140 PRB

[Filed 06-Jun-2011]

STATE OF VERMONT

PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2011.038

Decision No. 140

The parties have filed a Stipulation of Facts, proposed Conclusions of Law and a Recommendation for Sanctions. The Respondent waived certain procedural rights including the right to an evidentiary hearing. The panel accepts the stipulated facts and recommendations and orders that Respondent be admonished by Disciplinary Counsel for amending the *curriculum vitae* (hereinafter CV) of an expert witness whom he intended to call in a criminal proceeding. Disciplinary Counsel charged Respondent with violation of Rules 4.1 and 8.4(c) of the Vermont Rules of Professional Conduct. We find a violation of Rule 4.1. We do not find a violation of Rule 8.4(c) and that charge is dismissed.

Facts

In April of 2010, Respondent retained JS as an expert witness in a DUI defense. Prior to retaining her, he obtained from her a copy of her CV. In June of 2010, there was a civil suspension in the DUI case. JS was present but did not testify and the case was resolved at that time. Had the case not resolved, Respondent might have been precluded from calling JS since he had not disclosed her as a witness, and the Deputy State's Attorney objected on those grounds. The judge instructed Respondent that if in the future he intended to use an expert witness he would have to comply with the discovery rules and reveal the name of the witness.

Less than a week later, Respondent was retained to represent another client in a DUI. The same Deputy State's Attorney represented the state. By letter of July 27, 2010, Respondent disclosed to the Deputy State's attorney that he intended to call JS as an expert witness. In the letter he indicated that he had attached a copy of the expert's CV. The copy of the attached CV was not accurate due to the fact that Respondent had made several changes prior to sending it to the Deputy State's Attorney.

The CV which Respondent disclosed indicated that JS had testified in Vermont and had been previously qualified as an expert in Vermont. The CV that JS had provided to Respondent did not indicate that she had previously testified in Vermont or that she had been qualified as an expert in Vermont.

In addition, the CV that Respondent disclosed to the State, indicated that JS had experience with the "Datamaster" testing device. While it is true that JS had experience with the device, it was not included on the CV that she provided to Respondent.

On the day that Respondent sent the letter disclosing JS as an expert witness, he called a fellow criminal defense lawyer to ask about JS. The lawyer told Respondent that he had never used JS as a witness, but knew another Vermont lawyer who had. Respondent called the other lawyer who told him that she was "the real deal." Knowing that the second lawyer was an experienced DUI litigator, Respondent incorrectly assumed, without asking, that the lawyer had used JS as a witness in Vermont, and had also qualified her as an expert in Vermont. In fact the second lawyer had only consulted with JS.

After speaking with the second lawyer, Respondent reviewed JS's CV and noticed that it did not indicate that she had been qualified as an expert in Vermont or that she was an expert on the Datamaster. Respondent did not contact JS, since he knew that she was in Boston testifying on a case, nor did he contact the second lawyer with whom had had discussed JS. Instead, Respondent changed JS's CV to reflect that she had been qualified as an expert on Vermont and that she had experience with the Datamaster.

Respondent was anxious to notice JS as an expert. His client's civil suspension hearing was only nine days away, and he knew that he would be in Boston attending a conference on the discovery deadline date. Mindful of the judge's admonition in the previous DUI case, in which he had worked with the same Deputy State's Attorney, Respondent sent a letter to the State disclosing JS as an expert witness and attaching the altered copy of her CV.

A civil suspension hearing was held on August 5, 2010. Respondent called JS as a witness and asked "[a]nd you've been qualified as an expert in Vermont before?" JS answered "I don't think I've testified in Vermont. I've worked on a few Vermont cases." Later the Deputy State's Attorney had an exchange with JS in which it became clear that the CV that

Respondent had provided was inaccurate. Respondent never offered the CV into evidence at the hearing.

Respondent did not immediately inform the court what had happened. After the hearing he called the Deputy State's Attorney to apologize.

