109 PRB

[Filed 23-May 2008]

STATE OF VERMONT

PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No 2007.046

Decision No: 109

I. Facts/Background

Respondent is charged with making a false statement of material fact to a witness in the course of preparation for and litigation of a criminal trial in violation of Rules 4.1 and 8.4(c) of the Vermont Rules of Professional Conduct. The parties filed a stipulation of facts, as well as recommended conclusions of law and sanctions. The Respondent also waived certain procedural rights, including the right to an evidentiary hearing. The panel accepts the facts and the recommended sanction, and partially accepts the recommended conclusions of law. The Panel finds a violation of Rule 4.1, and orders that Respondent be privately admonished by Disciplinary Counsel. The charge of violation of Rule 8.4 is dismissed. Identical charges have been brought against Respondent's partner in practice, resulting in the same findings and conclusions. In re PRB File No 2007.046.

During the course of a serious felony trial, the partners received a letter from a person in another state alleging that he had information establishing the innocence of their client. The partners immediately made arrangements for an investigator to locate the witness and investigate his allegations. Their office also set up a telephone conference with the witness for late afternoon two days later. On that day, during an afternoon recess of the trial, the partners asked the judge for a continuance to complete their investigation. The judge gave them only until 8:30 the next morning.

The partners decided to tape the telephone interview with the witness. During the course of the interview the following exchange took place:

WITNESS: Are you recording this conversation”

RESPONDENT: No.

PARTNER: [My partner is] on speaker phone, so I can hear you, Mr. [witness].

The interview then proceeded until the partners had no further questions for the witness. The partners were mindful of the serious nature of the charges pending against their client, as well as the fact that this was their one opportunity to question a very important witness. Respondent was concerned that if the witness knew that he was being taped, he would terminate the interview, thus compromising the firm's ability to provide effective representation to their client.

In mitigation, there is no evidence of harm to the witness as a result of the false statement. Likewise, there is no evidence that the false statement was made for selfish purposes or with a dishonest motive. To the contrary, the partners' misrepresentation was apparently made for the sole purpose of providing a zealous defense of their client, to their own detriment. Furthermore, Respondent has cooperated fully with Disciplinary Counsel. There is one aggravating factor present; a prior disciplinary offense which resulted in admonition. The facts of that case bear no connection to the present.

II. Conclusions of Law

A. Background

Historically, the surreptitious recording of a conversation by a lawyer was generally prohibited. In its 1974 Formal Opinion No. 337, the ABA Committee on Ethics and Professional Responsibility stated that lawyers should not record conversations without the consent or knowledge of all involved. The ABA, however, made an explicit exception for prosecuting attorneys. ABA, Formal Op. No. 337 (1974). A substantial number of states accepted this general prohibition, with some variety in the exceptions allowed. Some states allowed only the ABA's prosecuting attorney exception. See, e.g., State Bar of Texas, Op. Nos. 514 (1995), 392 (1978). Others excepted both prosecutors and criminal defense attorneys from the general prohibition. See, e.g., State Bar of Arizona, Op. 90-02 (1990). This was typically done on the grounds that not to allow defense attorneys the same latitude as the prosecution would put them on unequal footing.

Interestingly, Oregon made a distinction between telephone conversations and in-person conversations, and Idaho between clients and other lawyers and witnesses. See Oregon State Bar Association, Op. No. 1991-74 (1991) (prohibiting secret recordings of in-person conversations, but allowing recording of telephone conversations); Idaho State Bar, Op. 130 (1989) (allowing recording of conversations with clients, but prohibiting recording of conversations with other lawyers and witnesses). Virginia went so far as to allow no exceptions to the prohibition. See Virginia State Bar, LEO 1635 (1995), 1324 (1990). Generally speaking, the rationale for the prohibition was that lawyers have a duty of candor, as expressed in each state's version of the ABA's now superseded Code of Professional Conduct and, specifically, DR 1-102(A)(4). See, e.g., Ohio SupCt., Formal Op. No. 97-3 (1997) (noting that DR 1-

102(A)(4)'s requirement that ?lawyers shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation@ required a general duty of candor). See also Vermont Professional Conduct Board Decision No. 73 (1994).

