

[Filed 30-Sep-2005]

STATE OF VERMONT  
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No 2004.208

Decision No. 78

On April 12, 2005, the parties filed a stipulation of facts as well as conclusions of law and recommendations on sanctions. The Respondent also waived certain procedural rights including the right to an evidentiary hearing. The panel accepts the facts and recommendations and orders that Respondent be admonished by disciplinary counsel for requesting of witnesses that they not speak to opposing counsel in an informal interview but only by deposition in violation of Rule 3.4 of the Vermont Rules of Professional Conduct.

Facts

Respondent was admitted to practice in Vermont in 1986 and during the time relevant to this case was prosecuting a licensee in an administrative proceeding before a licensing board. During the pendency of the board proceedings Respondent disclosed to the licensee's attorney a list of potential witnesses. This attorney wrote to 31 of the people on the list, identifying himself as the attorney for the licensee and requesting a deposition and or an informal meeting.

Between eight and ten of the recipients of the letter contacted Respondent's office to ask whether they were required to meet informally with the licensee's attorney. Respondent and or his paralegal told the callers that he could not act as their attorney or tell them what to do, but they also told the witnesses that it would be Respondent's preference for the witnesses to speak via deposition rather than informal interviews.

Anticipating that other witnesses might call with the same questions, Respondent sent letters to the witnesses conveying the state's position on the issue. The letters, which were copied to the licensee's attorney, included the following language: "The State requests that you not speak with [the licensee's attorney] or anyone from his office in an informal interview."

The licensee's attorney wrote to Respondent complaining about the "State's improper efforts to discourage witnesses from speaking with [the licensee] . . . ." Upon receiving this letter Respondent reviewed the Rules of Professional Conduct and concluded that he was merely expressing a preference for depositions over informal interviews, and that the letter was not improper.

The same day Respondent wrote back to the licensee's attorney stating that he was not discouraging witnesses from speaking with the licensee's client, but only stating a preference that such communication take place in a formal deposition. He invited the licensee's attorney to cite him to any professional conduct rule he might have violated.

The licensee's attorney raised the issue of the letters again in a motion to dismiss. At that time Respondent spoke with colleagues at his office and did some further research. He was unable to find any reported disciplinary decisions involving conduct similar to his own, and it appears that there are none. The board issued a decision in the matter which discussed the issue of witness access but refused to dismiss the matter. The licensee's attorney filed a motion to reconsider and the board issued an order stating that witnesses are not the property of either party and that all parties have a right to interview any willing adverse party's witness without the consent or presence of opposing counsel. The board directed the parties to forward a copy of the decision to all potential witnesses.

Two of the witnesses who were deposed stated that they understood the letters to be more directive than advisory and, following the advice of Respondent, declined the informal interview.

Respondent's substantial experience in the practice of law is an aggravating factor. Mitigating factors are the absence of a prior disciplinary record, no dishonest or selfish motive, cooperation with disciplinary authorities, remorse and a reputation for good character.

#### Conclusions of Law

Rule 3.4 of the Vermont Rules of Professional Conduct covers issues of "Fairness to Opposing Party and Counsel." Subsection (f) specifically provides that a lawyer shall not "request a person other than a client to refrain from voluntarily giving relevant information to another party . . . ." This rule appears on its face to proscribe Respondent's conduct, using the same verb "request" that Respondent used in his letters to the witnesses he identified in the proceeding before the MPB.

The purpose of the rule has been clarified both in the context of the disciplinary system and in general litigation. The underlying premise is that our adversary system is based upon each party having the ability to investigate his or her case without obstruction from an opposing party or that party's attorney.

The commentary to Rule 3.4 of the Vermont Rules of Professional Conduct provides"

The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure and the like

The Vermont Supreme Court also addressed this issue recently in the context of civil litigation. *Schmitt v Lalancette*, 175 Vt. 284 (2003). In this case the trial court denied plaintiff's request for names of other customers of defendant and issued a protective order preventing plaintiff from contacting customers whose names plaintiff had obtained through independent investigation. The Supreme Court found that the trial court had abused its discretion and ordered a new trial. The court relied on a

similar case, *IBM v Edelstein*, 526 F.2d 37 (2d Cir. 1975), where a trial court ordered that all interviews of adverse witnesses had to take place either in the presence of opposing counsel or with a stenographer present.

The Second Circuit struck down these restrictions using the following language quoted in the Vermont opinion:

The[se restrictions] not only impair the constitutional right to effective assistance of counsel but are contrary to time-honored and decision-honored principles, namely, that counsel for all parties have a right to interview an adverse party's witnesses (the witness willing) in private, without the presence or consent of opposing counsel and without a transcript being made. *Id.* at 42.

