

FILE NO. _____

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
against FREDERICK AUGUST FINK,
a Minnesota Attorney,
Registration No. 165840.

**PETITION FOR
DISCIPLINARY ACTION**

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

The Director of the Office of Lawyers Professional Responsibility, hereinafter Director, files this petition upon the parties' agreement pursuant to Rules 10(a) and 12(a), Rules on Lawyers Professional Responsibility. The Director alleges:

The above-named attorney, hereinafter respondent, was admitted to practice law in Minnesota on September 20, 1985. Respondent currently practices law in Chisago County, Minnesota.

Respondent has committed the following unprofessional conduct warranting public discipline:

FIRST COUNT

Weaver Matter

1. In October and November 2005 respondent was one of the assistant Ramsey County attorneys prosecuting the case of *State v. Weaver*. Weaver was charged with first-degree intentional felony murder and second-degree unintentional felony murder in connection with the death of his wife in 1999.

2. During the course of the *Weaver* trial, an issue arose as to the availability of lab reports regarding carbon monoxide testing done on the victim and the identity of

the person who conducted those tests. The carbon monoxide tests in question had been conducted by laboratory personnel at Regions Hospital.

3. On November 3, 2005, Weaver's counsel objected to the introduction into evidence of any testimony from the medical examiner based upon the carbon monoxide testing that was conducted by Regions Hospital. In support of the objection, Weaver's counsel argued, "We object to any testimony of Dr. Roe based on either one of those reports. The first objection is based on a lack of foundation for those reports. Apparently the person who did the work and the raw data itself, either the chromatography or the spectrometry is no longer available."

4. In response to this argument, respondent told the court, "Very briefly, Your Honor, as to the - - it's not exactly that the person who did the test is unavailable. When this issue first came up yesterday, we tracked the system that the Ramsey County Medical Examiner's Office used. What they do is they take these samples and they take them to Regions Hospital Toxicology Department, where in this case they were taken to the chemistry section. The tests were done, the data kept and the report given back to the Ramsey County Medical Examiner's Office. We were informed that it's their policy and procedure to keep the underlying data for a period of two years and then destroy it, and that's why it's unavailable. We don't know who did the test."

5. At the time respondent made the statements set forth above, he reasonably believed them to be true.

6. The trial court admitted testimony regarding the carbon monoxide testing through Dr. Roe, the medical examiner, under Minn. R. Evid. 703, without requiring the laboratory analyst to testify, holding that it was mere foundation data commonly relied upon by experts in her field in forming the forensic pathologist's opinion. After Weaver was found guilty of second-degree unintentional felony murder, the Minnesota Court of Appeals reversed and granted Weaver a new trial on the basis that the admission of

the laboratory tests into evidence violated Weaver's confrontation rights under the United States Constitution as elucidated in *Crawford v. Washington*, 541 U.S. 36 (2004).

7. On November 9, 2005, one of the investigating police officers in the *Weaver* matter told respondent that Regions Hospital had located an additional report concerning the carbon monoxide testing and that a laboratory supervisor from Regions Hospital was available to testify generally about the testing procedure that had been followed, although the supervisor could not testify about the specific test in question. While the additional report did not clearly identify the person who conducted the carbon monoxide testing, unbeknownst to either respondent or the investigating officer, it did contain information from which it was possible to identify that person. The additional report also identified the type of machine used to conduct the tests.

8. Upon receiving this information, respondent asked the investigating officer whether the newly-found report indicated results that differed from testimony Dr. Roe had already given. Although the investigating officer had not reviewed the report, he had inquired of Regions Hospital regarding the test results it reflected. After the officer reported that the results were the same, respondent told the investigating officer that since the results were not exculpatory, he need do nothing further.

9. Respondent did not disclose the existence of the additional records to defense counsel or the court nor did he correct his statement to the court that the underlying test data had been destroyed.

10. Rule 9.01, subd. 1(4), Minnesota Rules of Criminal Procedure, requires the prosecution to, without order of the court, disclose to defense counsel, amongst other things, any results or reports of physical examinations, and scientific tests, experiments or comparisons made in connection with a particular case. Rule 9.03, subd. 2, Minnesota Rules of Criminal Procedure, provides that a party who discovers additional material, information, or witnesses subject to disclosure shall promptly notify the other party of the existence of the additional material or information and the identity of the

witness. As noted above, respondent did not disclose to Weaver's counsel the existence of the additional records of the carbon monoxide testing from Regions Hospital.

11. Respondent's conduct in failing to disclose to the court and defense counsel the existence of the additional test records and his failure to correct his statement to the court that the underlying test data had been destroyed violated Rules 3.3(a)(1), 3.4(c), and 8.4(d), Minnesota Rules of Professional Conduct (MRPC).

WHEREFORE, the Director respectfully prays for an order of this Court imposing appropriate discipline, awarding costs and disbursements pursuant to the Rules on Lawyers Professional Responsibility, and for such other, further or different relief as may be just and proper.

Dated: August 25, 2008.



PATRICK R. BURNS
FIRST ASSISTANT DIRECTOR OF THE
OFFICE OF LAWYERS PROFESSIONAL
RESPONSIBILITY

Attorney No. 134004
1500 Landmark Towers
345 St. Peter Street
St. Paul, MN 55102-1218
(651) 296-3952