On the other hand, several states refused to prohibit lawyers from surreptitiously recording conversations. See Hawaii SupCt, Formal Op. No. 30 (Modification 1995); Mississippi Bar, Op. No. 203 (1992); New York County Lawyers' Association, Op. No. 696 (1993); Oklahoma Bar Association, Op. No. 307 (1994); Utah State Bar, Op. No. 96-04 (1996). The ABA itself came to share this position in 2001, when it formally revoked ABA Formal Opinion No. 337, and replaced it with Formal Opinion No. 01-422. That new opinion states that mere secret recording, where lawful, is not inherently deceitful and is, thus, ethically permissible. In support of its new position, the ABA cited the replacement of the Code of Professional Responsibility with the Rules of Professional Conduct, the widespread use of such recording by law enforcement and journalism, and the legality of recording of a conversation with the consent of one party in the overwhelming majority of states, as factors contributing to this change of position.

The ABA's change of position, however, was not an enthusiastic endorsement of secret tape-recording, and it noted in dicta that any misrepresentation as to whether a lawyer was tape-recording a conversation would most likely be a violation of Rule 4.1's general prohibition on misrepresentation. See Formal Opinion No. 337, at 6. It also declined to address application of the Rules to "deceitful, but lawful conduct by lawyers, either directly or through supervision of the activities of agents and investigators . . ." See ABA Formal Opinion No. 337, at 1.

It is tempting to resolve this case on that dicta alone and simply be done with this issue. However, the history of the old general prohibition on surreptitious recording and, more specifically, the development of the exceptions to that old rule, require us to address a few points. In particular, we must analyze the initial exception to the rule made for prosecuting attorneys, and the eventual development of its counterpart, the criminal defense attorney exception.

The ABA's original opinion prohibiting surreptitious recording of conversations had an exception for prosecuting attorneys. See ABA Formal Opinion No. 337, supra. Many states adopted the ABA's position exactly. As time passed, however, some states came to recognize that this rule gave prosecuting attorneys an unfair advantage over criminal defense attorneys. Noting that the truth "takes no side," and emphasizing constitutional rights, those states expanded the exception, applying it to criminal defense attorneys as well as prosecutors. See, e.g., Tennessee SupCt, Formal Op. No. 86-F-14(a) (1986) (?Truth is absolute and takes no sides. The defense should be given the same opportunity to assume its attainment.@); Kentucky Bar Association, Op. No. E-279 (1984) (Relying on the Sixth and Fourteenth Amendments to the United States Constitution as grounds, inter alia, for expanding the exception to criminal defense attorneys). It was clear to these states that secretly recording conversations is a powerful evidence-gathering tool, and that it was fundamentally unfair to give prosecutors access to this tool, while simultaneously denying similar access to defense attorneys.

That same logic applies in today's situation. If we are to hold that criminal defense attorneys such as Respondent cannot ethically misrepresent their recording of a conversation, so too should prosecuting attorneys be prohibited. To hold otherwise would give prosecuting attorneys the same unfair and unconstitutional advantage they enjoyed before the old exception to the old rule was finally expanded to criminal defense attorneys. Moreover, if we are to go further and prohibit criminal defense attorneys from advising agents on the misrepresentation of surreptitious tape recording, are we going to allow a double-standard for prosecuting attorneys advising law enforcement personnel?

As such, if we are to establish a bright-line rule that misrepresenting whether one is tape recording, or advising one's agent to do so, is per se unethical, it is paramount that this rule specifically applies to prosecuting attorneys as well as criminal defense attorneys. If we do not specifically prohibit prosecutors, as well as criminal defense attorneys, from engaging in this conduct, we invite the possibility of an unacceptable disparity between the tactics allowed for prosecutors and those allowed for criminal defense attorneys. Considering the fundamental importance of protecting a criminal defendant's rights, as enshrined in both the State and Federal Constitutions, such a disparity must not be allowed. The corollary, of course, is that if we are ever to allow prosecuting attorneys to misrepresent their secret tape-recording, or to advise their investigating agents to do so on their behalf, we have automatically allowed criminal defense attorneys to do the same.

Thus, the history of the ethical bounds on the surreptitious recording of conversations makes clear the potential for exceptions to develop that favor law enforcement over defense. To avoid that unfair and unconstitutional result, we emphasize that the holding we announce today applies equally to all attorneys throughout the criminal process, both defense and prosecution.

