STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

In re: William Cobb, Esq.
PRB No. 2020-99, 2020-103

WILLIAM COBB, ESQ.'S ANSWER TO PETITION OF MISCONDUCT

Allegation of probable cause on October 5, 2020, and formal charges alleging violations pursuant to A.O. 9, Rule 11(D)(1)(b), are denied herein.

Count 1 of 5

Denied that in January 2020 Respondent engaged in conduct prejudicial to the administration of justice. Specifically, it is denied that Respondent mishandled or unlawfully disclosed confidential juvenile court information in violation of Vermont Rule of Professional Conduct 8.4(d). In addition and in the alternative, Respondent submits that no criminal statute was violated and the alleged conduct, if a disciplinary violation, should not be treated as criminal conduct.

Count 2 of 5

Denied that between June 2019 and January 2020 Respondent failed to provide competent representation to criminal defendant-client MK. Respondent did not "fail" to obtain or review evidence necessary to advise the client. Respondent had sufficient information to competently advise the client between receiving an offer on August 22, 2019 and expiration of both offers on October 22, 2019. Respondent did not violate Vermont Rule of Professional Conduct 1.1.

Count 3 of 5

Denied that between August 2019 and January 2020 Respondent failed to provide

diligent representation to criminal defendant-client MK. During all relevant times, Respondent represented MK only in Windsor County. Pursuant to Rule of Professional Conduct 1.2(a), Attorney Cobb determined the appropriate means of meeting MK's stated goals. It was not a violation of Rule of Professional Conduct 1.3 for Respondent not to file the motion at any time relevant to the Petition. MK's alleged "multiple requests" that a motion to modify conditions of release in Windsor County be filed are disputed, and in the alternative even if such requests are established under the circumstances Respondent did not violate Vermont Rule of Professional Conduct 1.3.

Count 4 of 5

Denied that on January 28, 2020 Respondent inappropriately shared confidential client information with another attorney. In the context of the joint representation, Respondent believed that his communications with MK's new attorney would be maintained in confidence. Considering the permissible circumstances of the communication, there was no violation of Vermont Rule of Professional Conduct 1.6. In the alternative, if a violation is established then the fact that the former client did not learn of the disclosure until informed by disciplinary counsel shows minimal actual harm was caused to the client and should be considered a mitigating factor.

Count 5 of 5

Denied that in May 2020 Respondent engaged in conduct involving dishonesty or misrepresentation. Respondent provided disciplinary counsel with the substance and circumstances of Respondent's work on behalf of client MK. No violation of Vermont Rule of Professional Conduct 8.4(c) occurred.

Respondent's Answers to Numbered Facts Alleged in Support of the Petition

1. Admitted that Respondent is an attorney licensed to practice in Vermont who maintains a solo practice in St. Johnsbury and sits part time as a probate court judge in Caledonia County.

2. Denied that misconduct occurred. Admitted that the allegations arise out of two separate, unrelated client matters. Admitted that in the first matter, Respondent represented client KH (father) in a civil action against the mother of KH's deceased child who died in the custody of the Vermont Department for Children and Families (DCF).

3. Admitted that in the second matter, Respondent represented client MK in a criminal sex assault case involving alleged victims in both Windsor and Caledonia Counties.

KH's Civil action (Rule 8.4(d) – unlawful disclosure of confidential juvenile material)

4. Admitted that in KH's civil action, Mother (KL) of the deceased juvenile sought to settle the disposition and apportionment of a monetary settlement from DCF for the death of KL and KH's child. Admitted that Respondent's client father-KH's position was that mother may be barred from receiving any portion of the settlement funds because of her own conduct, which position was taken in response to Mother's allegation that Father was disqualified from receiving any portion of the settlement fund due to his own conduct.

5. Admitted that Respondent filed motions for summary judgment in the matter setting out Father's position regarding the facts and law in support of KH's position, including case law from other states supporting Respondent's position on behalf of KH that Mother's conduct in the CHINS case could be referred to in the wrongful death civil action.

6. Denied that the pleadings (e.g. the Answer or Complaint) filed by Respondent in the

public civil action described in detail confidential juvenile court information. Admitted that Respondent's Summary Judgment filings describe specific facts that were known to Respondent's client both independently and due to the prior juvenile proceeding. Denied that the filings "described in detail confidential juvenile court information." Admitted that Respondent's Summary Judgment filings described the Parties' history and referenced "Exhibits A-L" in support of the allegedly disputed and undisputed material facts. Admitted that Respondent's filing letter sent with one of the summary judgment filings stated that "Exhibits A-L" were filed "under seal" with the Washington Civil Division.