A case with facts very similar to the present case arose in a criminal case in the District of Columbia. *Gregory v. United States*, 369 F.2d 185 (D.C.Cir. 1966). The Court of Appeals overturned defendant's conviction due in part to the fact that the prosecutor had advised witnesses not to speak to anyone unless he was present. Using language very similar to Respondent's, the prosecutor testified: "I instructed all the witnesses that they were free to speak to anyone they like. However, it was my advice that they not speak to anyone about the case unless I was present." *Id.* at 187.

Interfering with an opposing party's right to interview adverse witnesses is an unreasonable interference in the right to prepare and defend one's case. It is a violation of the discovery rules and also of the Rules of Professional Conduct and we find that Respondent's letters to witnesses requesting that they not speak informally with opposing counsel violates rule 3.4.

#### Sanction

In determining the appropriate sanction we have been guided by the ABA Standards for Imposing Lawyer Sanctions and A.O.9 Rule 8(A)(5). The ABA Standards require the Panel "to weigh the duty violated, the attorney's mental state, the actual or potential injury caused by the misconduct, and the existence of aggravating or mitigating factors." *In re Andres*, Supreme Court Entry Order, July 6, 2004, citing *In re Warren*, 167 Vt. 259, 261 (1997).

Respondent's conduct is covered by Rule 6 of the ABA Standards for Imposing Lawyer Sanctions which deals with violations of duties owed to the legal system. This section is introduced by the following language. "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." It is the rules of procedure that Respondent failed to follow. Standard 6.24 of the ABA Standards provides that "[a]dmonition is generally appropriate when a lawyer engages in an isolated instance of negligence in complying with a court order or rule, and causes little or not actual or potential injury to a party, or causes little or no actual or potential interference with a legal proceedings." When the attorney's mental state is still one of negligence and there is "injury or potential injury," reprimand is appropriate. ABA Standards §6.23.

It appears that Respondent's mental state here was one of negligence

rather than a knowing or intentional disregard of the rules. He sought to determine whether or not his conduct was appropriate and when he determined that it was, copied the licensee's attorney on his letters. We thus find his conduct to be negligent.

The difference here between imposing reprimand or admonition is in the determination of whether or not there was any injury. It is not known how many witnesses would have talked to the licensee's attorney absent the letter from Respondent, and thus it is not possible to determine from the facts whether there was any injury to the opposing party, though Respondent's conduct had the potential for injury. Clearly at least two of the witnesses saw the letter as akin to a directive from the State and decided not to engage in an informal interview. To the extent that the licensee's attorney was forced to depose some witnesses than would have talked to him informally there is added time and expense in trial preparation. With the number of witnesses involved in the case, this could have been a substantial burden for the licensee's attorney and evidence of actual injury which could point to imposition of reprimand.

In reaching a final decision between reprimand or admonition it is necessary to look at the aggravating and mitigating circumstances. There is only one aggravating circumstance, Respondent's substantial experience in the practice of law. ABA Standards §9.22(i). There are a number of mitigating factors. Respondent has no disciplinary record, ABA Standards §9.32(a), nor any dishonest or selfish motive, ABA Standards §9.32(b). He has cooperated with Disciplinary Counsel, ABA Standards §9.32(e), has expressed remorse, ABA Standards §9.32(l), and has good character and reputation. ABA Standards §9.32(g).

Another factor we have considered is one that does not fit squarely within the mitigating factors enumerated in the ABA Standards for Imposing Lawyer Sanctions. The Panel applauds the fact that when opposing counsel raised the issue of the propriety of Respondent's action, he thought to research the issue to determine if he was in violation of the conduct rules. Though there are apparently no disciplinary cases covering circumstances similar to this particular case Respondent failed to appreciate that the plain language of Rule 3.4 might apply to his situation, and failed to consider cases involving abuse of discovery rules such as the Schmitt case. The Panel would suggest to Respondent that should he find himself in this situation in the future, it is possible to obtain prospective advice on ethical issues from the Vermont Bar Association.

Weighing all of these facts, we believe that admonition is appropriate in this case. It is also consistent with the provisions of A.O.9 Rule 8(A) (5) which provides that admonition is appropriate only "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." The extent of any injury is uncertain and based upon Respondent's lack of prior discipline and the fact of his remorse and cooperation with Disciplinary Counsel, we believe that there is little likelihood of repetition.

#### Order

It is hereby ordered that Respondent be admonished by Disciplinary Counsel for violation of Rule 3.4 of the Vermont Rules of Professional Conduct.

Dated: \_\_\_\_\_

FILED 9/30/05

Hearing Panel No. 9

/s/

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Stephen Dardeck, Esq., Chair

/s/

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Mary Gleason Harlow, Esq.

/s/

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Barbara Carris