STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

In re: Norman E. Watts, Esq.
PRB File Nos. 102-2019, 011-2020

RESPONDENT'S RENEWED MOTION FOR CONTINUANCE OF MERITS HEARING AND REQUEST FOR REMOVAL OF SPECIALLY ASSIGNED DISCIPLINARY COUNSEL; MOTION FOR RECONSIDERATION

NOW COMES the Respondent, Norman E. Watts, by and through his counsel, Kaveh S. Shahi, Esq., of the firm of Cleary Shahi & Aicher, P.C., and respectfully renews his motion for the continuance of the merits hearing currently scheduled for June 7-9, 2023, seeks reconsideration of the May 30, 2023, decision to deny his motion for continuance and request for removal of the Specially Assigned Counsel, and renews his request that the Specially Assigned Disciplinary Counsel be removed.

1. **A.O. 9, Rule 20(J) Requires the Removal of Disciplinary Counsel**

The parties and the Panel overlooked A.O. 9, Rule 20(J) which provides in relevant part:

> If a complaint is filed against bar counsel or disciplinary counsel, the Board *shall* appoint substitute counsel to serve in that lawyer's place on that matter.

(Emphasis Added). The Respondent's Reply memorandum dated May 15, 2023, complained about the specially assigned disciplinary counsel's conduct exhibited in the Opposition filed to the motion for continuance. Disciplinary Counsel is also aware of the complaint. Rule 20(J) makes it mandatory that the specially assigned disciplinary counsel be removed. This is not a matter of discretion for this Panel. the Rule reflects the arguments made earlier by Respondent that it is not appropriate for disciplinary counsel to

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continue and it is not the role of this Panel to adjudicate the complaint against disciplinary counsel.

2. Additional Objection to Specially Assigned Counsel and her Firm

Based on a recent email from Disciplinary counsel (attached), it appears that Specially Assigned Counsel was retained pursuant to the authority of the Board under A.O. 9, Rule 1(E)(1)(c) which allows the "appointment of alternates" when disciplinary counsel is unable to serve – which was the case here due to a family leave. The rules do not address the qualifications, process, limitations, and considerations involved in the appointment of alternates. It is not even known whether "alternates" are limited to the pool of the existing program personnel such as Bar Counsel or Screening Counsel who, like Disciplinary Counsel, would have been appointed pursuant to A.O.9, Rule 2, requiring Court approval, or can be anyone.

The lack of specific rules regarding the appointment of alternates does not mean that the Respondent is without protection. All the lawyers involved are subject to the Rules of Conduct. Rule 1.7, Comment 10, for example, addresses a lawyer's personal-interest conflicts. A lawyer's business or personal interests should not affect the representation. More importantly, the Respondent's due process rights entitle him to a fair and bias-free process when the deprivation of his property interest in his ability to practice law is at stake. *LaFlamme v. Essex Junction Sch. Dist.*, 170 Vt. 475, 481, 750 A.2d 993, 997 (2000)("The license to practice law, for example, is a property interest, infringement of which requires due process.); *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S. Ct. 1456, 1464 (1975) ("[A] 'fair

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trial in a fair tribunal is a basic requirement of due process.' (Citation)"); *In re Crushed Rock*, 150 Vt. 613, 617-19, 557 A.2d 84, 87 (1988).

The Respondent is being prosecuted in this case by a lawyer with a firm that has a robust employment law practice. Gravel & Shea lists employment law on its website as one of its six practice areas in Vermont. (Attached). "Litigation" is listed separately as another of the six practice areas. *Id.* Given that the Respondent's practice primarily focuses on employment litigation, he is at times an adversary, rival, and/or competitor of Gravel & Shea, the employer of the Specially Assigned Counsel. (Respondent's affidavit). The Respondent's practice area of employment litigation therefore overlaps with 2/6 of the practice area of the Specially Assigned Counsel's firm.