7. Denied that aside from the "under seal" exhibits, Respondent's public pleadings disseminated confidential juvenile information within the public filings, *as proscribed* by 33 V.S.A. § 5117.

8. Admitted that in a summary judgment filing, partially responsive to Mother's erroneous claims regarding her past history relative to her conduct as a parent, Respondent submitted information relevant to Mother's claims. Admitted that the summary judgment filing provided details of Mother's involvement with DCF, regarding which Respondent's client had independent knowledge, and which Respondent believed could be referenced to prevent Mother from misrepresenting the true facts to the Court.

9. Admitted that Respondent did not notify AC's prior attorney in a different matter in which Respondent was not representing Father, about the claims being made in the civil litigation. Under the circumstances, where the information was not obtained from the juvenile court, there was no obligation to provide an "opportunity to intervene" to protect AC's interests. 33 V.S.A. § 5117 is inapposite, as Respondent did not access "Court files concerning a person subject to the jurisdiction of the Court"..."maintained separate from the records and files of other persons"...not open to public inspection. Moreover, Respondent was not a "receiving person" pursuant to 33 V.S.A. § 5117.

10. Denied.

11. Denied. Respondent was not a "receiving person" pursuant to 33 V.S.A. § 5117. In the case before the Board, the subject information was learned by Respondent independent of the juvenile proceeding or the juvenile court action, and the subject information had already been disseminated when discussed in Respondent's Summary Judgment filings. Moreover, Respondent was permitted to rely upon the subject information to counter Mother's false claims that were contrary to her admissions in the juvenile action. Respondent's client had independent knowledge of those admissions and of the facts supporting them, which were communicated to Respondent by his client.

12. The statute speaks for itself, but to be clear Respondent did not view any records pursuant to 33 V.S.A. § 5117. Therefore, Respondent was not given any of the admonitions or notices set forth in 33 V.S.A. § 5117. Respondent denies there is any other statute related to the subject allegation.

13. The statute speaks for itself, but to be clear Respondent did not view any records pursuant to 33 V.S.A. § 5117, and there is no other statute related to the subject allegation.

14. Denied.

15. Denied.

16. Admitted that on January 9, 2020, Respondent sought court permission from the Washington Family Division to access the complete Juvenile Court file, but the request was denied for lack of sufficient information.

17. Denied. See Respondent's responses to Paragraphs 4 - 16 above for a complete explanation of Respondent's position regarding the remaining allegations in Paragraph 17.

18. Denied that Respondent's position as a probate division judge gave him any greater understanding of 33 V.S.A. § 5117.

19. Admitted that the Probate Division handles adoptions and guardianships. Admitted that a specific provision of 33 V.S.A. 5117 addresses the probate court's access and handling of juvenile court records under subsections (c)(2) and (3).

20. Denied. See Respondent's responses to Paragraphs 4 - 19 above.

21. Denied. In addition, see Respondent's responses to Paragraphs 4 - 20 above for a complete explanation of Respondent's position regarding the remaining allegations in Paragraph 20 of the Petition.

MK's criminal matter: Rule 1.1 (failure to obtain and review discovery material) and Rule 1.3 (failure to pursue amended conditions of release)

22. Admitted.

23. Admitted.

24. Unknown as to whether or not MK knew at the relevant time that there were attorneys in the State of Vermont whom MK could ask for help. MK quickly found another attorney to represent him. Admitted MK called Respondent and Respondent promptly attended an arraignment for MK in St. Albans, which it turned out related to both the Caledonia County and Windsor County charges. Admitted that after his arraignments, MK hired Respondent to represent MK in the Windsor County case only. MK obtained public defender services for the Caledonia County case and was represented by attorney A.F.

25. Admitted that MK qualified for assistance from a court-appointed attorney in Caledonia County and was appointed counsel for the Caledonia County charges.

26. Respondent lacks sufficient knowledge, information or belief to admit or deny whether MK's relatives pooled funds to pay Respondent. Admitted that Respondent was engaged to assist with the Windsor County case. Admitted that Respondent was engaged to perform work for MK's defense of the Windsor County case. Admitted that Respondent explained to MK that in Respondent's view of the judicial conduct code, Respondent was not permitted to represent clients in Caledonia County matters because Respondent was a part-time probate court judge in Caledonia County. Respondent believed, based upon his training with Judge Zonay, that Respondent should avoid appearing in the Caledonia Judicial Unit while serving in the Probate Division of that Unit as Probate Court Judge.

