

5007-W-1002

BEFORE THE DISCIPLINARY BOARD OF THE  
SUPREME COURT OF THE STATE OF NORTH DAKOTA

**In the Matter of the Application for Disciplinary Action Against Cynthia M. Feland,  
A Member of the Bar of the State of North Dakota**

Disciplinary Board of the Supreme Court  
of the State of North Dakota

File No. 5007-W-1002

Petitioner,

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
RECOMMENDATION FOR SUSPENSION**

vs.

Cynthia M. Feland,

Respondent.

THIS MATTER came before a hearing of the Disciplinary Board of the North Dakota Supreme Court on June 29 and 30, 2011, in Bismarck, North Dakota, before the hearing panel of Don B. Eppler, Chair; Daniel M. Traynor; and Dan Ulmer. Cynthia M. Feland was present with her Attorney of Record, Ronald F. Fischer. Also present was Disciplinary Counsel Paul W. Jacobson. The Hearing Panel heard the testimony of Michael R. Hoffman, Kim Bless, Richard Riha, Jason Wahl, Rozanna C. Larson, Aaron Birst and Respondent Feland and received Exhibits 1 through 22, and A through T. Based upon the pleadings, evidence, and post-hearing written arguments of Disciplinary Counsel and Respondent, the hearing panel makes the following Findings of Fact, Conclusions of Law and Recommendation for Suspension:

**FINDINGS OF FACT**

1. Cynthia M. Feland was admitted to practice as an attorney at law in the courts of North Dakota, on January 18, 1991, and her name has appeared since that date on the

roll of attorneys admitted to the Bar of North Dakota as maintained by the Supreme Court of North Dakota.

2. Throughout her legal career, Feland has worked as a trial attorney, handling an estimated 300 jury trials, nearly 100 appeals and numerous other bench trials and hearings. She has extensive experience as a prosecutor and has had no prior reported violation of the Rules of Professional Conduct.

3. Because of her experience, Feland, as Burleigh County Assistant State's Attorney, was selected to prosecute the case of *State of North Dakota vs. Charles Blunt*, Burleigh County Case No. 07-K-789. The criminal complaint alleged the violation of N.D.C.C. 12.1-23-07, misapplication of entrusted property. After a trial to a jury, Charles Blunt was convicted of one count of misapplication of entrusted property.

4. One of the witnesses called by the prosecution in support of the allegation of misapplication of entrusted property was Jason Wahl, a senior performance auditor with the Office of the State Auditor. Part of Wahl's testimony related to the assertion of the prosecution that Blunt, as Executive Director of Workforce Safety and Insurance, had violated the misapplication of entrusted property statute through his failure to collect back moving expenses, pursuant to an employment agreement between Workforce Safety and David Spencer.

5. At sometime prior to the trial of Blunt, Feland requested and received a memorandum from Wahl, dated November 8, 2007, with the "re" line reading "Information Related to Dave Spencer Leaving." The memorandum contained Wahl's rendition of the State Auditor's interactions with WSI executive Blunt and others concerning whether moving expenses paid to Dave Spencer would, or should, be paid

back by Spencer because of his leaving employment with WSI. The last sentence in the memo says "Due to the new information provided by Mr. Blunt, we determined, in consultation with a representative of the Attorney General's Office, there was not a voluntary resignation so it was determined to drop the recommendation we had drafted."

6. In the course of the representation of Mr. Blunt in the criminal matter, his attorney, Michael Hoffman, propounded a Request for Discovery and Request for Notice of Prosecution's Intention to Use Evidence, dated and served on April 19, 2007. At least three separate responses were made by Feland, on behalf of the State's Attorney's office, to this request. Later, on August 14, 2008, Hoffman served an Amended Request, to which Feland responded with supplementation over the course of the criminal case before trial. Finally, on November 24 and November 26, 2008, Hoffman sent letters to Feland requesting further discovery updates. Although Feland acknowledges that the Wahl memo should have been provided by her to Attorney Hoffman with the supplemental responses that were made to these discovery requests, it was not provided.