With a small legal market and community like Vermont's, it is fundamentally unfair and a conflict for the Specially Assigned Counsel to prosecute this case against the Respondent. The prosecution is tantamount to a license to put the competition and/or adversary out of business. Parenthetically, on May 22, 2023, another member of the firm unilaterally filed his notice of appearance as co-counsel with the Specially Assigned Counsel: "Alfonso Villegas, Esq., of the law firm Gravel & Shea PC, enters his appearance as Co-Counsel with Navah C. Spero, Esq., Specially Assigned Disciplinary Counsel, in the above captioned matter." (Notice of Appearance of attorney Villegas). This is yet another indication that the specially assigned counsel and her firm, Gravel & Shea, have a conflict in the prosecution of this case. *See* RPC Rule 1.10.

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It is well recognized that both economic and non-economic competition between a prosecutor and the defendant are grounds for disqualification. This can even include competition over an amorous relationship:

> Our appellate courts have determined that an impermissible conflict of interest exists in situations where the district attorney has a direct financial interest in obtaining a defendant's conviction. (Citations.... In addition, the appellate courts have concluded that a prosecutor can be disqualified from prosecuting a case if the prosecutor has a non-economic, personal interest in the outcome of the prosecution. *See Commonwealth v. Balenger*, 704 A.2d 1385, 1389-90 (Pa. Super. 1997) (concluding that defendant was entitled to new trial because prosecutor's amorous relationship with defendant's former girlfriend created an impermissible conflict of interest as prosecutor attempted to remove defendant as competitor for girlfriend's affections), appeal denied, 556 Pa. 670, 727 A.2d 126 (Pa. 1998). "This non-economic, personal interest is likewise a conflict of interest." Commonwealth v. Lutes, 2002 PA Super 51, 793 A.2d 949, 956 (Pa. Super. 2002).

Commonwealth v. Havlik, No. 1712 EDA 2012, 2013 Pa. Super. Unpub. LEXIS 3243, at *63-64 (July 17, 2013).[1]

The Respondent is a well-known and recognized practitioner in employment litigation in Vermont. The reason Gravel & Shea was selected as the firm that employs Specially Assigned Counsel is not yet known, but the notion that competitors and/or rivals can be pitted against one another in a disciplinary matter with the potential for inflicting damage to the Respondent's reputation and the ability to practice law, is constitutionally

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[1]The Vermont Supreme Court in the area of the law in question has cited Pennsylvania precedent. *See In re Crushed Rock*, 150 Vt. 613, 621-22, 557 A.2d 84, 89 (1988)("A second reason is that this case has almost none of the personal intermixing of roles that normally is a hallmark of a due process violation. Compare *Bruteyn v. State Dental Council & Exam. Bd.*, 32 Pa. Commw. 541, 549-50, 380 A.2d 497, 501-02 (1977); . . . .").

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offensive. The assignment should not have been made in the first place or should have been declined.

3. The Panel's Denial of Respondent's Right to Counsel and Strident Refusal to Allow a Continuance Are Contrary to Best Interests of Justice

The procedural history of this case was part of the overall delays caused by the pandemic. It is the Respondent's impression that as pro se litigant facing an opponent that is a larger law firm (for Vermont standards) with disproportionate resources, this Panel has been particularly harsh in its rulings regarding deadlines and matters of timing with prejudice resulting.

The merit hearing currently scheduled for June 7-9, 2023, will not be fair. It is well settled that the Respondent is constitutionally entitled to not only a fair, unbiased hearing but one that is beyond even the probability of unfairness:

> Concededly, a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). This applies to administrative agencies which adjudicate as well as to courts. *Gibson v. Berryhill,* 411 U.S. 564, 579 (1973). Not only is a biased decisionmaker constitutionally unacceptable but "our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison, supra, at 136; cf. Tumey v. Ohio*, 273 U.S. 510, 532 (1927). In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him.

Withrow v. Larkin, 421 U.S. 35, 46-47, 95 S. Ct. 1456, 1464 (1975).

Recently the Respondent has been able to access hundreds of emails relative to both complainants in this matter. (Respondent's affidavit). The likely total for both

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complainants exceed a 1000 emails. (Respondent's affidavit). Surely the Panel understands the significance of emails at an age that considerable communication takes place by such means. Much of the conversations amongst parties in many cases are documented by way of electronic communications, and as a result there are fewer and fewer "he said, she said" contests at trials and hearings. To adjudicate anything in this matter without the ability to fully understand and absorb these emails, is tantamount to excluding the majority of the evidence.