27. Admitted that Respondent arranged for a flat rate monthly charge to be paid for his services. Admitted that the monthly payments were paid each month between June 2019 and January 2020, by MK or his agent.

28. Admitted.

29. Admitted that MK's conditions of release in Caledonia County did not permit him to have in-person contact with his daughters.

30. Admitted that with MK's permission, much of the communication and organizing for MK's defense was coordinated through MK's fiancée. Admitted that MK's fiancée was a point of contact for a period of time, because at first MK was incarcerated. Admitted that after MK was released from jail, MK's fiancée continued to communicate on MK's behalf with Respondent. The Petition's characterization that MK's fiancée "strongly advocate[d]" for MK is misleading. When Respondent attempted to provide MK with private counsel, and asked MK's fiancée for privacy in order to provide such private consultations, Respondent's relationship with MK

declined and Respondent was replaced as counsel for MK.

31. The allegation contained in Paragraph 31 of the Petition is misleading. While it is probably true that MK inquired of Respondent whether MK's criminal conditions of release could be amended so that MK could have contact with his daughters, it is inaccurate that such an amendment would be sufficient to permit contact between MK and his daughters. Respondent only represented MK in the Windsor County case. In order to see his daughters, MK's conditions in his Caledonia County case had to be amended. Respondent did generally communicate with MK's Caledonia County attorney A.F. regarding MK's Caledonia County case, and would have been advised if a Motion to Amend Conditions of Release was being filed or was granted in Caledonia County. Upon belief, attorney A.F. received the same requests from Complainant as did Respondent, but neither Respondent nor A.F. filed a motion to modify conditions of release either. Both Respondent and A.F., for similar reasons, did not consider filing such a motion advisable during any time relevant to the Petition. When MK's subsequent counsel D.S. took over the cases, upon belief D.S. entered an appearance in both Caledonia and Windsor Counties, which allowed him to avoid the complications raised by having multiple jurisdictions involved and file the Motion to Modify in both counties.

32. Admitted that in October 2019, Respondent provided supererogatory assistance to MK, when Respondent inquired whether the Caledonia deputy state's attorney would consent to an amendment to MK's Caledonia County Conditions of Release. Admitted that the deputy S.A. responded in the negative. At that time, MK's Caledonia County attorney,

A.F., would have had to move to amend MK's conditions of release, and prevail at a contested hearing, before amending MK's Windsor County conditions of release would have made a difference in MK's ability to have contact with his children.

33. The allegation contained in Paragraph 33 is misleading. Use of the phrase "Respondent never pursued the matter further" implies that he had an obligation to do so. Respondent made the inquiry informally in order to explore whether it made sense to file a Motion to Modify Conditions of Release in Windsor County. Respondent had no ability to file a Motion to Modify Conditions of Release in Caledonia County. In addition, use of the phrase "despite the family's continued requests" is misleading. See Paragraphs 22 - 32 regarding Respondent's position concerning filing a motion to modify conditions of release. In addition, during Respondent's representation of MK there were strategic reasons not to file such a motion over the objection of the prosecuting attorneys. Specifically, Respondent sought to leverage MK's restrictions to help persuade the State to make a reasonable plea offer. Respondent understood that, pursuant to Rules of Professional Conduct 1.2 and 1.4, while MK had control of the goals of representation, Respondent had decision making authority relative to the legal means of achieving those goals. Respondent submits that he communicated adequately and acted appropriately.

34. Respondent lacks sufficient knowledge, information or belief to admit or deny whether upon MK deciding to hire new counsel in January 2020, his new attorney filed a motion "right away," and therefore leaves Petitioner to its proof. No position is taken on whether the matter was set for hearing, as that is a matter of public record. Unknown whether in February 2020 "the conditions" were ordered amended. Unknown which county's conditions are referred to in

the allegation - Caledonia, Windsor or both. Presumably conditions of release in Caledonia County were amended. Whether that amendment was sufficient, and whether any amendment to the Windsor County conditions of release was also necessary, "so that MK could have contact with his daughters" is unknown and therefore Petitioner is left to its proof. Denied that Respondent was obligated to file a motion to modify MK's Caledonia County conditions of release at any relevant time, and denied that moving to amend the Windsor Conditions of Release only would have been sufficient for MK to have contact with his children. In addition, Respondent denies the allegation, implicit or explicit in Paragraph 34 of the Petition, that Respondent did something inappropriate by not moving to amend MK's Windsor conditions of release during Respondent's representation. Not only was Respondent limited by the facts as previously stated herein, but also there were strategic considerations that justified waiting to file such a motion.

