
In the Matter of the Disciplinary Proceedings
Against Stephen P. Hurley, Attorney-at-Law:

OFFICE OF LAWYER REGULATION,

Case No. 07 AP 478-D

Case Code: 30912

Complainant,

v.

STEPHEN P. HURLEY,

FILED

FEB 05 2008

Respondent.

CLERK OF SUPREME COURT
OF WISCONSIN

REFEREE'S REPORT AND RECOMMENDATION

PROCEDURAL HISTORY

1. On February 27, 2007, the Office of Lawyer Regulation ("OLR"), by Attorney William J. Weigel, filed a Complaint against Attorney Stephen P. Hurley ("Mr. Hurley").
2. On March 23, 2007, Mr. Hurley, by his attorneys, Boardman, Suhr, Curry & Field, by Attorney Claude J. Covelli, filed an Answer to the Complaint.
3. On April 11, 2007, by order of the Wisconsin Supreme Court, the undersigned was appointed referee in this matter.
4. On June 7, 2007, this referee issued a Scheduling Order, establishing a schedule for discovery and the filing of motions, as well as scheduling a hearing in this matter for December 10 and 11, 2007, at 450 S. Yellowstone Drive, Madison, Wisconsin 53719.

5. On August 3, 2007, OLR filed a Motion for Summary Judgment, with a supporting affidavit and brief, after having been granted an approximately week-long extension.

6. On September 12, 2007, Mr. Hurley filed a Brief in Opposition to OLR's Motion for Summary Judgment, with supporting affidavits.

7. On September 20, 2007, OLR filed a Reply to Mr. Hurley's brief, with a supporting affidavit.

8. On October 15, 2007, OLR filed its Witness List.

9. On November 7, 2007, this referee denied OLR's Motion for Summary Judgment.

10. On November 15, 2007, Mr. Hurley filed his Witness List.

11. On December 10 and 11, 2007, this referee presided over a hearing in this matter at 450 S. Yellowstone Drive, Madison, Wisconsin 53719.

FINDINGS OF FACTS

1. On September 4, 2003, the State of Wisconsin filed a criminal complaint against Gordan E. Sussman ("Mr. Sussman"), charging him with two counts of repeated sexual assault of the same child, two counts of exhibiting harmful material to a child, and sixteen counts of possession of child pornography. The charged offenses were punishable by imprisonment, with the maximum sentence approaching a life term.

2. Assistant District Attorney Jac Heitz (“ADA Heitz”) was assigned to prosecute the case, and Detective Bruce Frey of the City of Madison Police Department (“Detective Frey”) was assigned to investigate the case.

3. The sexual assault charges were based on the statements of a child named Scott, who was 9 years old at the time of the earliest charged offenses, 12 years old at the time of the latest charged offenses, and 13 years old when he reported the allegations.

4. The charges of possessing child pornography were based on images found on a computer used by Mr. Sussman at his place of business, Rutabaga Sports.

5. Mr. Sussman and Scott were acquainted through a mentoring program, and they spent time together at Mr. Sussman’s place of business.

6. On July 10, 2002, Detective Frey watched and listened to a Safe Harbor of Dane County representative interview Scott. At one point during the interview, Scott offered to show the interviewer and investigators pornography on Mr. Sussman’s office computer. He said he knew Mr. Sussman’s computer password and that Mr. Sussman left the office by 3:30 p.m.

7. After learning of Scott’s accusations, Mr. Sussman retained Hurley, Burish & Milliken to defend him. Mr. Hurley is a principal in the firm and was primarily responsible for Mr. Sussman’s case.

8. The present disciplinary proceedings concern an undercover investigation devised and supervised by Mr. Hurley during the course of his representation of Mr. Sussman. The investigation was designed to gather potentially exculpatory evidence on Scott's computer through the use of deception of purpose.

9. On July 16, 2002, a search warrant was obtained and computers from Mr. Sussman's home and office were seized. The office computer contained pornographic images involving children.

10. In the months leading up to August 24, 2004, Mr. Hurley began to doubt Scott's credibility and believed he was lying about his allegations against Mr. Sussman. The bases for his belief were as follows:

- Evidence he uncovered that Scott had previously made and threatened to make false accusations of sexual abuse against two male relatives, including his father. (Scott had admitted that the accusations against his father were untrue.)
- Evidence he uncovered that Scott had a history of accessing pornography on the Internet on his home computer and at school.
- Evidence he uncovered that Scott's family members and teachers considered Scott an untruthful person.

