**STATE OF VERMONT**
**PROFESSIONAL RESPONSIBILITY PROGRAM**

**In Re: William Cobb, Esq.**
**PRB File No. 001-2024**

**DISCIPLINARY COUNSEL'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

In response and opposition to the November 15, 2023 Amended Petition for Reinstatement of Petitioner William W. Cobb, Esq. pursuant to Vermont Supreme Court Administrative Order No.9, Rule 26, Respondent Office of Disciplinary Counsel requests that the Hearing Panel (1) make the following findings of fact and conclusions of law based on the testimony taken and other evidence admitted at the November 27, 2023 hearing on Attorney Cobb's Amended Petition; and (2) deny Attorney Cobb's Amended Petition for failure to carry his "burden of demonstrating by clear and convincing evidence that he . . . has the moral qualifications, competency, and learning required for admission to practice law in the state, and the resumption of the practice of law will be neither detrimental to the integrity and standing of the bar or the administration of justice nor subversive of the public interest and that the respondent-attorney has been rehabilitated." A.O. 9, Rule 26.D.

**PROPOSED FINDINGS OF FACT**

1. Between October 18, 2016 and January 2, 2019, Petitioner Cobb was the attorney of record for Kandeh Kebbie in *State of Vermont v. Kandeh Kebbie*, Docket No. 976-8-16 Rdcr. *See* Docket Entries for *State v. Kebbie*, 976-8-16 Rdcr at 2, 6 (noting appearance entered and withdrawn by Attorney Cobb for Defendant Kebbie on, respectively, October 18, 2016 and January 2, 2019), copy attached hereto as **Disciplinary Counsel Exhibit 2**.
2. Mr. Kebbie, who was represented by Attorney Cobb at his trial on October 10-11, 2017, was charged with and "convicted by jury of four counts of misdemeanor domestic

assault, two counts of felony aggravated domestic assault, and one count of felony aggravated assault." *State v. Kebbie*, No. 2019-203, 2020 WL 1659298, at *1 (Vt. Mar. 20, 2020; *see also State v. Kebbie* Docket Entries at 4, **Ex. 2**.

3. The charges stemmed in part from Mr. Kebbie's "assaultive conduct from eight different days between October 2015 and August 2016 in which [he] allegedly punched, strangled, or restrained" his girlfriend at the time. *State v. Kebbie*, No. 2018-064, 2018 WL 6173595, at *1 (Vt. Nov. 21, 2018).

4. The Rutland Superior Court Criminal Division, the Honorable Thomas A. Zonay presiding, imposed on Mr. Kebbie "an aggregate to-serve sentence of thirteen to twenty-five years". *Kebbie*, 2020 WL 1659298, at *1.

5. In separate opinions, the Vermont Supreme Court "affirmed [Mr. Kebbie's] convictions on appeal" and later affirmed the trial court's denial of Mr. Kebbie's motion for sentence reconsideration. *Id.* at *1-2, **Ex. 2**.

6. On April 15, 2019, Mr. Kebbie filed with the Rutland Superior Court Civil Division a *pro se* "Petition for Post Conviction Relief" pursuant to 13 V.S.A. § 7131 in which he alleged that, with respect to Attorney Cobb's representation of him in *State v Kebbie*, "his right to the effective assistance of counsel at every stage of the proceedings was violated, and that, but for the numerous and highly prejudicial and unprofessional errors of his trial counsel," Attorney Cobb, "there exists a reasonable probability the results of the proceedings would have been different." Apr. 15, 2019 Pet. for Post Conviction Relief ("Kebbie PCR Petition") at 1, *Kandeh Kebbie v. State of Vermont*, Docket No. 205-4-19 Rdcv ("Kebbie PCR Action"), copy attached hereto as **Disciplinary Counsel Exhibit 3**.