7. The Wahl memo would have been of assistance to Attorney Hoffman in the defense of the case, as it addressed the question of whether the Spencer expenses were recoverable by WSI. The Wahl memo contained information that tended to negate the guilt of the accused. Attorney Hoffman could have used the memo in the course of his cross-examination of Wahl related to the Spencer moving expenses. It is noteworthy that Jason Wahl was the State's first witness in the prosecution of Mr. Blunt.

8. The criminal complaint which had been lodged against Blunt in April of 2007 alleged merely that Blunt had committed the crime of misapplication of entrusted

property, without specifying any particular acts. The Response to and Request for Discovery and Notice of Intent to Use Evidence signed by Feland on May 10, 2007, did not identify Dave Spencer in the list of the names of all prospective prosecution witnesses.

9. There was no reference to the failure to recover the Spencer moving expenses at the preliminary hearing in the Blunt criminal matter held on August 7, 2007.

10. The matter was dismissed by the district court, but appealed by the State's Attorney. While the appeal of the dismissal was pending, the State apparently continued its investigation of Blunt relating to the failure to recover the Spencer moving expenses. It was during this time that Feland sought and received the memo from Wahl. During the period of time that the criminal case was dismissed and on appeal, Feland held, rather than send to Blunt's defense lawyer, the documents she received as a result of the State's further investigation, including the Wahl memo. When the supreme court returned the case to district court, Feland provided Attorney Hoffman with some documents that had been received during the appeal period, but there is no evidence that the full investigative reports and Wahl memo accumulated by Feland during the appeal were provided to Attorney Hoffman.

11. In the weeks before trial, it is significant that Hoffman sent Feland two letters specifically requesting law enforcement interviews. In Hoffman's letter of November 24, 2008, he requested "all law enforcement interviews with potential witnesses which have not been previously provided." Feland states that she understood Hoffman's request to mean recorded interviews. In a hand-delivered letter, dated November 26, 2008, Feland provided Hoffman with transcripts that were previously provided to him and

stated "the only interviews that were taped were those of Angie Scherbenske and Jim Long which have already been provided to you." By responsive letter, mailed on November 26, 2008, Hoffman again requested Feland provide "all law enforcement *written reports of* interviews with potential witnesses which have not previously been provided." (Emphasis added). Feland acknowledged she failed to notice Hoffman's specific request for written reports and did not respond to it. (Feland Tr. Vol. 2 at 301-302). She further acknowledged this was her error. (Feland Tr. Vol. 2 at 393-399).

12. The investigative reports that were not provided to Hoffman included reports from BCI Agent Quinn that were obtained by the State during the time when the criminal case was on appeal from the trial court's dismissal. Included in those documents was a report that Agent Quinn spoke with Auditor Wahl, and Wahl basically repeated the same language that is in the Wahl memo to Feland of November 8, 2007.

13. During the course of Feland's examination of Wahl during the Blunt trial, Feland solicited testimony from Wahl as follows:

Q: How much did WSI expend in moving expenses for Mr. Spencer?

A: \$15,929.59.

Q: Okay. So under the terms of the letter that was sent to Mr. Spencer and based on his resignation date, what did Mr. Spencer – what was he responsible for paying back?

A: Fifty percent of that, so \$7,964.80.

(Blunt Tr. 132). Through this testimony, Feland elicited testimony from Wahl that Spencer was obligated to reimburse the State for his moving expenses, although Wahl's memo to Feland showed the auditors, after consultation with the Attorney General's

office, had concluded the resignation was not voluntary so the recommendation was dropped from their report.

14. Feland also brought out testimony that Wahl, or the auditors ("you guys"), had talked to the Attorney General's office about the Spencer moving expenses (Blunt Tr. 133). Feland then elicited testimony from Wahl that when Blunt was presented with the Attorney General's opinion, he told Wahl that he didn't care and that they (WSI or Blunt) believed they couldn't pursue collection of the moving expenses from Spencer (Blunt Tr. 134). This colloquy between Feland and Wahl would have left the jury with the false impression that the ultimate position of the Attorney General's office was that the Spencer moving expenses could or should have been pursued by Blunt.

