointed counsel for five children who were the subject of legal proceedings. Respondent knew that the mother of the children, who was also a party to the proceedings, was represented by counsel.

The mother was pregnant, and prior to the due date of her child, the Department for Children and Families (DCF) scheduled a meeting to discuss alternatives to DCF custody for the soon to be born child. The mother and her attorney were present as was Respondent. One of alternatives presented was for the mother and child to stay at the Lund Home, a comprehensive treatment center and family support agency.

In March of 2014, there was a Temporary Care Hearing with respect to the newborn. The Respondent, the mother and her attorney were all present. At the hearing

the parties discussed whether the mother would go to the Lund Home or stay in her own home. The hearing ended without a decision.

Immediately after the hearing, Respondent approached the mother to urge her to at least visit the Lund Home before making her decision. The mother's attorney was not present during this conversation nor did the attorney give consent for Respondent to speak to the mother. Respondent's conversation with the mother was an attempt to follow through with what she (and others) believed would be the best plan for the newborn.

The following mitigating factors are present in this case: Respondent has no prior disciplinary record; she had no selfish or dishonest motive; she has cooperated with the disciplinary proceedings, and has expressed remorse about her conduct. There are no aggravating factors.

Conclusion of Law

Rule 4.2 of the Vermont Rules of Professional Conduct states that:

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 court order.

Respondent violated this rule when she spoke to the mother outside of her attorney's presence about her housing plans, which was the subject of the representation. She knew that the mother was represented by counsel and that she did not have that lawyer's permission to speak with the mother.

Sanction

The parties join in recommending that Respondent be admonished by Disciplinary Counsel. In determining whether or not to accept this recommendation, we look to the ABA Standards for Imposing Lawyer Sanction (ABA Standards) and as well as Vermont

case law. *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 consider the duty violated, the lawyer's mental state, the injury or potential for injury and presence of aggravating and mitigating factors.

Duty Violated

"Lawyers are officers of the court, and the public expects lawyers to abide by the legal rules of substance and procedure which affect the administration of justice." *ABA Standards* §6.0. Respondent violated this duty when she improperly communicated with the mother outside the presence of her attorney about the subject matter of the representation. Respondent's motives were well intentioned. She was not seeking to sabotage the mother's relationship with her attorney, but was attempting to follow up with she and others believed would be the best plan for the newborn. This does not excuse the violation but it does reinforce our decision that admonition is the appropriate sanction in this matter.

Lawyer's Mental State

We need to assess whether Respondent acted knowingly or negligently. Under the ABA Standards, knowledge is defined as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." Negligence is defined as "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." *ABA Standards, Section IV Definitions*. It might first appear that Respondent

acted knowingly when she communicated with the mother, but when her actions are viewed in the context of the situation, it is clear that negligence more clearly describes her state of mind. The contact with the mother was spontaneous and unplanned and was a continuation of conversations that had just taken place with the court moments before.

Injury or Potential Injury

While there is always the injury to the legal system when an attorney fails to live up to the standards expected of lawyers, there was little or no injury to the mother. Respondent did not obtain confidential information from the mother and there is no evidence that this conversation influenced the outcome of the legal proceedings.

Aggravating and Mitigating Factors

In mitigation, Respondent has no prior disciplinary record, *ABA Standards §9.32(a)*; she had no selfish or dishonest motive, *ABA Standards §9.32(b)*; she has cooperated with the disciplinary process, *ABA Standards §9.32(e)*, and has expressed remorse, *ABA Standards §9.32(l)*. There are no aggravating factors.

The ABA Standards provide that admonition is “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, or causes little or no actual or potential interference with the outcome of the legal proceedings.” *ABA Standards §6.34*. Respondent’s conduct fits within these parameters. Her conversation with the mother was a single act of negligence, caused no actual injury and had no effect on the outcome of the legal proceedings.

Admonition is also consistent with prior hearing panel decisions. In *In re PRB Decision No. 9* (2000), the attorney was admonished for communicating with a party

known to him to be represented by counsel. The communication was unrelated to the merits of the case and there was no actual injury, even though in this case the panel found that the attorney acted intentionally rather than negligently.

In *In re PCB Decision No. 72* (1994), the attorney was admonished for sending a deed to release a right of first refusal to a trustee who had been represented by counsel in the purchase of real estate. Respondent was aware that the attorney had represented the trustee in connection with tax issues related to the real estate transaction but failed to consider the on-going representation of the trustee's counsel. The Board found that Respondent acted negligently in assuming that the trustee was unrepresented.

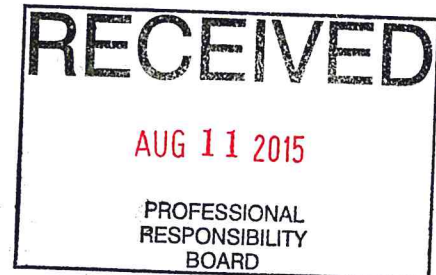
Admonition is also consistent with Administrative Order 9 Rule 8(A)(5) which provides that admonition is appropriate “[o]nly in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood or repetition by the lawyer.” There was no injury in this case and we believe that there is little likelihood of repetition. The hearing panel feels that this is a very minimal violation and hopes that it will not have an adverse effect on Respondent's future practice of law.

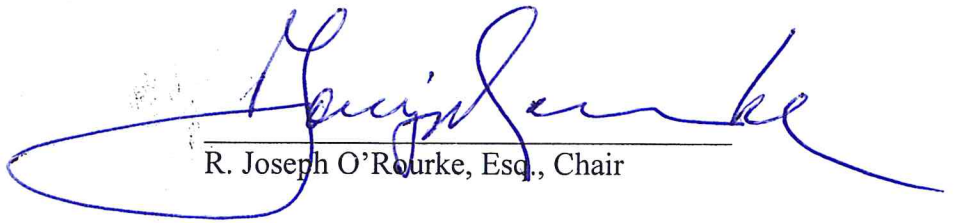
Based upon the foregoing, we accept the parties' recommendation that admonition is the appropriate sanction in this matter.

Order

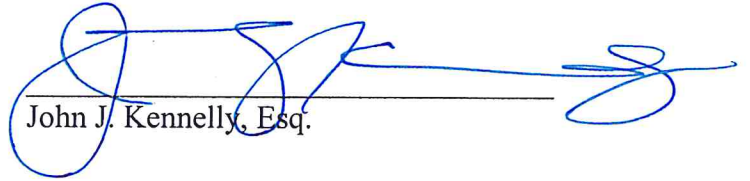
Respondent shall be admonished by Disciplinary Counsel for violation of Rule 4.2 of the Vermont Rules of Professional Conduct.

Dated: August 11, 2015 Hearing Panel No. 1

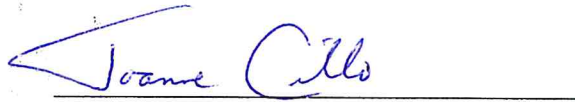




R. Joseph O'Rourke, Esq., Chair



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Joanne Cillo