As to the issue of the ethics of attorneys advising investigating agents to do that which they themselves are prohibited from doing, that case is not before us today, and we do not address that issue. However, we would be remiss if we did not at least recognize the illogical inconsistency between forbidding a lawyer from misrepresenting the taping of a communication, while simultaneously permitting said lawyer to assent to and/or advise, either directly or tacitly, one in his charge to do the same.

Obviously, however, there is a counter-argument to that position, based on the interests of investigating and prosecuting crimes. Given that fact, if Vermont wishes to condone such conduct, we would recommend that Vermont follow the approach of Oregon which, when confronted with this issue in the aftermath of its ruling in In re Gatti, 8 P.3d 966 (2003)[1], amended that State's ethics rules to allow lawyers to advise and supervise others who engage in deceit and/or misrepresentation in certain limited situations.

B. Rule 4.1

Rule 4.1 of the Vermont Rules of Professional Conduct provides that "[i]n the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person." In the case before us, the fact of the taping was not insignificant. The witness was concerned about having his interview recorded, and Respondent believed that the interview would be terminated if the witness knew that he was being taped.

We wish to make it clear that it is the false statement to the witness, and not the undisclosed tape recording itself, that is the basis for the charge of a violation of Rule 4.1. We find one Vermont case on the issue of surreptitious recording, which was decided under the prior disciplinary Code. In that case, an attorney recorded an interview with a witness without telling the witness. The Professional Conduct Board found this to be "conduct involving a lack of candor and honesty in violation of DR 1-102(A)(4), stating also that "[w]e feel that an attorney should give the opportunity to the other party to consent to the tape recording prior to doing so." PCB Decision No. 73 (July 15, 1994). While that decision did not specifically cite it, the American Bar Association had issued Formal Opinion No. 337 in 1974, which held that an attorney could not ethically record anyone by electronic means without the prior knowledge of all parties to the conversation.

As previously discussed, in 2001, the ABA formally rejected Opinion No. 337, replacing it with Formal Opinion No. 01-422, in which it concluded that "the mere act of secretly but lawfully recording a conversation is not deceitful . . . ." In the wake of that opinion, a number of states have now changed course, declining to find a violation in the mere undisclosed electronic taping of a conversation. See, e.g., Utah opinion 96-04 (1996); Oklahoma Opinion 307 (1994); Maine Opinion 168 (1999); Michigan Opinion RI-309 (1998); Ohio Opinion 97-3 (1997).

We are persuaded that should the issue of surreptitious taping ever arise again in Vermont, we should and will follow the new ABA Formal Opinion.[2] In deciding this case, however, we recognize that it is not the fact of the undisclosed taping that is the alleged violation here, but rather the misrepresentation to the witness when he specifically asked if the conversation was being taped. We find this to be a violation of Rule 4.1.

The decision perhaps closest on point is Mississippi Bar v. Attorney ST, Op. No. 90-BA-0552, 621 So.2d 229 (1993). In that case, the respondent attorney, ST, was charged with violating Rules 4.1 and 8.4 of the Rules of Professional Conduct for surreptitiously taping conversations with a judge and police chief, and for telling the police chief that he was not taping the conversation, when in fact he was. The taping occurred after the attorney's criminal defendant client was found guilty by the judge ten days after the judge had informed the attorney that the prosecution had a problem proving its case. After the judge returned a verdict against the client, the attorney called the judge to inquire as to the reasons for his apparent change of heart. During that conversation, the judge informed the attorney that the police

chief and other city officials were "after" his client. ST, 621 So.2d at 231. The attorney then called the chief to verify that story. During that conversation, the chief asked the attorney if he was recording their conversation. The attorney denied that he was, despite the fact that he was, in fact, taping it. The chief apparently made some incriminating comments during the conversation, and the attorney subsequently brought a civil rights suit against the city and various city officials.

As a result of his conduct, the attorney was charged with violating Rules 4.1 and 8.4. He was originally tried before a complaint tribunal consisting of three judges. After hearing the evidence, the tribunal entered a judgment in ST's favor on the complaint and dismissed the charges. It held that restricting the actions of an attorney in ST's position "puts the attorney on the 'horns of a dilemma' by impeding his pursuit of the trust and the judicial process.." Id. at 230. It noted that to hold otherwise would result in an attorney in ST's position having "a distinct conflict of interest thrust upon him, requiring him to choose between his interests and those of his client." Id.