15. During Attorney Hoffman's examination, Wahl was asked "If his leaving was involuntary, then your opinion as a state auditor is that the recoupment of relocation or moving expenses would be a moot point. Correct?" To which Wahl responded "I guess that would relate to a legal question, so we would present the information that we had available to us at the time and contact our legal counsel, which is the Office of the Attorney General." Because he had not been provided with the Wahl memo, that expressly stated the fact, Attorney Hoffman did not know there had been a second consultation with the Attorney General's office by the Auditors, which led to the auditors dropping the issue of the Spencer moving expenses. Wahl's answer to Attorney Hoffman's question did not alert Hoffman to the fact that there had been such a consultation; in fact by answering the question the way he did, the jury could reasonably be led to believe there was no such consultation.

16. In Feland's initial response to Attorney Hoffman's discovery request, a large number of documents, including what is called a C99 document, were provided. C documents, such as the C99, are working papers of the State Auditor's office, used in the course of an audit to make notes. They are computer printouts, which ultimately contain handwritten entries by the auditors.

17. Hoffman claims the C99 document received by his office did not contain any handwriting. It did contain lined-out typewritten information concerning the Spencer moving expenses. It also contained typewriting which was not lined out. It said "Eventually we were told (and convinced) the separation was other than voluntary." Significantly, at the time disclosure of the C99 document was made to Hoffman, the state did not indicate an intention to call Spencer as a witness. See Response to and Request for Discovery and Notice of Intent to Use Evidence, dated May 10, 2007.

18. Feland presented information in support of a contention that she provided a C99 document with the initial discovery response which contained the handwriting "based on discussions with Attorney General's office determination was made the separation was other than voluntary; letter offering position requires 50% pay back if leave voluntarily in first 2 years." She also presented information that a copy of this C99 document was obtained before trial by a supporter of Blunt and by Blunt, himself, shortly before the trial.

19. The distinction between the C99, with or without handwriting, and the Wahl memo is that the memo was, self-evidently, authored by Wahl, who testified at the Blunt trial, while the C99 did not contain the name of the author of the information contained in it or the date when such information was written on the document. The C99 was

produced by the Auditor's office sometime in 2006, at the time of the audit of WSI, whereas the Wahl memo was prepared on November 8, 2007, when the criminal charges were pending (on appeal) against Blunt.

**CONCLUSIONS OF LAW**

1. Respondent's motion to dismiss and/or for summary judgment, renewed prior to the commencement of the hearing on June 29, 2011, is denied. The recent North Dakota Supreme Court decision in *State v. Blunt*, 2011 ND 127, 799 N.W.2d 363, is not dispositive of the issue in this case. The issue before the North Dakota Supreme Court was whether the potential *Brady* violation by the State entitled Mr. Blunt to a new trial. See also *Brady v. Maryland*, 373 U.S. 83 (1963). The issue in this matter is whether the Respondent violated Rule 3.8 of the North Dakota Rules of Professional Conduct.
2. Rule 3.8, N.D.R.Prof.Conduct, does not state that an intentional act is required for a violation. In explaining the difference between a prosecutor's duty under *Brady* and Rule 3.8, commentators have observed the following:

"Model Rule 3.8(d) requires a prosecutor to make timely **voluntary** disclosure to defense counsel of **all** favorable or mitigating evidence, including information relevant to sentencing. This professional ethical duty is considerably broader than the constitutional duty announced in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, including *Giglio v. United States*, 405 U.S. 150 (1972); and *United States v. Bagley*, 473 U.S. 667 (1985). Under those cases, a conviction will be overturned if the prosecutor does not disclose evidence helpful to the defense (including evidence useful for impeachment), but the constitutional rule is inapplicable unless the evidence in question is **material**, which has been interpreted to mean that 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different[']; *Bagley*, 473 U.S. at 682. Under this test, 'a reasonable probability' is 'a probability sufficient to undermine confidence in the outcome.' The extent to which the defense has made a request for *Brady* material, and the specificity of that request, also factor into the constitutional equation.

“By making the prosecutor’s duty broader and also self-activating, Model Rule 3.8(d) presses beyond *Brady*, continuing the requirements of DR 7-103(B) of the Code of Professional Responsibility, as well as most of the requirements set forth in the ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function, Standard 3-3.11.”

2 Geoffrey C. Hazard & W. William Hodes, The Law of Lawyering, § 34.6 (3d ed. Supp 2009) (emphasis retained).

3. The Panel concludes Cynthia M. Feland did not disclose to Michael Hoffman, defense attorney for Charles Blunt, the Wahl memo, and other documents which were evidence or information known to the prosecutor that tended to negate the guilt of the accused or mitigate the offense.