11. After obtaining this evidence, Mr. Hurley believed that Scott's computer could contain potentially exculpatory evidence. Scott had accused Mr. Sussman of forcing him to view child pornography and other harmful materials. Mr. Hurley believed that Scott had an independent interest in, and the ability to access, the materials he accused Mr. Sussman of showing him. Because Scott had

had access to Mr. Sussman's work computer, Mr. Hurley considered Scott's independent proclivity to view child pornography a key question in the case.

12. In the months leading up to August 24, 2004, Mr. Hurley believed that if given advance notice of Mr. Hurley's desire to examine his computer, Scott would destroy any evidence of wrongdoing on his computer. The bases for his belief were as follows:

- Evidence he uncovered that Scott sought and received advice from Rutabaga's IT department about how to delete "cookies" and other types of computer code that store the images one views on the Internet.
- Evidence he uncovered that Scott's mother's former roommate had helped Scott improve the performance of his home computer by deleting a large amount of material, much of which the former roommate alleged was pornographic.

13. Around this same time, Mr. Sussman's trial was set for February or March of 2005.

14. Prior to August 24, 2004, Mr. Hurley became suspicious of Detective Frey's intentions, believing him to be heavily biased toward Scott. The bases for his belief were as follows:

- Detective Frey referred to Scott as "my victim."
- Before formal charges were filed against Mr. Sussman, Mr. Hurley arranged a "book and release," a procedure in which the accused voluntarily goes to jail to be booked and is then immediately released to attend his initial appearance. Under this procedure, the first public notice of the charges is the filing of the Complaint at the initial appearance. Detective Frey was present at the booking. When Mr. Sussman and Mr. Hurley arrived at the initial appearance, news reporters and television crews were present.

- At a hearing in the criminal case regarding the chain of custody of Mr. Sussman's office computer, the testimony indicated that the computer had been stored in an evidence locker from the day it was seized, July 16, 2002, until August 23, 2002. On July 24, 2002, Detective Frey told a social worker that he had observed numerous images of child pornography on the computer. A subsequent analysis of the computer showed that many such images had been accessed on July 10, 2002, the day Scott was interviewed at Safe Harbor, when he offered to show the interviewer the pornographic images on Mr. Sussman's computer and revealed Mr. Sussman's computer password.
- For the first two years of the police investigation, Detective Frey did not seize or examine Scott's computer.
- Detective Frey never interviewed the two male relatives Scott had allegedly accused of molesting him.
- Scott accused Mr. Sussman of watching pornographic movies in front of him in a motel room. To Mr. Hurley's knowledge, Detective Frey made no effort to verify the availability of pornographic movies at the motel. Mr. Hurley's investigators interviewed the motel's manager and were told that such movies were not available at the motel.
- In preliminary hearings, Scott testified that Mr. Sussman was uncircumcised. Mr. Sussman is in fact circumcised. When Mr. Hurley brought this fact to the ADA's attention, according to a report by Detective Frey that Mr. Hurley had access to, Detective Frey spoke with Scott about the inconsistency. Scott thereafter changed his story, claiming he meant that Mr. Sussman was circumcised.

15. Mr. Hurley therefore did not trust Detective Frey to investigate Scott's home computer in a way that would prevent Scott from destroying evidence. Mr. Hurley also did not trust that if Detective Frey knew of Mr.

Hurley's suspicions regarding the computer, he would not provide Scott with advance notice of that fact.

16. Prior to August 24, 2004, Mr. Hurley retained a private investigator named Rikki Glen ("Ms. Glen") on Mr. Sussman's behalf. At Mr. Hurley's request, Ms. Glen contacted Scott and his mother and attempted to interview them. Scott and his mother refused to speak with her at length.

17. Mr. Hurley examined all judicial, discovery, and informal methods available to him to obtain Scott's computer. These methods are discussed at length in Section II, *infra*. Mr. Hurley decided that only one method had a chance of obtaining the evidence intact: a private investigation involving deceit.

18. Mr. Hurley designed the investigation to deceive Scott and his mother into giving Scott's computer to Mr. Hurley's agent. Mr. Hurley also supervised the investigation.

19. Before setting the investigation in motion, Mr. Hurley researched the lawfulness of the plan, as well as its appropriateness under the Wisconsin Rules of Professional Conduct for Attorneys. He also surveyed attorneys inside and outside his firm and noted the practice in Wisconsin of public and private attorneys conducting similar investigations without sanction. He did not, however, call the Wisconsin State Bar ethics hotline. His research took approximately two months. Mr. Hurley concluded that the investigation would be lawful and ethical.

