

JUDICIAL CONDUCT BOARD

TELEPHONE (802) 748-8161
FACSIMILE (802) 748-4001



1194 MAIN STREET, SUITE 104
P.O. BOX 189
ST. JOHNSBURY VT 05819-0189

Steven A. Adler, Esq.
Chair

STATE OF VERMONT BEFORE THE JUDICIAL CONDUCT BOARD

IN RE:
Judge Paul Kane

Docket No. 16.004

ORDER - MOTION IN LIMINE

This matter is before the Judicial Conduct Board as a result of a Formal Complaint filed by Special Counsel Ian P. Carleton, Esq. dated June 30, 2016. Assistant Judge Paul Kane has been represented throughout this matter by Attorney Melvin D. Fink who entered an Appearance and filed an Answer to the Formal Complaint on July 28, 2016. On the same day the Answer was filed, the parties were instructed to confer and submit a joint Discovery Schedule. The parties were initially unable to agree upon a Discovery Schedule but ultimately filed a Stipulated Pretrial and Discovery Schedule Order which was approved by the Board on August 24, 2016. That stipulated Order did provide that the matter was to be trial ready by March 15, 2017.

Pursuant to Vermont Rules for the Disciplinary Control of Judges §9(4), discovery proceeded pursuant to the Vermont Rules of Civil Procedure although shortened time limits were imposed by the Board as the announced trial date of March 20, 2017 approached. By Order dated December 20, 2016, this Board set trial for March 20, 21 and 22, 2017 in Rutland Superior Court. The parties were advised to notify the Board if they had conflicts with other court commitments on these dates. The December 20 Order further provided as follows:

"The Board will require premarked exhibits, pretrial memorandum and stipulated facts, if any, to be filed by both parties no later than Monday, March 13, 2017."

A second Notice of Trial Dates was sent out on January 5, 2017 which reminded the parties of the March 13, 2017 deadline and varied only in the location of the trial.

By Scheduling Order dated February 1, 2017, the parties were again reminded of the trial dates and again reminded that exhibits were to be premarked and provided to the Board no later than Monday, March 13, 2017 along with any Pretrial Memoranda and

Stipulated Facts. The parties were advised that no continuances of the trial would be granted except for unanticipated medical emergencies.

In January of 2017, Special Counsel sought to depose Attorney Christopher Moore who was, at relevant times, personal counsel to Respondent. Mr. Moore's testimony related to Respondent's "advice of counsel" defense. Notwithstanding this defense, Respondent did not waive attorney client privilege, leading to Special Counsel's request for an Order to compel Attorney Moore's testimony and a waiver of attorney client privilege. Counsel for Mr. Kane wrote to the Board on February 10, 2017 announcing that he had returned from vacation "that week" and requesting a telephone hearing in connection with the attorney client privilege waiver and other issues. That request was granted and a telephone hearing was held on February 14, 2017. Counsel for Mr. Kane had not formulated a position on the several pending issues and requested until February 22, 2017 to respond in writing. That request was granted but no response was received from Respondent. Accordingly, the Board issued an Order resolving those pending issues. That Order, dated February 23, 2017, again reminded the parties that all pretrial memoranda, witness lists, stipulated facts (if any) and "to the greatest extent possible all premarked exhibits are to be delivered to the Board *on or before March 13, 2017.*"

On March 13, 2017, Special Counsel filed a Pretrial Memo, witness list identifying six witnesses and an exhibit list identifying 30 proposed exhibits. There were no stipulated facts and no stipulated exhibits. Nothing was received from Respondent on that date and the next day, Special Counsel filed a Motion in Limine seeking to preclude Respondent from calling witnesses or introducing exhibits for failure to comply with this Board's multiple Orders identified above. That Motion in Limine is the subject of this Order.

After business hours on March 14, 2017, Counsel for Respondent provided in a series of emails Respondent's proposed exhibits which are deemed filed on March 15, 2017. Special Counsel then supplemented his Motion in Limine to specifically request exclusion of Exhibits A, C, F, M and Q which contain documents requested in discovery but never provided in initial responses nor through supplementation required by our Rules of Civil Procedure, nor identified on a privilege log. V.R.C.P. 26(b)(5)(A). Had the withheld documents been at least identified, Special Counsel would have had the opportunity to raise the issue in a Motion to Compel for a timely resolution and to seek sanctions if appropriate. See V.R.C.P. 37.