The Mississippi bar appealed the tribunal's decision to the Mississippi Supreme Court. While recognizing the extenuating circumstances the case presented, the Supreme Court reversed the decision of the tribunal in part, found that ST's conduct violated Rule 4.1, and issued him a private reprimand. ST was not found to be in violation of Rule 8.4.

The decision of the Mississippi Supreme Court is interesting, in that it was a plurality decision, with many justices filing dissenting and concurring opinions. Justices Smith and Banks, in a concurring opinion, recognized that the mere undisclosed recording of another person, even without a misrepresentation, could certainly be considered deceitful. Id. They then went on to state that given that the initial level of deceit was permissible, the tribunal judges had found it reasonable to allow an attorney to continue the deception "in the face of a direct question." They closed by indicating that their concurrence was premised on the understanding that the opinion would apply equally to prosecution and defense attorneys. Id.

On the other end of the spectrum were Justices Sullivan and Prather, who penned a separate opinion concurring in part and dissenting in part. Id., at 234-235. They took a hard-line view reminiscent of the ABA's position under the old Code. Stating that surreptitious taping, in and of itself, "is not only deceitful but dishonest and should be illegal," they called for an absolute ban on undisclosed taping both in the criminal and any other context. Id. at 234. They also made it clear that any lying by an attorney should be considered an ethical violation. Id. at 235.

The ST case does a very nice job of capturing the nuances of this issue, the competing policy considerations, and the various points of view. Clearly, certain powerful extenuating circumstances were at play during the interview that resulted in the misrepresentation in the present case. We are not convinced that all other competent criminal defense attorneys in the state would do differently, if confronted with the same set of facts. That said, as the Professional Responsibility Board, we cannot

countenance lying by attorneys. To do so would be to abdicate our responsibility, and to render the Rules little more than an empty shell. Rule 4.1 is clear on its face in prohibiting lawyers from making false statements to third parties. Respondent's conduct was in violation of that rule.

On the other hand, we also do not feel that we can totally ignore the extenuating circumstances in this case. Without trying to glorify the conduct in question, the Board does recognize that the partners not only acted unselfishly and in the best interests of their client, but actually put their client's interests above their own.

Balancing these competing interests and policies, and taking the lead of the Mississippi Supreme Court's ruling in ST, we find that a private admonition is appropriate under the circumstances.

C. Rule 8.4(c)

On the other hand, we do not find a violation of Rule 8.4, under which Respondent was also charged. Rule 8.4(c) provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." We decline to find a violation of this rule on the facts as presented to us. Clearly, there was a misrepresentation to the witness, in that he was told that the conversation was not being taped. However, taken in the context of the intent behind this Rule, the seriousness of the charges against the partners' client, and the extreme time pressure, we do not believe that this conduct rises to the level of the behavior found in recent cases in which a Hearing Panel found violation of Rule 8.4(c).

For instance, In re Coburn, PRB Decision No 102 (June 26, 2007), involved deliberate misrepresentations to three clients about the status of their cases over a substantial period of time, which caused injury to the clients. In re Harwood, PRB Decision No. 83 (Dec. 6, 2005), involved commingling and misappropriating client funds. No client lost money as a result of the commingling, but the conduct occurred over a seven-year period. In In re Griffin, PRB Decision No. 76 (May 12, 2005), the attorney forged a fee agreement that was purportedly between him and his client. In re Heald, PRB File No. 67 (June 15, 2004), involved failure to file income tax returns and making false statements on an attorney licensing statement. All of these cases involve other charges more specific to the exact nature of the misconduct, and all of them involve some level of deliberate and calculated deceit, as well as selfish motive. We simply do not believe that Rule 8.4 was intended to apply to the type of conduct involved in this case, and we decline to find a violation.

Cases from outside the jurisdiction and other authorities also support that view. See e.g. Isbell, D. and Salvi, L., "Ethical Responsibility of Lawyers for Deception by Undercover Investigator and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct," Georgetown Journal of Legal Ethics (Summer 1995). In that article, the authors recognize that Rule 8.4 is intended to apply only to conduct so egregious that it indicates that the lawyer charged lacks the moral character to practice law. Again, we do not feel that the conduct in question in the instant case rises to that level.