35. Undisputed that the discovery material in MK's criminal matter included recorded interviews with the alleged victims. Admitted that there was a standard notification regarding discovery. Although it is admitted that the standard initial disclosures by the State may have indicated that the recordings had to be obtained directly from law enforcement and would be provided upon request, pursuant to V.R.Cr.P. 16 the information should have been available from the State's Attorney as it was not within the scope of V.R.Cr.P. 16(e). Regardless, the allegation in Paragraph 35 is misleading, as it implies that the existence of the videotapes and their availability "upon request" necessarily mandates that Respondent request and view the contents of the videotapes prior to responding to the State's so-called offer. Respondent had read the statements purportedly made in the subject video tapes and

was confident that watching the tapes would confirm the statements were made as alleged.

36. Paragraph 36 of the Petition is misleading, fails to precisely state the facts, contains numerous unrelated allegations as though they are related, and contains numerous implications that misapprehend the nature of criminal defense practice. Respondent did not obtain or review the purported interviews, because doing so was unnecessary at all relevant times to the Petition for numerous reasons. First, there were written statements that clearly set forth the facts the State intended to prove, and which the State believed justified its offer of settlement, including transcribed portions of the subject videos. Second, MK did not consider the State's offer even worthy of consideration and rejected it out of hand, refusing to seriously consider the offer. Third, MK's Caledonia County case was a higher priority than his Windsor County case, so for strategic reasons Respondent believed that MK would want to resolve the Caledonia County case before resolving the Windsor County case even though the Windsor County case appeared to be on a faster trial track. That appearance is misleading, because the reality of jury draw days in Windsor County at the time was that a trial in MK's case was highly unlikely and the more accurate assessment is that the trial would not go forward that month. Respondent and MK agreed that anything that could be done to delay the Windsor County case would be to Complainant's benefit. Thus, Respondent was implementing a strategy agreed upon with MK. Moreover, Respondent knew from the information provided by MK and the witness statements, including transcribed portions of the subject interviews, that MK had an extremely challenging case. Respondent knew that more time needed to pass before it was likely a negotiated resolution could be reached. MK was agreeable to the strategy of delaying resolution of the Windsor County case as long as possible, and Respondent's representation of MK was tailored toward that

goal.

37. Paragraph 37 of the Petition is extremely misleading. Although, to be clear, Respondent is not implying that Petitioner intends the allegation to be misleading, characterizing the August 2019 offer to resolve the Windsor County charge as a "time-sensitive" offer completely fails to accurately comprehend that type of offer in the context of MK's Windsor County criminal case. What is deceptively referred to as the August 2019 "time-sensitive offer to resolve the Windsor County charge" included substantial jail time. It is highly likely that MK could have agreed to enter a plea agreement with a lengthy jail sentence at any time, regardless of an artificial time limit on a punitive offer. MK was extremely clear that he would not consider entering a plea with significant jail time under any circumstances. It is likely the offer would have remained available even after the artificial "deadline" or that another similar or better offer would be made as the case progressed. It is the practice of the Windsor County State's Attorney's Office, as well as many others in the State, to make an early offer that purportedly expires by a date certain or upon the filing of any motion or engaging in certain types of discovery such as depositions. It is the competent practice of many criminal defense attorneys to treat such offers as an opening to negotiations, and to negotiate more favorable terms over the course of a case. Such a strategy has to balance whether a deposition will improve the case sufficiently to make it worthwhile, or if a deposition will harden the State's position and educate the prosecutor on defense strategy. It is further a regular and competent practice of criminal defense attorneys in Vermont to assess such offers based upon the Information and supporting Affidavit and other witness statements provided at arraignment. Some such offers are made at arraignment, and can only be accepted at arraignment before any discovery occurs. Respondent submits that if attorneys can consult with