7. Specifically, Mr. Kebbie alleges that Attorney Cobb, *inter alia*, "failed to conduct any meaningful pre-trial investigation into viable alternative defense strategies . . . failed to present any defense whatsoever, and instead relied solely upon an un-fulfilled promise to the jury that Petitioner [Kebbie] would testify . . .failed to investigate the existence of evidence and favorable witnesses . . . [and] failed to ensure that Petitioner was aware that he had a right to testify on his own behalf . . . ." *Id.* at 2, ¶¶ a-d, **Ex. 3**.
8. Soley on the basis of Attorney Cobb's allegedly ineffective representation of him, Mr. Kebbie's PCR Petition sought, *inter alia*, to vacate his allegedly "unlawful convictions" in *State v Kebbie*. *See id.* at 6.
9. On August 9, 2022, Robert J. Kaplan, Esq. entered his appearance on behalf of Mr. Kebbie in the PCR Action. Aug. 9, 2022 Kaplan Notice of Appearance, *Kebbie v. State*, Docket No. 205-4-19 Rdcv, copy attached hereto as **Disciplinary Counsel Exhibit 4**.
10. On February 1, 2023, Mr. Kebbie, through Attorney Kaplan, filed an Amended Petition for Post-Conviction Relief that provided more detailed allegations in support of his ineffective assistance of counsel claim ("IAC claim") concerning Attorney Cobb. The Amended PCR Petition alleged that in *State v. Kebbie* "the amount of time Defense Counsel [Cobb] spent working on this case was completely inadequate" and his "planned legal strategy was destined to fail from the start." Feb. 1, 2023 Am. Pet. for Post-Conviction Relief ("Kebbie Am. PCR Petition") at 4, *Kebbie v. State*, Docket No. 205-4-19 Rdcv, copy attached hereto as **Disciplinary Counsel Exhibit 5**.
11. Attorney Cobb's "resulting performance" during trial was allegedly "utterly deficient of even basic professional competence," *id.* at 6, "far below the lowest standard of professional competence," *id.* at 10, and overall "atrocious" insofar as Attorney Cobb

was reportedly "unprepared, erratic, and odd." *Id.* at 14. According to Mr. Kebbie, Attorney Cobb's "unprofessional errors led directly to [his] convictions and heavy sentencing." *Id*, **Ex. 5**.

12. The Kebbie PCR Action is scheduled for Pre-Trial Conference on December 18, 2023, but Mr. Kebbie and the State, represented by Rutland County Deputy State's Attorney Nicholas Battey, have filed a stipulated motion, pending now with the Rutland Superior Court, to continue this hearing and extend the discovery schedule. Dec. 8, 2023 Stip. Mot. to Amend the Discovery Schedule and Continue the Pretrial Conf., *Kebbie v. State*, Docket No. 205-4-19 Rdcv, copy attached hereto as **Disciplinary Counsel Exhibit 6**.

13. At the November 27, 2023 Hearing on Attorney Cobb's Amended Petition for Reinstatement in the above-captioned matter, Attorney Cobb agreed that, as Mr. Kebbie's counsel in *State v. Kebie*, he is now "essentially a witness" in the pending Kebbie PCR Action, rather than a party or counsel of record. *See* Tr. of Nov. 27, 2023 Reinstatement Hrg. ("Hearing Tr.") at 173, lines 15-17, *In re William Cobb, Esq.*, PRB File No. 001-2024, copy of selected excerpts attached hereto as **Disciplinary Counsel Exhibit 7**.

14. Accordingly, on November 20, 2023, Attorney Cobb spoke by telephone with DSA Battey, counsel for the State in the Kebbie PCR action, regarding the arrangements for his deposition in that action by DSA Battey and Attorney Kaplan, which was scheduled for (and ultimately took place on) November 28, 2023. *See* Hearing Tr. at 173:5-11, 18-22, **Ex. 7**; *see also* **Ex. 6** at 1 (noting that "Plaintiff's trial counsel" in *State v. Kebbie*, Attorney Cobb, was deposed in the Kebbie PCR action on November 28, 2023S).

15. In addition, Attorney Cobb used the November 20, 2023 telephone call with DSA Battey "as an opportunity to simply throw out an idea of how a settlement" of the Kebbie PCR

Action "could go, if they chose to do it." Hearing Tr. at 186:15-17, **Ex. 7**.