20. At this time, Mr. Hurley believed that his obligation to provide Mr. Sussman with effective assistance of counsel under the Sixth Amendment to the U.S. Constitution required him to attempt the investigation.

21. Mr. Hurley retained Sheridan Glen ("Mr. Glen") on Mr. Sussman's behalf to conduct the investigation.

22. A letter was drafted to Scott on Thermetric letterhead, a company of which Mr. Glen is a part owner. The letter approved by Mr. Hurley, except for the signature, read as follows:

August 23, 2004

Mr. Scott #####
960 Joliet Rd.
Lot #8
Valparaiso, IN 46385

Thermetric, Inc., a consulting company, is conducting research into computer usage preferences of students and young adults, ages 13 to 21. In order to accomplish our research goals, we offer you, as participant, new computer equipment, which is to be used for a predetermined period, after which we observe your program usage patterns.

You have been selected to receive a brand new Hewlett Packard laptop computer, free of charge.

Here is how the program works: you will simply swap your existing computer with the new model, (a receipt will be given you) which you will then use in your normal computer activities for ninety days. During this period, your current computer will be stored. We ask that you use only this new computer during this time. At the end of the period, we will contact you again and you may then return the computer in exchange for your old unit, or keep the new one, free of charge.

This risk free program allows our company to perform valuable market analysis and, as a young student invited, the new computer is your reward for participation.

We look forward to contacting you within the next several days.

Sincerely,

Glen Sheridan
Phone: 217-741-3567

See Complainant's Exhibit 1.

23. Mr. Hurley instructed Mr. Glen to use Thermetric's real name, address, and telephone number.

24. Without Mr. Hurley's knowledge, Mr. Glen reversed his first and last name on the letter before sending it to Scott, such that his name appeared as "Glen Sheridan" on the letter actually sent to Scott.

25. Mr. Hurley arranged for someone to purchase the new laptop computer that would be given to Scott.

26. Mr. Hurley instructed Mr. Glen not to approach Scott, when he visited Scott's home to exchange the computers, unless Scott's mother was present. Mr. Hurley also instructed Mr. Glen to give Scott an opportunity to remove anything he wished from the old computer before making the exchange.

27. On August 24, 2004, with Scott's mother present, Mr. Glen met with Scott and exchanged Scott's old desktop computer for the new laptop. After proposing the exchange to Scott, Mr. Glen went outside to afford Scott the opportunity to erase from his computer whatever he wanted.

28. At the time of the exchange, Scott lived with his mother in Indiana, and he was 15 years old. He had previously lived away from his mother for periods of time. His mother, a recovering alcoholic, had not had a drink for approximately one year.

29. That same day, as Mr. Hurley instructed, Mr. Glen delivered Scott's computer to a forensic computer specialist in Milwaukee, Wisconsin, and authored a memorandum regarding the computer exchange and the chain of custody of Scott's computer. *See Complainant's Trial Exhibit 4.*

30. The forensic computer specialist analyzed Scott's computer and found it to have a small hard drive, which caused the computer frequently to write over its oldest contents. Nevertheless, numerous pornographic images involving adults, children, and animals were found on the computer, having been accessed in April 2004. The forensic computer specialist prepared an email report and submitted it to Mr. Hurley on September 15, 2004.

31. After the computer exchange, Scott and his mother became suspicious and contacted the District Attorney's Office. Detective Frey investigated and determined that the "Glen Sheridan" who visited Scott's home was actually Mr. Glen, a private investigator employed by Mr. Hurley and Mr. Sussman. Mr. Glen's identity was confirmed, at least in part, by Scott's mother's identification of Mr. Glen from his photograph in a photo array presented by Detective Frey.

32. Having confirmed that Scott's computer contained images of child pornography, Mr. Hurley and his forensic computer specialist recognized that possession of the computer could be criminal. On September 16, 2004, Mr. Hurley contacted ADA Heitz to inform him of the investigation and its results and to attempt to negotiate a protective order regarding the computer. Lengthy negotiation and litigation ensued.

33. On September 23, 2004, District Attorney Brian Blanchard ("DA Blanchard") filed the grievance against Mr. Hurley which is the subject of these proceedings.

34. Prior to Mr. Sussman's trial, the parties litigated the admissibility of the contents of Scott's old computer. The Court ruled that because the evidence related to Scott's activities in 2004, the evidence was too remote in time from the charged offenses to be relevant. It appears that the manner in which the evidence was obtained was not a factor in the Court's ruling. Ultimately, the evidence was not offered or received.

