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BAR ASSOCIATION
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VIA EMAIL ONLY

August 7, 2020

Anne K. Block
115 West Main St Suite 204
Monroe, WA 98272

Re: Grievance by Anne K. Block against Michelle L. Rutherford
ODC File No. 19-01805

Dear Ms. Block:

This letter is to advise you that we have completed our investigation of your grievance against lawyer Michelle L. Rutherford and to advise you of our decision. The purpose of our review has been to determine whether sufficient evidence exists on which to base a disciplinary proceeding. Under the Washington Supreme Court's Rules for Enforcement of Lawyer Conduct (ELC), a lawyer may be disciplined only on a showing by a clear preponderance of the evidence that the lawyer violated the Washington Supreme Court's Rules of Professional Conduct (RPC). This standard of proof is more stringent than the standard applied in civil cases.

Based on the information we have received, insufficient evidence exists to prove unethical conduct by Ms. Rutherford by a clear preponderance of the evidence in this matter. Therefore, we are dismissing the grievance. Our decision to dismiss the grievance is based on a review of your original grievance received on December 30, 2019, Ms. Rutherford's March 6, 2020 response, the additional materials we received from you on January 8, 2020 and May 2, 2020, an interview with Snohomish County Prosecuting Attorney Adam Cornell, and a review of the record in *State v. Keland Guinn*, Snohomish County Superior Court No. 19-1-0043-31.

Your grievance is based on news reports of a decision by Snohomish County Superior Court Judge Anita Farris in *State v. Guinn*. In her decision, Judge Farris made several findings highly critical of Snohomish County Deputy Prosecuting Attorney Rutherford, who represented the State of Washington in that case. While Ms. Rutherford clearly made some mistakes in her handling of the case, which she freely admits, we do not believe the evidence shows that she knowingly misled the court or otherwise violated the RPC.

On February 28, 2019, Keland Guinn and Emma May were charged in the Snohomish County Superior Court with first degree robbery. Ms. Rutherford represented the State, Elbert Aull represented defendant Guinn, and Coleen St. Clair represented defendant May. The two defendants were alleged to have participated in an armed drug robbery at a school. During the investigation, several firearms were seized.

The case was scheduled for trial on May 31, 2019. During much of the time the case was pending, Ms. Rutherford was absent, due first to her own medical issues, and then to the death of her father. Ms. Rutherford admits that she was "woefully behind" when she returned from her bereavement leave shortly before trial, and that she was "not doing very well" emotionally. For a variety of reasons, Ms. Rutherford did not believe that *State v. Guinn* would go to trial as scheduled, so it was not her highest priority when she returned to work.

On May 29, 2019, however, Ms. Rutherford learned, to her surprise, that Mr. Guinn's lawyer wanted to proceed to trial as scheduled in two days' time. This presented Ms. Rutherford with a number of urgent problems. Among these were that discovery had not been completed, that evidence had not been sent for forensic testing, and that no plea agreement had been reached with Mr. Guinn's co-defendant, Ms. May, whose testimony was needed in the case against Mr. Guinn.

On May 31, 2019, Mr. Guinn moved to dismiss under CrR 4.7 and 8.3, alleging "governmental mismanagement" due to the State's failure to provide the defense with the results of forensic testing that had not yet occurred. The court then entered various discovery orders that Ms. Rutherford was not confident she could comply with despite her best efforts. Ms. Rutherford discussed the situation with her supervisors and recommended that the case be dismissed. On June 7, 2029, Prosecuting Attorney Adam Cornell moved to dismiss the case in the interests of justice. At the hearing, Ms. Rutherford admitted that her mistakes in trial preparation and discovery contributed to the State's decision. The State's motion was granted.