The charge of violation of Rule 8.4(c) is dismissed.

III. Sanction

We accept the recommended sanction of admonition by Disciplinary Counsel. It is consistent with both the ABA Standards for Imposing Lawyer Discipline and Vermont law.

Under the schema of the ABA Standards, it is necessary to look at the duty violated, the lawyer's mental state, any actual or potential injury, and the existence of mitigating or aggravating circumstances.

Section II of the ABA Standards discusses the general nature of the duty of a lawyer, stating that "[i]n determining the nature of the ethical duty violated, the standards assume that the most important ethical duties are those obligations which a lawyer owes to clients." It goes on the state that "[i]n addition to duties owed to clients, the lawyer also owes duties to the general public. Members of the public are entitled to be able to trust lawyers to protect their property, liberty and their lives. The community expects lawyers to exhibit the highest standards of honesty and integrity, and lawyers have a duty not to engage in conduct involving dishonesty, fraud, or interference with the administration of justice."

No duty to the client was violated in this case. The misconduct arises out the partners' determination to defend their client against serious criminal charges, and in so doing they violated their duty to the public. The two relevant sections of the ABA Standards are Section 5.13, which provides that "[r]eprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit or misrepresentation and that adversely reflects on the lawyer's fitness to practice law;" and Section 5.14, which provides that "[a]dmonition is generally appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law."

The severity of the recommended sanction under these two standards depends, in part, on whether the lawyer acted knowingly or negligently. We believe that the lawyers' collective mental state was more than one of mere negligence. However, the decision to make the misrepresentation to the witness must be put in its proper context. It was made two weeks into a felony trial, while interviewing a witness who claimed to have information about the innocence of their client, and facing an order from the judge that the trial resume the next morning. The entire focus of the pressured interview was motivated by the lawyers' duty to their client, and in that context their duty to the general public was breached. We do not intend to imply that the exigent circumstances justify the violation. They clearly do not. We believe, however, that they reflect on the mental state of the lawyers.

In addition, as analyzed more fully above in our discussion of Rule 8.4(c), we do not believe that their conduct rises to the level of dishonesty, fraud, or deceit, and we do not believe that Rule 8.4 applies in the present circumstances. Further, there was no injury to the witness. For these reasons, we do not believe that the sanction of reprimand suggested by section 5.13 is appropriate in these circumstances.

Further bolstering this opinion are the existence of mitigating factors. Respondent has cooperated with Disciplinary Counsel, ABA Standards '9.32(e), and Respondent did not act from any dishonest or selfish motive, ABA Standards '9.32(b). As mentioned above, the partners were motivated by a desire to establish the innocence of their client. Our decision is also not inconsistent with Rule 8(A)(5)(b) of Vermont Supreme Court Administrative Order 9 which provides: "Only in cases of minor misconduct, when there is little or no injury to a client,

the public, the legal system, or the profession, and where there is little likelihood of repetition by the lawyer, should an admonition be imposed."

Clearly there was no injury to the client and no evidence of injury to the witness. While misrepresentation to third parities should not always be deemed minor, we believe that in the context of the present circumstance, it is within this Rule.

Taking all of these factors into consideration, we accept the recommendation of the parties.

ORDER

Respondent shall be admonished by Disciplinary Counsel for violation of Rule 4.1 of the Vermont Rules of Professional Conduct. The charge of violation of Rule 8.4(c) is dismissed.

Filed: May 23, 2008 Hearing Panel No. 6

/s/

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Richard H. Wadhams, Esq. Chair

/s/

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Eric Johnson, Esq.

/s/

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Lisa Ventriss

[1]In Gatti, a lawyer representing several chiropractors made telephone calls to a medical review company, during which he represented himself as a doctor or chiropractor interested in the possibility of work with the company. Based on what he learned from those conversations, the lawyer filed a federal suit against the company for fraud. He was brought up on ethics charges for his misstatements, was found to have violated the rules of ethics, and was reprimanded. The court rejected the lawyer's arguments that an exception to the Rules should be recognized for certain types of misrepresentations, such as those involving suspected illegal activities. It held that the ethical rules were equally binding on all members of the bar, and there was no basis for permitting an exception that would allow any lawyer, in any circumstances, to engage in dishonesty.

[2]In this case, the act of taping has not even been made a basis for the charges.