16. These telephone "settlement discussions" between Attorney Cobb and DSA Battey centered on Attorney Cobb's "offer," *id.* at 186:6, or "proposal," *id.* at 186:21, that Mr. Kebbie agree to settle the PCR Action against the State in exchange for a lowered minimum prison sentence for Mr. Kebbie, but with Mr. Kebbie accepting an increased maximum potential sentence. *See id.* at 186:9-10.

17. Attorney Cobb initially testified that he made this settlement proposal to DSA Battey because settlement of the Kebbie PCR Action "would have served two purposes" benefiting Attorney Cobb's own personal interests. "One, it could have resolved the [PCR] case without having to have a hearing and dragging me into it. And [two] if they settle the case, I probably don't have to get deposed either." *See id.* at 186:22-25—187:1, **Ex. 7**.

18. On November 21, 2023, the day after his telephone conversation with DSA Battey, Attorney Cobb sent an email message to DSA Battey and Attorney Kaplan, copying Rutland County State's Attorney Ian Sullivan, in which Attorney Cobb again "broached the topic of settlement . . . of the PCR case." *Id.* at 185:19-22.

19. In his November 21 email to the counsel for the parties in the Kebbie PCR Action, Attorney Cobb reiterated the substance of his previous settlement proposal to DSA Battey:

> "How about if Kandeh resolves his case by getting something off the minium [sic] and giving something back on the maximum. Kandeh would like to have a 6 year minimum, 6 years reduced from the current 12 year minimum, and he should offer that time back on the maximum, and making the maximum 31 years. 12-25 years becomes 6-31 years. Shuffling the deck, the years are the same and Kandeh has the ability to get out in a year or so and get supervised on parol [sic]. Or, how about 12-25 all suspended but 6 years to serve."

Nov. 21-22, 2023 Email Messages between and among W. Cobb, N. Battey, R. Kaplan and I. Sullivan (3-pages), copy attached as **Disciplinary Counsel Exhibit 1**; *see also* **Ex. 7** at 181:12-14 (Exhibit 1 admitted into Reinstatement Hearing evidence).

20. When asked at the Reinstatement Hearing whether he was, by his November 21st email, "attempting to help negotiate a settlement of Mr. Kebbie's ineffective assistance of counsel claim" made by Mr. Kebbie against Attorney Cobb in the PCR Action, Attorney Cobb conceded, "I did that." Hearing Tr. at 187:3-6.

21. Attorney Cobb admitted that, in making his settlement proposals, he was "advocating" for the interests of both Mr. Kebbie and the Rutland County State's Attorney insofar as a settlement would purportedly avoid for both parties a PCR trial that would be "potentially time consuming and difficult." *Id.* at 187:21-25, **Ex. 7**. Attorney Cobb admitted that his settlement overtures to counsel in the Kebbie PCR Action were "all unsolicited." *Id.* at 193:12.

22. In repeatedly seeking settlement of the Kebbie PCR Action in the days immediately preceding his scheduled deposition in that action, Attorney Cobb maintained at the Reinstatement Hearing that he was attempting to act as "[p]roblem solver," *id.* at 187:6, and "simply trying to be helpful," *id.* at 193:8, but did not deny that such a settlement of the IAC claim would be helpful to his own personal interests. *See id.* at 86:22-25 (Attorney Cobb noting that settlement of the Kebbie PCR Action would avoid "dragging me into" a contested merits hearing on Attorney Cobb's allegedly incompetent representation of Mr. Kebbie at his felony assault trial).

23. Attorney Cobb prefaced his November 21st email settlement overture with his admission that "I think that Robert [Kaplan] has a good case that my advocacy [for Mr. Kebbie] fell

below the standard of care. Whether the [PCR] Court agrees, and finds that it reached the level of ineffectiveness based on the legal standard - I have no idea." **Ex. 1** at 2.

24. Attorney Cobb explained that "[a]fter doing counseling over the last couple of months, I have learned for the first time that I have ADHD. I think that it partly explains some of my weaknesses - lack of organization, lack of follow-through, lack of planning ahead, unable at times to prioritize and complete tasks." **Ex. 1** at 2.

