

114 PRB

[Filed 18-Aug-2008]

STATE OF VERMONT

PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2007.215

Decision No. 114

The parties filed a Stipulation of Facts and Joint Recommendations as to Conclusions of Law and Sanctions. Respondent also waived certain procedural rights including the right to an evidentiary hearing. The Hearing Panel accepts the stipulated facts and the recommendation and orders that Respondent be admonished by Disciplinary Counsel for making a frivolous statement in court in violation of Rule 3.1 of the Vermont Rules of Professional Conduct.

Facts

Respondent, who was admitted to practice in Vermont in 1999, works as a deputy State's Attorney. The violation charged arises out of his responses to the judge and defense counsel when questioned about the steps his office had taken to comply with a discovery request.

By letter dated March 14, 2007, defendant's attorney requested discovery from the state. Included was a request the state produce the police radio log relating to the defendant's stop and arrest. On March 26, 2007, defendant's attorney faxed a letter to Respondent informing him that she had yet to receive all of the requested discovery. The letter did not specify what was lacking. A specific request for the radio log was faxed from the State's Attorney's office to the police department on the same day.

On the Thursday or Friday before the hearing scheduled on Monday, Respondent called the police department, looking for the missing radio log. He was told that the log request had been located on a sergeant's desk. He called the police department a second time to determine the status of the request. He learned that the radio log had been placed in the "out-box" to be delivered to the State's Attorney,

and that the officer he had originally spoken to had left. Respondent then asked that the radio log be faxed to the State's Attorney's office and to defendant's attorney.

A civil suspension hearing was held the next week. During the hearing an issue arose as to when Respondent's office had forwarded the initial discovery request to the police department. The Judge asked Respondent if he knew "when exactly it went out from your office?" Respondent stated that he would have to look in his file. The Judge asked Respondent if he had his file in front of him. After which, Respondent began to review his file and stated:

It looks like we made two requests specifically for the ra. . ., one specifically for the radio log, one with the a, ah, the 17 point discovery letter attached, ah, the first went out the day after we received [defendant's attorney's] letter, so the 15th, and then we had a specific request for the radio log on the 26th, so last week.

Defendant's attorney then made a request "to look at the request that [was] sent to the . . . Police Department, supposedly on the 15th. . ." Respondent refused to show the request to defendant's attorney. When pressed as to the reason, Respondent stated "[b]ecause it's work product and it's irrelevant." Respondent spoke as if his file contained a letter documenting the date that his office forwarded to original discovery request to the police department. In fact, the file contained no such letter.

When he stated that the discovery request had been forwarded to the police the day after it had been received in his office, Respondent did not intend to mislead the court or opposing counsel. He knew that the police department had provided some discovery, and therefore concluded that his office must have forwarded the request in accordance with his understanding of office procedure. He could not, however, locate a letter tending to indicate when his office had forwarded the request, other than a copy of defense attorney's request with his office's internal office markings on it demonstrating that it had been acted upon. Thus, his response was based on his understanding of office practice not on documentation in his file.

At that time, Respondent was not generally in charge of handling discovery for his office. Discovery was handled by office staff under the supervision of the State's Attorney. It was Respondent's understanding that the practice was to send copies of defense discovery requests, such as defense counsel's March 14th letter, directly to the investigating agency within a day or two of receipt. Thus, when he looked through the file at the hearing, he expected to find something that would document that the discovery request had been forwarded to the police department within a day or two of receipt.

Since this time, Respondent has learned that copies of discovery requests are not necessarily forwarded to the investigating agency. Rather, it is common for a staff member to make discovery requests by telephone to the investigating agency.

Respondent has no prior discipline and has cooperated fully with Disciplinary Counsel's investigation.

Conclusion of Law

Rule 3.1 of the Vermont Rules of Professional Conduct provides that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law."

When asked when the initial discovery request had been forwarded to the police, Respondent looked in his file and answered as if the file contained a letter documenting that the request had been forwarded to the police within a day or two of receipt. The file contained no such letter, only the original discovery letter with his office's internal markings on it demonstrating that it had been acted on. Thus, Respondent did not have a non-frivolous basis for responding as if his file contained such documentation, and we accept the recommended conclusion that Respondent's conduct violated Rule 3.1 of the Vermont Rules of Professional Conduct.

Sanction

The Hearing Panel accepts the recommended sanction of admonition by disciplinary counsel. Admonition is consistent with Rule 8(5)(b) of Administrative Order 9 which provides that admonition is appropriate "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." There is no evidence of injury in this case, and since the Respondent is now familiar with the practices in the State's Attorney's office there would appear to be little likelihood of repetition. In addition, Respondent has no prior disciplinary record and has cooperated with the disciplinary process. ABA Standards for Imposing Lawyer Discipline §§9.32(a)&(e)

Order

Respondent shall be admonished by Disciplinary Counsel for violation of Rule 3.1 of the Vermont Rules of Professional Conduct.

Dated: August 18, 2008

Hearing Panel No. 2

FILED: 8/18/08

/s/

Jesse M. Corum IV, Esq., Chair

/s/

Theodore C. Kramer, Esq.

/s/

Christopher G. Chapman