The Panel's insistence on the harsh enforcement of the disclosure deadlines and other housekeeping type deadlines, has jeopardized the entire fairness and constitutionality of the adjudicatory process. To hold the hearing on June 7-9 while effectively depriving the Respondent of the right to counsel and to deprive him of the opportunity to be properly ready, is a due process violation. And all this controversy is apparently because the Panel cannot schedule another merit hearing until September. A three-month delay in the larger context of the history of this matter cannot justify violating the Respondent's constitutional protections and rushing a hearing the outcome of which may be subject to multiple challenges.[2]

4. **The Panel's Attempt to Investigate and Adjudicate the Complaint Against Specially Appointed Counsel Renders the Proceeding Before this Panel Unconstitutional**

The difficulty in providing the Respondent with a fair process that meets due process requirements is well recognized by the courts when all the other actors, the

[2] It is also evident that with two claimants and the volume of emails alone, 3 days will not be sufficient for this matter, and the merit hearing will have to be staggered over the course of the ensuing weeks or months.

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Program Board, Chair, Screening Counsel, Bar Counsel, Disciplinary Counsel, Specially Assigned Counsel, and this Panel are part of the same governmental organ. *See Withrow v. Larkin,* 421 U.S. 35, 95 S. Ct. 1456 (1975). This structural risk is tolerated on the strength of the presumption of the honesty and integrity of the individual actors involved. However, when the actors mix their roles, that presumption is defeated:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Withrow v. Larkin, supra, 421 U.S. 35, 47.

The *Withrow* decision was summarized by the Vermont Supreme Court's *In re Crushed Rock, supra.* The upshot was that the Wisconsin medical examiners' board had failed to act as "[a]n independent decision-maker since it had investigated the charges and presented them for prosecution." 150 Vt. at 617; *see also In re O'Dea*, 159 Vt. 590, 601-02, 622 A.2d 507, 514 (1993).

Here, this Panel's decision issued May 30, 2023, on the request for removal of the Specially Assigned Counsel, impermissibly mixed the investigative and adjudicative roles required under A.O. 9. While the Respondent and undersigned respectfully disagree with the Panel's conclusions about the conduct of the specially assigned counsel, the purpose of this motion is not to argue those conclusions. Rather, this motion considers the Panel's role and the mixing of the investigative/charging functions that A.D. 9 outlines for Screening

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Counsel and/or Disciplinary Counsel, and the adjudicatory role of the hearing panels. A.D. 9, Rules 12-14. Once this Panel upstaged the screening/investigative/charging roles outlined in the rules and proceeded to effectively adjudicate a complaint against the Specially Assigned Counsel, the structural safeguards for due process fairness were lost.

With a background of harsh rulings against the Respondent, the denial of his right to counsel at the merits hearing, the denial of a continuance necessary for a fair hearing, and the defense/advocacy on behalf of the specially assigned counsel against the complaint for her conduct, this Panel can no longer function within the due process mandates.

Conclusion

There is still time to allow this matter to proceed in a fair manner consistent with the requirements of due process. A delay of three months pales in comparison to the growing procedural errors and other defects associated with this proceeding. Ultimately the adjudicatory process is to serve the interest of justice and fairness, and in its current posture here that goal cannot be attained. This motion should be granted.

Dated this 2nd day of June, 2023.

CLEARY SHAHI & AICHER, P.C.

By:_____

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Practice Areas

In today's world, it is critical to manage risk by considering business structures, tax, regulatory hurdles, employment issues, estate planning and more. And we have the expertise you'll need when your situation calls for litigation. We'll stand beside you with the tenacity, instinct and decisiveness of born advocates.

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STATE OF VERMONT

PROFESSIONAL RESPONSIBILITY PROGRAM

In re: Norman Watts, Esq.