25. Attorney Cobb continued, "I believe that these weaknesses" from his asserted Attention Deficit Hyperactivity Disorder "impacted my ability to advocate for Kandeh [Kebbie] as well as I could have" since "I did not have a good defense in mind . . . didn't prepare as well as I should have" for his trial "and I have to blame myself in part for the loss." *Id.*

26. Attorney Cobb testified at the Reinstatement Hearing that, as treatment for his asserted ADHD, he attended professional counseling sessions twice a week for the previous two months, but had not yet been prescribed any medication for control of his ADHD symptoms. Hearing Tr. at 182:20-23, 199:2-11, **Ex. 7**.

27. Attorney Cobb did not claim in his own testimony (or present any other competent evidence) that his asserted ADHD is now (or soon will be) sufficiently ameliorated, well-controlled or managed such that his immediate return to legal practice would not be detrimental to clients or to the administration of justice.

28. Specifically, Attorney Cobb has not demonstrated in any scientifically or medically-reliable manner that the ADHD-related "weaknesses" he identified in his legal practice skills and professional habits while inadequately representing Mr. Kebbie at trial in 2017 have not persisted and would not cause him to again render substandard representation of other clients if he were presently reinstated to Vermont practice.

29. By freely volunteering to State's Attorney Sullivan and DSA Battey that his prior representation of Mr. Kebbie fell below expected professional standards, Attorney Cobb evidently sought to bolster the apparent strength of Mr. Kebbie's IAC claim and PCR Action, render Attorney Cobb's contemporaneous settlement proposal more compelling to the State, and, as a result, increase the likelihood that the Kebbie PCR Action would settle without need for any testimony by Attorney Cobb or judicial findings concerning his allegedly incompetent representation of Mr. Kebbie.

## PROPOSED CONCLUSIONS OF LAW

Attorney Cobb Recently Engaged in the Unauthorized Practice of Law

1. "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so." Vt. R. Pr. C. 5.5(a). "The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons." *Id.*, cmt. 2.
2. "Rule 5.5(a) prohibits even the unintentional practice of law without a license. It is ultimately each attorney's duty to ensure that he or she is licensed to practice law before engaging in the practice of law." *In re Hongisto*, 2010 VT 51, ¶ 12.
3. "It is well-established that Rule 5.5(a) prohibits lawyers who have been suspended from 'practic[ing] law or holding themselves out as eligible to practice.'" *In re Michelle Sherer, Esq.*, PRB File No. 2019-037, Decision No. 228 at 9 (quoting ABA Ctr. For Prof'l Responsibility, *Annotated Model Rules of Prof'l Conduct* 521 (8th ed. 2015)).
4. Under Vermont law, "'[a] person who gives legal advice to clients and transacts business for them in matters connected with the law in the settlement, adjustment, and

compromise of claims is engaged in the practice of law.'" *In re Morales*, 2016 VT 85, ¶ 9 (quoting *In re Flint*, 110 Vt. 471, 477, 8 A.2d 655, 657 (1939)).

5. In *Flint*, the Court "concluded that a law student who, for a fee, offered an individual advice about an ongoing dispute, and ultimately negotiated a settlement of the case on the individual's behalf, had engaged in the unauthorized practice of law." *Morales*, 2016 VT 85, ¶ 9 (citing *Flint*, 110 Vt. at 477-78, 8 A.2d at 657-58). In reaching its decision, the *Flint* Court "emphasized" that "the defendant negotiated and effected a settlement." *Id.*; *see also id.*, ¶ 8 (explaining that Court's decision in *In re Ripley*, 109 Vt. 83, 191 A. 918 (1937) announced "a broader definition of unauthorized practice" when it found that "the defendant also ran a debt collection agency in which, for a fee, he undertook the obligation of enforcing, securing, settling, adjusting, and compromising a civil claim.").
6. The *Flint* Court concluded that the law student had engaged in unauthorized practice despite its findings that he had merely "conferred with" the parties to the dispute, "acted as a 'go–between in the matter" and "[a]fter talking with both of them" had "told them that it was a matter for them to decide." *Flint*, 110 Vt. at 477, 8 A.2d at 656; *see also Green v. Unauthorized Practice of Law Comm.*, 883 S.W.2d 293, 298 (Tex. App. 1994) (noting that even if unauthorized person claims to act merely as a "go between," such "conduct still constitutes negotiation" for purposes of unauthorized practice of law since "[a] party negotiates if that party conducts communications or conferences with a view toward reaching a settlement or agreement").
7. Other jurisdictions likewise hold that when a lawyer suspended from practice attempts to negotiate the settlement of a legal dispute, the suspended lawyer engages in the unauthorized practice of law. *See* M*atter of Herzberg*, 163 A.D.3d 220, 225, 82