4. Consistent with the opinion of commentators noted above, the Panel concludes that Rule 3.8 is self-activating and a violation does not require an intent to avoid disclosure on the part of a prosecutor. In reaching this conclusion, the Panel acknowledges that Feland has provided interpretations from other states where courts have read an intentional standard into their rule where there is none. *See, e.g., Lawyer Disciplinary Bd. v. Hatcher*, 483 S.E.2d 810, 818 (W.Va. 1997) (holding “a prosecutor, who knowingly fails to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . runs the risk of violating . . . Rule 3.8”); *In re Attorney C*, 47 P.1167, 1174 (Colo. 2002) (choosing to read Rule 3.8 itself as “including the mens rea of intent” . . . “because we do not wish the possibility of a grievance proceeding to permeate every discovery dispute in criminal cases”).

5. The drafters of the Rules of Professional Conduct know how to include a standard of intent in our professional rules when one is needed. For instance, Rules

3.3, 3.4(c), and 3.6(a) all include a knowing requirement. Rule 3.8(d) contains no knowing requirement. It places a special duty on prosecutors to act and it is a duty that is in the interest of justice. See The Law of Lawyering, *supra* at § 34.6 (observing a prosecutor's role is that of a modified adversary in our system to "ensure fairness to the accused," which will enhance public trust in our system of criminal justice). Therefore, the Panel concludes a violation of Rule 3.8, N.D.R.Prof.Conduct, does not require a prosecutor to knowingly withhold evidence. Where a prosecutor fails to timely disclose information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense, it is a violation of the rule.

6. However, even when an intent requirement is implied, we conclude that a violation of Rule 3.8 has occurred in this case. The State Attorney's office tracked disclosure through numerous discovery checklists to Hoffman. This very good procedure would have allowed the State to confirm that everything had been provided to defense counsel. However, despite repeated requests by Hoffman to review the disclosures, no effort was made by Feland to ensure that the Wahl memo and other important documents were listed on discovery checklists. Given the repeated requests by Attorney Hoffman, the failure by Feland to disclose the Wahl memo was so reckless as to constitute a knowing disregard of the discovery requirement contained in Rule 3.8. Accordingly, the Panel concludes Cynthia M. Feland either knew or should have known that the Wahl memo was not provided to defense attorney Michael Hoffman.

7. The above conduct of Cynthia M. Feland violates the following rule:

N.D.R. Prof. Conduct 3.8(d), which provides, in part, the prosecutor in a criminal case shall disclose to the defense at the earliest practical time all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.

8. The Hearing Panel considered North Dakota Standards for Imposing Lawyer Sanctions:

North Dakota Standards for Imposing Lawyer Discipline 5.12, which provides suspension is generally appropriate when a lawyer knowingly engages in conduct which does not contain the elements listed in Standard 5.11 but that seriously adversely reflects on the lawyer's fitness to practice.

North Dakota Standards for Imposing Lawyer Discipline, in Standard 5.22, which provides suspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.

North Dakota Standards for Imposing Lawyer Discipline 6.12, which provides, in part, suspension is generally appropriate when a lawyer knows that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

North Dakota Standards for Imposing Lawyer Discipline 6.22, which provides suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

9. The Hearing Panel also considered North Dakota Standards for Imposing Lawyer Discipline 9.32 (a) absence of a prior disciplinary record and (g) character or reputation.

**RECOMMENDATION FOR SUSPENSION**


The Hearing Panel recommends to the North Dakota Supreme Court that Cynthia M. Feland be SUSPENDED from the practice of law for sixty (60) days and that she be ORDERED to pay the costs of the disciplinary proceeding in the amount of \$11,272.21.

BY THE DISCIPLINARY BOARD  
OF THE SUPREME COURT,  
STATE OF NORTH DAKOTA:

DATED November 1st, 2011.

  
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Don B. Eppler  
Chair, Hearing Panel

DATED November 1, 2011.

  
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Daniel M. Traynor  
Member, Hearing Panel

DATED November 24<sup>th</sup>, 2011.

  
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Dan Ulmer  
Member, Hearing Panel