PRB (Nos. 2019-102 and 2020-011

In re: Watts

AFFIDAVIT

The undersigned Attorney hereby states that the following information is true and accurate to the best of his knowledge:

1. Due to technical reasons, I have been unable to access my email inventories in a way that could be produced in bulk for submission to the Special Disciplinary Counsel and the Panel for the Alibozek and Hiramoto cases, identified above, until recently. I did so after having to consult with an IT specialist to go through the tedious and slow process.

2. The emails in the Alibozek and Hiramoto cases exceed 1000 collectively. I will not be able to review these to properly prepared for the merit hearing currently scheduled for June 7-9, 2023. There is considerable risk that this Panel's findings will be wrong, incomplete or false without the benefit of these emails which in many cases provide considerable information about the communications amongst the parties. I therefore renew my request for additional time to properly prepare for this hearing.

3. The focus of my practice has been employment litigation for years in Vermont. I litigate these cases against lawyers located at various firms in the state as well as out-of-state firms. I have built my practice and career on employment litigation in numerous matters. Gravel & Shea is a firm that I encounter as an opponent in these cases, and their employment litigation lawyers are well known to me. I was surprised and dismayed that Gravel & Shea was appointed as Special counsel in this matter but did not understand the legal implications until I was able to review the circumstances with my counsel recently.

Dated: June 2, 2023.

/s/ Norman E. Watts
Norman E. Watts, Esq.
Respondent

Dalene Sacco

From: Alexander, Jon <Jon.Alexander@vermont.gov>
Sent: Tuesday, May 30, 2023 10:32 AM
To: Kaveh Shahi
Cc: Navah
Subject: RE: Alibozek v. Watts

Hi Kaveh-

Yes, my weekend was good; hope yours was too.

My understanding is that the authority for Navah's special appointment was VSC AO 9, PRB Rule 1(E)(1)(c):

"Rule 1. The Professional Responsibility Board
Responsibility for, and overall supervision of, the program shall be vested in the Professional Responsibility Board (hereafter "Board").
. . .

E. Powers and Duties. The Board oversees the program, and implement, coordinate, and periodically review its policies and goals. Its powers and duties include the following:
. . .
(c) the appointment of alternates when any member of a hearing panel, bar counsel, disciplinary counsel, or staff has a conflict or is otherwise disqualified or unable to serve;"

A.O. 9 - 4.1.21.pdf (vermontjudiciary.org)

See also PRB Policy No. 22:

"22. When bar counsel, disciplinary counsel, screening counsel or any member of a hearing panel has s a conflict or is otherwise disqualified or unable to serve, the Board Chair shall appoint an alternate."

Here's a link to the current version of the PRB policies:

220325 Board Policies - Effective March 25, 2022.pdf (vermontjudiciary.org)

My understanding is that prior Disciplinary Counsel Sarah Katz did not have a conflict in relation to Mr. Watts but was unable to serve because of her family leave, so Navah graciously agreed to take this on.

Thanks, Jon

VERMONT JUDICIARY
Jon T. Alexander
Disciplinary Counsel, Professional Responsibility Program
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Burlington, VT 05401
(802) 859-3001

From: Kaveh Shahi <kss@clearyshahi.com>
Sent: Tuesday, May 30, 2023 9:57 AM
To: Alexander, Jon <Jon.Alexander@vermont.gov>
Subject: RE: Alibozek v. Watts

EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.
Hi Jon,

Hope you had a good holiday weekend. Regarding the issue of appointment of special counsel, I like to know the authority pursuant to which one was retained in this case. Thank you.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date he made service of **Respondent's Renewed Motion for Continuance of Merits Hearing and Request for Removal of Specially Assigned Disciplinary Counsel; Motion for Reconsideration** via email upon the following parties:

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Gravel & Shea, P.C.
nspero@gravelshea.com

Merrick Grutchfield
Court Administrator's Office
Professional Responsibility Program
merrick.grutchfield@vermont.gov

Alfonso Villegas, Esq.
Gravel & Shea, P.C.
avillegas@gravelshea.com

Dated this 2nd day of June, 2023.

CLEARY SHAHI & AICHER, P.C.

By: _____

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