N.Y.S.3d 9, 13 (1st Dept. 2018) (summarily disbarring suspended attorney who had engaged in the unauthorized practice of law by communicating with attorneys regarding pending litigation and attempting to settle various matters while holding himself out as a "paralegal;" noting that "[w]hile there is no evidence that respondent actually appeared at a closing or in court, respondent plainly communicated with various attorneys regarding pending litigation and attempted to settle various matters, all after learning of his suspension"); *see also People v. Zodrow*, 276 P.3d 113, 119 (Colo. O.P.D.J. 2011) (attorney's conduct while working as a law clerk during period of suspension of his license of e-mailing employer attorney's client offering legal advice about his case and e-mailing opposing attorney to negotiate on behalf of client was unauthorized practice of law).

8. In this matter, Attorney Cobb engaged in the unauthorized practice of law in violation of Vermont Rule of Professional Conduct 5.5 when he attempted, while suspended from practice, to negotiate a settlement of the Kebbie PCR Action on November 20-21, 2023, just days before his Reinstatement Hearing.
9. Attorney Cobb has admitted that he repeatedly initiated settlement discussions with counsel for the parties in the Kebbie PCR Action, by telephone and email, and his settlement overtures were unsolicited.
10. Attorney Cobb has further admitted that was attempting to negotiate a settlement of the Kebbie PCR Action. Attorney Cobb also indicated that such a settlement would advance his personal interest in not having the parties "dragging me into" testifying at a deposition and contested PCR hearing in which the Rutland Superior Court will adjudicate Mr. Kebbie's allegations that Attorney Cobb provided him with grossly incompetent

representation at his 2017 felony assault trial.

Attorney Cobb Recently Attempted to Engage in a Settlement Negotiation on Behalf of a Former Client for Which He Had a Concurrent Conflict of Interest Due to His Personal Interests

11. Vermont Rule of Professional Conduct 1.7 provides in pertinent part that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest" and such "concurrent conflict of interest exists if: . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Vt. R. Prof'l C. 1.7(a)(2); *see also id.*, cmt. 10 ("[I]f the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.").
12. Even when a lawyer does not succeed in effectuating a conflicted representation, a lawyer is prohibited from pursuing such a representation directly or indirectly since "[i]t is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Vt. R. Prof'l C. 8.4(a).
13. "[A] lawyer may not ethically present a claim that he/she provided a client with ineffective assistance of counsel." *Hood v. State*, 651 S.E.2d 88, 89 (Ga. 2007); *see also United States ex rel. United States Attorneys for the Eastern and Western Districts of Kentucky v. Kentucky Bar Ass'n*, 439 S.W.3d 136, 152 (Ky. 2014) (finding that it was personal interest conflict under Rule 1.7 for an attorney defending a client in federal court to advise a client to accept a plea agreement containing a waiver of the right to file IAC claims and for a prosecutor to include such a waiver in a plea agreement since "[w]hen

defense counsel is forced, through the introduction of an IAC waiver in a plea agreement, to advise a client on the attorney's own conduct, a personal interest certainly exists. An IAC claim is time consuming for an attorney, may tarnish the attorney's professional reputation, may subject the attorney to discipline by the bar or courts, and may even have serious financial consequences for the attorney's practice"); *In re Ponds*, 888 A.2d 234, 236, 239 (D.C. 2005) (lawyer violated Rule 1.7 by continued representation of defendant on his motion to withdraw guilty plea based on lawyer's alleged coercion and ineffective assistance of counsel since lawyer's representation of client "was materially limited by his own interests" and lawyer "could not argue the motion to withdraw without possibly admitting serious ethical violations and subjecting himself to possible liability for malpractice.").