Respondent was admitted to the Vermont Bar in 2008. He has no prior discipline. He cooperated with Disciplinary Counsel's investigation and has expressed remorse for his conduct. Respondent did not intend to deceive the Deputy State's Attorney.

Conclusions of Law

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." The Rule is clarified by the Comment which states that "[m]isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."

When Respondent sent the altered CV to the Deputy State's Attorney, his letter stated "I have attached a copy of . . . [JS's] c.v. to this letter." Respondent did not qualify his statement or give any indication that he had altered the CV without confirming the changes with JS. By his failure to qualify the statement in his letter, Respondent was in essence telling the Deputy State's Attorney that "this is the CV that JS provided to me" when it was not. This was a false statement of fact and violates Rule 4.1.

Rule 8.4(c)

Rule 8.4(c) provides that "[i]t is professional misconduct for an attorney to engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

In a recent case, the Vermont Supreme Court discussed the scope of conduct which would violate this rule and the relationship of this Rule to Rule 4.1. The case involved two criminal defense attorneys who, while interviewing a potential exculpatory witness during a recess in a homicide trial, misled the witness about whether they were recording the telephone conversation. *In re PRB Docket Nos. 2007-046 and 2007-047*, 2009 VT 115(2009). The lawyers were charged with violation of Rules 4.1 and 8.4(c) . The Hearing Panel found a violation of Rule 4.1, since they had indeed made a false statement of material fact, but declined to find a violation of Rule 8.4(c). The Supreme Court affirmed.

In discussing the two rules the Court said: "[W]e are not prepared to believe that *any* dishonesty, such as giving a false reason for breaking a dinner engagement, would be actionable under the rules. Rather, Rule 8.4(c) prohibits conduct "involving dishonesty, fraud, deceit or misrepresentation" that reflects on an attorney's fitness to practice law, whether that conduct occurs in an attorney's personal or professional life." *Id*. at ¶ 12 (emphasis in original). In this case the Court did not find that the false statement made by the attorneys rose to the level of reflecting adversely on their fitness to practice law.

Here, Respondent made a false and misleading statement in his cover letter accompanying JS's altered CV. This meets the first test of the Supreme Court opinion. In order

to find a violation of Rule 8.4(c) we must also find that the conduct reflects adversely on Respondent's fitness to practice law.

The parties have stipulated that Respondent did not intend to deceive the Deputy State's Attorney nor do we find his actions to be dishonest or fraudulent. Thus, under Rule 8.4(c) we must determine whether Respondent's misrepresentation adversely reflects on his fitness to practice.

In cases where a violation of Rule 8.4(c) has been found, there has been a level of self-serving conduct and deliberate deceit that is missing in this case. In the case of *In re Griffin*, PRB Decision No. 76 (2005), the attorney forged a fee agreement. In *In re Heald*, PRB Decision No. 67 (2004) the attorney failed to file state income tax returns for three years and made false statements on his attorney licensing statement.

We find Respondent's actions, while clearly involving poor judgment, are more in line with those of the attorneys in *In re PRB Docket Nos. 2007-046 and 2007-047,* and we do not find a violation of Rule 8.4(c). He had made inquiries regarding JS's credentials and did not alter her CV with any intent to mislead the Court or the Prosecutor.

Sanction

We accept the parties' recommendation of admonition by Disciplinary Counsel.

Vermont Supreme Court Administrative Order 9 Rule (8)(A)(5)(b) 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 of repetition by the lawyer."

There is no evidence presented that there was any injury in this case. Respondent had been admitted for about two years at the time of the misconduct. We hope that this was a misguided action by a relatively inexperienced attorney and that it will not be repeated.

The sanction is also consistent with that imposed in *In re PRB Docket Nos. 2007-046 and 2007-047(2009)* cited above.

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.

Dated **June 6, 2011** Hearing Panel No. 9

/s/

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Shannon Bertrand, Esq., Chair

FILED 6/6/11

/s

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Alan P. Biederman, Esq.

/s/

William N. Scranton