DISCUSSION

In its Complaint, OLR alleges that Mr. Hurley violated SCR 20:4.1(a) and 8.4(c) of the Wisconsin Rules of Professional Conduct for Attorneys (“the Rules”) vicariously through SCR 20:5.3(c)(1) and 8.4(a). OLR bears “the burden of proving its allegations by clear, satisfactory and convincing evidence.” SCR 22.16(5). The evidence must be, when weighed against opposing evidence, clearly more convincing.

I. **STEPHEN HURLEY DID NOT VIOLATE SCR 20:4.1(A), DIRECTLY OR VICARIOUSLY.**

Rule 4.1(a) demands the following:

In the course of representing a client a lawyer shall not knowingly make a false statement of a material fact or law to a third person.

SCR 20:4.1(a) (2003-04).¹ Therefore, to violate the Rule, (1) one must be acting during the course of representing a client, (2) the false statement must be made knowingly, (3) the false statement must be one of material fact or law, and (4) the false statement must be made to a third person. It is undisputed that Mr. Hurley did not violate this Rule personally. Thus, in order to find that Mr. Hurley violated Rule 4.1(a), Mr. Glen must have violated this Rule. The violation could then be imputed to Mr. Hurley via Rules 5.3(c)(1) and 8.4(a). This referee finds that Mr. Glen did not violate Rule 4.1(a).

¹ All references to the Wisconsin Rules of Professional Conduct for Attorneys are to the 2003-04 version unless otherwise noted.

While the record is clear that Mr. Glen made false statements of fact knowingly, Mr. Glen was not acting in the capacity of an attorney at the time he made the false statements at issue. He was acting as a private investigator. On the face of Rule 4.1(a), it is unclear how anyone other than an attorney could form the basis for another attorney's violating this Rule vicariously.

The record is also clear that Mr. Glen made false statements to a third person, in fact two people, Scott and his mother, Joanne McDonald ("Ms. McDonald"). However, the statements he made did not contain material facts. The parties have not cited and this referee is not aware of any authority defining materiality for purposes of Rule 4.1. Instead, the only in-state authority cited to this referee was *State v. Sullivan*, 216 Wis. 2d 768, 785-86 (Wis. 1998), in which the Wisconsin Supreme Court defined the concept of materiality for purposes of the law of evidence. In that case, the Court stated that for a fact to be material, it must be "of consequence" to the charged offense. *Id.* This referee will use the *Sullivan* definition when applying Rule 4.1(a) until the Wisconsin Supreme Court mandates otherwise.

In the present case, Mr. Glen has admitted to deceiving Scott and his mother as to his identity and purpose.² He told them his name was "Glen Sheridan" and that he wanted to store Scott's computer to ensure Scott only used

² It should be noted that the record indicates Mr. Glen misrepresented his identity to Scott and his mother without Mr. Hurley's knowledge, much less ratification. The evidence showed that Mr. Hurley thought Mr. Glen was going to use his real name and the real name and letterhead of Mr. Glen's company, Thermetric, Inc.

the new laptop provided him during the 90-day survey period. These facts were not material to the underlying criminal case against Mr. Sussman. These facts were not “of consequence” to the charged offenses. Whether Mr. Glen’s last name was “Glen” or “Sheridan” in no way had the potential to influence the outcome of Mr. Sussman’s case. The same can be said for the purpose Mr. Glen professed to have to Scott and his mother. Whether Mr. Glen sought Scott’s old desktop for a focus group or for forensic examination also had no potential to influence the outcome of Mr. Sussman’s case.

The only two binding cases cited by OLR to support its theory of the case, *In the Matter of Disciplinary Proceedings Against Wood*, 190 Wis. 2d 502 (Wis. 1995), and *In the Matter of Disciplinary Proceedings Against Sandy*, 200 Wis. 2d 529 (Wis. 1996), are inapposite. In *Wood*, the attorney instructed a private investigator to engage in unlawful conduct. OLR did not introduce any evidence that Mr. Hurley’s investigation involved unlawful conduct.³ In *Sandy*, the attorney personally lied to the Clerk of Courts, saying that he was a child’s attorney, in order to obtain that child’s confidential court records. The attorney thereafter lied to the Court about how he obtained the information, as he was attempting to use the information in court against the child for the benefit of his criminal defendant client. Mr. Hurley’s conduct does not come close to such deplorable behavior.

³ DA Blanchard testified that in 2004, he referred Mr. Hurley’s conduct to the Milwaukee County District Attorney. However, as of the date of the hearing in this matter, no criminal charges had been brought against Mr. Hurley.