

SUPREME COURT OF VERMONT

In re PRB Docket No. 2007-046 and In re PRB Docket No. 2007-047

2009 VT 115 (Vt. 2009) · No. 2008-214 & 2008-215 · Decided November 25, 2009

SUMMARY

The Vermont Supreme Court held that attorneys violated Vermont Rule of Professional Conduct 4.1 by falsely denying to a potential witness that they were recording a telephone conversation. The Court declined to find a separate violation of Rule 8.4(c), concluding that the rule applies only to dishonesty or misrepresentation reflecting adversely on a lawyer's fitness to practice. The Court affirmed the imposition of a private admonition and directed formation of a committee to consider possible exceptions for investigatory misrepresentations.

CASE DETAILS

COURT	Supreme Court of Vermont
WRITING FOR THE COURT	Skoglund, J.; Reiber, C.J.; Dooley, J.; Johnson, J.; Burgess, J.
JURISDICTION	Vermont
DECIDED	November 25, 2009
DOCKET	2008-214 & 2008-215
DISPOSITION	affirmed
PROCEDURAL POSTURE	The Supreme Court of Vermont reviewed, in its original jurisdiction, Professional Responsibility Board disciplinary decisions concerning two attorneys' misleading a potential witness about whether a telephone conversation was being recorded.
STANDARD OF REVIEW	The Court reviewed the disciplinary decision and reviewed the hearing panel's sanction decision deferentially.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Office of Disciplinary Counsel v. Respondent attorneys

TOPICS

[appellate procedure](#) [criminal procedure](#) [evidence](#) [statutory interpretation](#)

PRACTICE AREAS

[legal ethics](#) [attorney discipline](#) [professional responsibility](#) [criminal defense](#)

QUESTIONS PRESENTED

1. Whether the attorneys violated Vermont Rule of Professional Conduct 4.1 by knowingly falsely stating that a telephone conversation with a potential witness was not being recorded.
2. Whether the same conduct violated Vermont Rule of Professional Conduct 8.4(c), which prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation.
3. Whether a private admonition, also termed a private reprimand, was the appropriate sanction.

HOLDINGS

1. The attorneys violated Vermont Rule of Professional Conduct 4.1 because they knowingly made a false statement concerning a material fact to a third person during the representation of a client.
2. Rule 8.4(c) does not prohibit every dishonest, deceitful, or misrepresentative act; it reaches conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on a lawyer's fitness to practice law. The isolated deception in this case did not violate Rule 8.4(c).
3. The Court expressly declined to decide whether surreptitious recording, without an additional unethical act such as lying about the recording, violates Rule 4.1.
4. A private admonition, also called a private reprimand, was an appropriate sanction for the Rule 4.1 violation.

KEY QUOTATIONS

“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.” (¶ 12)

“Accordingly, we hereby privately reprimand respondents for violating Rule 4.1 by falsely denying that they were recording a telephone conversation with a potential witness.” (¶ 25)

FACTUAL BACKGROUND

The respondent attorneys represented a client in a serious criminal matter. During trial, a potential witness contacted them with information allegedly tending to establish the client's innocence, and the attorneys arranged a telephone interview that they recorded. When the witness asked whether the call was being recorded, one attorney falsely answered no and the other attempted to distract the witness without correcting the false statement. The disciplinary charges were based solely on the misleading statements, not on the otherwise lawful surreptitious recording.

PROCEDURAL HISTORY

A hearing panel of the Professional Responsibility Board found that both attorneys violated Vermont Rule of Professional Conduct 4.1 but did not violate Rule 8.4(c), and imposed a private admonition. The Office of Disciplinary Counsel sought review, agreeing with the Rule 4.1 finding but arguing that Rule 8.4(c) was also violated. The Supreme Court affirmed the panel's decision and the private reprimand.

DISPOSITION

affirmed

CASES CITED

- Mississippi Bar v. Attorney ST, 621 So. 2d 229, 233 (Miss. 1993)
- Fletcher Hill, Inc. v. Crosbie, 2005 VT 1, ¶ 17, 178 Vt. 77, 872 A.2d 292
- Robes v. Town of Hartford, 161 Vt. 187, 193, 636 A.2d 342, 346-47 (1993)
- State v. Ben-Mont Corp., 163 Vt. 53, 57, 652 A.2d 1004, 1007 (1994)
- Judicial Watch, Inc. v. State, 2005 VT 108, ¶ 14, 179 Vt. 214, 892 A.2d 191
- Apple Corps Ltd. v. International Collectors Society, 15 F. Supp. 2d 456, 475-76 (1998)
- In re Farrar, 2008 VT 31, ¶ 5, 183 Vt. 592, 949 A.2d 438
- In re Karpin, 162 Vt. 163, 173, 647 A.2d 700, 706 (1993) (per curiam)
- Anderson v. Hale, 159 F. Supp. 2d 1116, 1117 (N.D. Ill. 2001)
- People v. Wallin, 621 P.2d 330, 331 (Colo. 1981)
- Iowa Supreme Court Board of Professional Ethics & Conduct v. Plumb, 546 N.W.2d 215, 217-18 (Iowa 1996)
- In re Supreme Court Advisory Committee on Professional Ethics Opinion No. 697, 911 A.2d 51, 59 (N.J. 2006)
- Miano v. AC & R Advertising, Inc., 148 F.R.D. 68, 83 (S.D.N.Y. 1993)
- Rupard v. Astrue, 627 F. Supp. 2d 590, 596 (E.D. Pa. 2009)
- Washington v. Pierce, 2005 VT 125, ¶ 33, 179 Vt. 318, 895 A.2d 173
- Insurance Co. of Pennsylvania, 2009 VT 92, ¶ 12
- Coca Cola Bottling Co. of Northampton v. Commissioner of Revenue, 473 N.E.2d 187, 189 n.3 (Mass. 1985)