As an alternative to exclusion of the exhibits, Special Counsel offered to reconvene the deposition of Paul Kane on the day before the trial, Sunday March 19th so he could inquire about these newly produced exhibits. This prompted a Response by Respondent which claims, *inter alia*, that:

- Respondent's Counsel had understood that the previously announced March 13th deadline was advisory only;
- He had intended to provide exhibits after he had reviewed those being used by Special Counsel;

- His production was delayed because of a serious snow storm that blanketed Vermont; and
- Respondent's exhibits "consist mainly of documents" that were protected by attorney client privilege and thus not discoverable until this Board ruled on the attorney client waiver on February 23, 2017, and by implication, not obtainable by Respondent from his former attorney until that ruling.

Respondent addresses various other issues not directly relevant to this Board's decision on the pending motion. Board Counsel has replied to Respondent, disputing many of the factual assertions made.

Based upon the above chronology, it is abundantly clear that the parties were repeatedly reminded of the "no later than" deadline for filing pretrial memoranda, witness lists and premarked exhibits. To the extent Respondent is claiming surprise at those deadlines, that is not a claim supported by the record. Similarly, the exchange of witness lists deadline was not suggestive. In order to manage a multiday trial, to allow the 9 member Judicial Conduct Board, sitting as a Court *en banc*, to be fully prepared, and to avoid surprise to opposing counsel, witness lists were to be exchanged no later than March 13. One side complied; the other has not.

Respondent does not address his failure to provide the Board and Special Counsel with his witness list in his Reply to the Motion in Limine, except to note that he did respond to an interrogatory identifying persons with knowledge of the facts of the matter. That interrogatory response, never provided to the Board, is not the functional equivalent of a trial witness list. Respondent has further declined to attend a reconvened deposition on Sunday (the day before the trial starts) as "an unwarranted intrusion upon both Judge Kane and his counsel." This leaves the Board few options.

Accordingly, to the extent Special Counsel's Motion in Limine seeks to prohibit Respondent from calling witnesses in his case in chief other than those already identified by Special Counsel, that Motion is GRANTED.

We are not now presented with the question of whether Respondent may call to testify as yet unidentified individuals as rebuttal witnesses, having in mind the very limited circumstances in which rebuttal witnesses may be called. The Board declines to reach this issue unless and until it is presented.

The issue of a wholesale exclusion of Respondent's proposed exhibits A, C, F, M and Q presents somewhat different issues. First, these documents are a diffuse collection, and certainly are not all reasonably within the claim of attorney client privilege. Moreover, Respondent was the client and thus he could have recovered his file from his former attorney Christopher Moore at any time. Respondent did not need to wait for the Board's ruling of February 23, which was to allow Special Counsel access. That said, some of the proposed exhibits, particularly in Exhibit C, appear to be Probate court documents which Special Counsel may have obtained elsewhere. Others, such as Exhibit A, are not self-authenticating and may suffer from other evidentiary infirmities, particularly in light of the Board's ruling above prohibiting

Respondent from using undisclosed witnesses. Finally, the specific documents under this more focused Limine request are a small selection of Respondent's proposed exhibits, consisting of A: 13 pages, C: 5 pages; F: 3 pages; M: 1 page; Q: 5 pages (total 27 pages). To the extent that these 5 exhibits are the subject of the pending motion, the Motion in Limine to exclude them is DENIED WITHOUT PREJUDICE. Should Respondent actually seek to introduce any of these exhibits at trial, Special Counsel is free to object should he be so advised.

Perhaps most troubling in this 11th hour discovery battle is the representation by Counsel for Respondent that he possesses "four banker's boxes of documents" in contrast to Special Counsel's representation that less than 300 pages of materials were actually produced in response to his September 14, 2016 discovery requests. It is possible that Respondent was using hyperbole in describing his file. That said, Respondent did not produce any privilege log or file with the Board any Motion for Protective Order to prevent disclosure of all these documents. Without disclosure, there is no way to determine whether the documents would be exculpatory or inculpatory. As Special Counsel speculates, it is possible the documents would suggest other Code of Judicial Conduct violations. It is equally possible that they do not.

In accordance with the above, Special Counsel's Motion in Limine is GRANTED to the extent that Respondent may not use or reference any documents contained in the "four banker boxes" which have not previously been produced in discovery or in the proposed exhibits. V.R.C.P. 37(c). Moreover, the Board will offer the parties an opportunity to be heard on why the documents were not previously identified and what if any sanctions, to include document production and/or financial sanctions, would be appropriate

IT IS SO ORDERED.

Dated at St. Johnsbury, Vermont this 17 day of March, 2017.

VERMONT JUDICIAL CONDUCT BOARD

By: 
Steven A. Adler, Chair

c: Ian P. Carleton, Esq.
Melvin D. Fink, Esq.
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