At a hearing on June 4, 2019, shortly before the motion to dismiss, Judge Farris began aggressively demanding to know why Ms. Rutherford should not be sanctioned "for the failure to make discovery." She accused Ms. Rutherford of "screwing up the State of Washington's cases, adding that "[t]hese are not your cases personally to screw up." Ms. Rutherford describes Judge Farris's remarks as a "tirade" during which the judge was "shouting" at her. While the transcript does not reflect the decibel level of the judge's remarks, it otherwise supports Ms. Rutherford's description of them.

A hearing on sanctions was held on August 16, 2019. Ms. Rutherford was represented by counsel from the Snohomish County Prosecuting Attorney's Office, who submitted a memorandum opposing sanctions. Ms. Rutherford and Mr. Cornell submitted declarations, as well. Mr. Guinn's lawyer asked for "sanctions" against the Snohomish County Prosecuting Attorney's Office, but not Ms. Rutherford, in the form of "training sessions" to be led by Mr. Cornell.

Almost four months later, on December 5, 2019, Judge Farris issued an unusual 214-page document entitled "Findings of Fact, Conclusions of Law, and Order Regarding Sanctions." In the last section, entitled "Sanctions," Judge Farris listed a number of things for which Ms. Rutherford was *not* being sanctioned, followed by a list of things for which she *was* being sanctioned. The latter, which involve statements made by Ms. Rutherford and her counsel concerning the issue of sanctions, are discussed below. Then the judge ordered "sanctions" against Ms. Rutherford in the form of (1) attending continuing legal education (CLE) courses, (2) reading various rules, statutes, cases, orders, etc., and (3) making written apologies to Mr. Cornell, Mr. Aull and others.

In an earlier section of her "Findings of Fact, Conclusions of Law, and Order Regarding Sanctions," Judge Farris found that Ms. Rutherford knowingly provided false information to the Court when she stated in a declaration that she did not realize *until she was in trial* that a certain firearm had not been tested. In paragraph 23 of the declaration, Ms. Rutherford stated,

> During the scramble to prepare, it was not until we were actually in trial that I realized the firearm seized from co-defendant Emma May's residence, which formed the basis for Count II, UPF 2, had not been tested for operability.

The record is unclear both as to when Ms. Rutherford realized that the firearm had not been tested, and when she considered trial to have commenced. There is evidence that the statement was accurate if trial commenced on May 31, 2019, the date the case was called for trial, and there is also evidence that Ms. Rutherford considered the trial to have commenced on that date. In any case, Ms. Rutherford submitted a supplemental declaration shortly after the one referenced above in which she clarified and corrected her earlier statement. In that declaration, Ms. Rutherford stated,

> With regard to paragraph 23 of my prior declaration, it was not until I began *preparation for trial*, that I realized the gun had not been test fired.

(Emphasis added.) In light of all the evidence, we do not believe it could be proven by a clear preponderance of the evidence that Ms. Rutherford knowingly made a false statement of fact or failed to correct a false statement of fact concerning when she realized that the firearm had not been tested. It seems more likely to us that she did not.

Judge Farris also found that Ms. Rutherford made a false statement of fact in her declaration when she stated that she did not realize that testing the firearm could destroy fingerprint and DNA evidence. In paragraph 25 of the declaration, Ms. Rutherford stated,

> However, in my haste, I did not sufficiently consider that test firing the firearm could interfere with fingerprint or DNA evidence on the firearm. It was understood, as of the trial date, that DNA and fingerprint analysis on the firearm had not been done and that the State could not and would not be offering that evidence at trial. I was also aware that defense counsel had made no request at any time to have independent testing done on that firearm, which likely influenced my latent sense that collecting the evidence at any time thereafter would be a needless exercise. Unfortunately, *I neglected to recognize that by test firing the firearm, certain evidence would no longer be available.*

(Emphasis added.) Ms. Rutherford clarified these statements in her supplemental declaration:

> Regarding paragraph 25 of my prior declaration, a better and more clear explanation of my thinking with regard to testing the firearm for operability was that I did not appreciate the implications of the fingerprint and DNA evidence

> being destroyed in light of the fact that the State had abandoned that possible source of evidence to prove possession.