14. In this matter, Attorney Cobb violated or attempted to violate Vermont Rule of Professional Conduct 1.7's prohibition on personal interest conflicts by presenting Mr. Kebbie's IAC claim against him as a meritorious one that the Rutland County State's Attorney should seek to settle through a minimum sentence reduction for Mr. Kebbie in exchange for dismissal of the Kebbie PCR Action.
15. Attorney Cobb freely admits that he sought to negotiate a settlement of the IAC claim so that neither the State nor Mr. Kebbie would be "dragging me into" a merits hearing on the IAC claim, during which he would be forced to testify and the competency of his representation would be subjected to judicial scrutiny and assessment.
16. Because it was in Attorney Cobb's obvious personal interest to avoid through settlement the potential reputational, disciplinary and financial damage to him from a judicial finding that his representation of Mr. Kebbie was incompetent, Attorney Cobb was

conflicted from presenting any assessment or recommendation to Mr. Kebbie's PCR counsel, Attorney Kaplan, or to the State concerning whether and on what terms Mr. Kebbie should settle his IAC claim, or whether instead Mr. Kebbie should proceed to a contested hearing before the Rutland Superior Court that might result in vacated convictions and a new trial, albeit with potentially serious adverse consequences for Attorney Cobb.

Attorney Cobb Has Failed to Demonstrate By Clear and Convincing Evidence that His Professional Ethical Judgment Has Been Rehabilitated Sufficiently to Merit Reinstatement

17. When, as in this matter, an attorney's suspension from practice derives in part from "misconduct [that] raises serious questions regarding his professional judgment . . . externally imposed practice conditions" and "imposition of prophylactic controls, without more, does not prove rehabilitation under circumstances where character shortcomings exist and are manifested in the exercise of poor professional judgment. Rehabilitation requires proof establishing that [the attorney] has, in some way, altered the manner in which he exercises his judgment." *Goff v. People*, 35 P.3d 487, 496 (Colo. O.P.D.J. 2000) (denying reinstatement to suspended attorney). Likewise, "[i]n addition to 'soul searching' or personal reflection, there must be some illustrative evidence from which it can be concluded that change is real." Id. at 496 n.14.
18. In this matter, Attorney Cobb's very recent decision to avidly engage in the unauthorized practice of law by pursuing an obviously conflicted representation illustrates that he has not sufficiently rehabilitated the poor professional judgment that led, in part, to his previous misconduct and suspension from practice.
19. In considering a petition for reinstatement to practice, the Panel must also consider whether Attorney Cobb has been the subject of any "new allegations of misconduct"

during the period of suspension. *Matter of Griffin*, 175 A.D.3d 1720, 1721, 107 N.Y.S.3d 191, 192 (App. Div. 2019).

20. In this matter, Attorney Cobb has, during his period of suspension, admitted to new potential misconduct with respect to his substandard representation of Mr. Kebbie at his 2017 trial. Although such misconduct occurred more than six years ago, Attorney Cobb attributes his apparent lack of diligence and competence in representing Mr. Kebbie (and perhaps many other clients) to a recently diagnosed mental disorder – ADHD – for which Attorney Cobb has only just begun treatment.

21. Under such uncertain and troubling circumstances, the Panel cannot conclude that Attorney Cobb has "demonstrate[ed] by clear and convincing evidence that . . . [his] resumption of the practice of law will be neither detrimental to the integrity and standing of the bar or the administration of justice nor subversive of the public interest . . . ." A.O. 9, Rule 26.D.

Dated at Burlington, Vermont this11th day of December 2023.

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