The record is far from clear that Ms. Rutherford knew at the relevant time what effect testing the firearm would have on fingerprint and DNA evidence. At one point during persistent, aggressive questioning by Judge Farris at the June 4, 2019 hearing, Ms. Rutherford said, "Your Honor, testfiring the gun would disturb if there was DNA or fingerprint evidence or could disturb that evidence if it existed. So, the idea would be to collect that evidence before doing anything that could disturb it." But at the same hearing she explained, or tried to explain, that she did not know this to be a fact. For example, shortly after the statement quoted above, the following occurred:

> Court: It's your understanding and belief they cannot now test it for fingerprints and DNA?
>
> Rutherford: No, they certainly can, your Honor, but I don't know what effect or impact it would have to have it testfired in the meantime.
>
> Court: Well, you believed that that could destroy evidence on this and that's one of the reasons that you didn't test fire it earlier?
>
> Rutherford: That's my guess, your Honor, but I don't have any expertise in this area.

Other statements Ms. Rutherford made at the June 4 and June 5, 2019 hearing strongly suggest that she did not know what effect testing the firearm would have on fingerprint and DNA evidence. We are far from convinced, and we do not believe we could prove at a disciplinary hearing, that that Ms. Rutherford knowingly made a false statement of fact when she stated that she did not realize that testing the firearm could destroy fingerprint and DNA evidence.

Judge Farris also found that Ms. Rutherford made a "misleading" statement in her declaration opposing sanctions when stated that she "neglected" to provide a copy of defendant May's completed plea agreement to counsel for defendant Guinn. In paragraph 26 of the declaration, Ms. Rutherford stated,

> Regarding discovery material related to co-defendant Emma May, the period of time that lapsed between her proffer and reaching a plea agreement was impacted by my absence from the office, both from my personal medical leave in April, and then my personal leave after the illness and death of my father. It is unfortunate that the cooperation agreement and the plea and sentencing was [*sic*] not accomplished sooner. Once the agreement was completed, however, I informed defense counsel of the same, along with the identity of the witness and the charges, as soon as possible, prior to trial. *I neglected to provide a copy of the completed plea agreement to defense counsel, and in hindsight, I should have provided a copy directly from the courtroom after the judge and all parties signed it.*

(Emphasis added.) The judge apparently found this statement "misleading" because other statements by Ms. Rutherford at the June 4, 2019 hearing suggest that she did not believe she was obligated to provide a copy of the plea agreement to defendant Guinn's counsel because he would receive it through Odyssey, the court's electronic filing system. But even if that was in fact her belief at the time, it does not follow that the statement in her declaration was misleading, much less deliberately misleading. It was, rather, simply an acknowledgment by Ms. Rutherford that she could have done better and, more importantly, it was a true statement.

Judge Farris found that Ms. Rutherford made some other "misleading" statements, such as the statement, which appears at various places in her declaration opposing sanctions, that she expected the May 31, 2019 trial date to be continued. Having reviewed these statements along with relevant parts of the record in *State v. Guinn*, we do not believe we could prove by a clear preponderance of the evidence that any one of them was deliberately false or misleading, or a knowing false statement to a tribunal. Ms. Rutherford clearly made some mistakes in her management of the case, which she admits, but we do not believe that she knowingly misled the court, that she acted unethically, or that sufficient evidence exists on which to base a disciplinary proceeding.

We are dismissing this grievance under ELC 5.7(a). If you do not mail or deliver a written request for review of this dismissal to us within **forty-five (45) days** of the date of this letter, the decision to dismiss your grievance will be final. Dismissal of a grievance constitutes neither approval nor disapproval of the conduct involved and should not be taken as the position of the Office of Disciplinary Counsel with respect to any other matter.

Sincerely,

Scott G. Busby
Senior Disciplinary Counsel

cc: Michelle L. Rutherford (via email only)