criminal defendants regarding whether or not to accept an arraignment offer based upon written material provided by the State, and if attorneys can ethically assist a criminal defendant with entering a guilty plea at arraignment consistent with an arraignment offer without procuring discovery, then Respondent was certainly permitted to consult with MK Regarding the subject offer relying upon the written statements provided by the State and MK's recitation of facts. The allegation that "Respondent would have had to advise MK on [the offer] in light of the strength of the evidence, which Respondent had not fully reviewed because he had not viewed the interviews," is also inaccurate, misleading and misapprehends the practice of criminal law. The logic of the allegation is faulty as well. Petitioner's allegation produces a slippery slope: if Respondent had to watch the videos to advise MK on the State's "time sensitive" offer, then he would have to depose the witnesses to fully advise MK. If respondent had to depose the witnesses in order to adequately advise MK, then the witnesses social media traffic and text messages during the relevant time should have been discovered, before advising MK on the settlement offer. Clearly, such offers are intended to resolve a case expeditiously, without the need for further discovery or litigation. Since the offer was considered a completely unreasonable, unacceptable non-starter by MK, the notion that Respondent had to engage in any further inquiry or discovery to advise MK regarding the offer is mistaken. Respondent had sufficient information at all relevant tims to advise MK regarding the State's purported offer. Considering the strategy being employed, and the information available to Respondent, it was unnecessary for Respondent to view the subject videos at the time the Petition alleges in order to adequately represent MK or advise him regarding the subject offer.

Rule 1.6 disclosure of confidential client information

38. Unknown when MK decided to hire new counsel, but admitted that in approximately January 2020, MK terminated Respondent's representation and hired replacement counsel after Respondent sought to consult with MK without MK's fiancée present.

39. Admitted that upon request, Respondent transferred MK's file to replacement counsel D.S. The email speaks for itself. Respondent objects to the characterization in Paragraph 39 of "the approach he purportedly was pursuing for MK and ideas about what he had planned for the upcoming months." The Petition repeatedly implies that Respondent's strategy was a chimera. Instead, Respondent's strategy was an intentional undertaking made with MK's knowledge and consent. Respondent advised MK as to the reasons for taking such an approach, and MK agreed. It should be noted that the wisdom of Respondent's "approach" will not be known at least until a final resolution is reached in MK's criminal cases, and depending upon successor counsel's approach whether Respondent's strategy would have achieved a better result may never be known. Successor counsel took over both the Windsor and Caledonia County cases, and was therefore more easily able to amend MK's conditions of release, but such action may have unintended consequences later in the case. Only upon conclusion of MK's criminal cases will there be any ability, however slight, to assess the wisdom of successor counsel's approach as compared to Respondent's.

40. The email speaks for itself. At the time of the subject email, Respondent considered successor counsel and Respondent to both be MK's criminal defense attorneys. Respondent had not withdrawn and D.S. purported to be representing MK. Therefore, all information shared between counsel while they were both representing MK should be considered as

remaining confidential. *See, e.g., United States v. Gonzalez*, 669 F.3d 974, 978 (9th Cir. 2012) (the joint defense privilege is "an extension of the attorney-client privilege." (citing *United States v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000) (explaining that a JDA had established an implied attorney-client relationship between the co-defendants and their counsel)).

41. Admitted that at the time described in the Petition, Respondent was covering BA's matter for a scheduled weight of the evidence hearing set for February 3, 2020 while BA's primary assigned counsel was out of the country for much of January and February.

42. Admitted that at the time described in the Petition, BA's only entered plea was not guilty and he was being held without bail awaiting further proceedings.

43. Admitted that at the time described in the Petition, BA was neither aware of nor consented to the subject email; however, as stated in Paragraph 40 above it was not considered an impermissible "disclosure" by Respondent at the time due to the joint nature of the defense at that time. In addition, upon information BA only learned of the subject email from disciplinary counsel's communications. Therefore, in mitigation there was minimal actual harm to BA caused by the subject email, and respondent had no selfish or financial motive.

Dishonest conduct in the course of disciplinary investigation: Rule 8.4(c)

44. Admitted that in the course of the disciplinary investigation into the conduct related to the MK matter, Respondent produced a written response, through counsel, dated May 29, 2020. Admitted that one of the issues the letter responded to related to a complaint by MK that he had not received much for the $8,000 in fees he had paid over the course of eight months from MK's arraignment in June 2019 through January 2020 when MK decided to hire different counsel.

45. Admitted that the written response material included Respondent's counsel's characterization of "contemporaneous" notes relative to work performed in descriptive entries in dated billing records using a software called freshbooks.

46. Admitted that when asked specific questions about when Respondent opened the matter in freshbooks, Respondent acknowledged that he reconstructed his billing based upon notes and work he performed, including but not limited to reviewing his file in response to the disciplinary inquiry. Admitted that the Respondent acknowledged during his interview that there might be some mistakes in the billing records. It should be noted that Respondent was engaged on a capped monthly fee basis, therefore it was not necessary for him to maintain timekeeping records of the time devoted to his representation of MK.

47. Admitted that the freshbooks "invoice autobiography" for the MK matter showed log-in history only on the following dates: May 20, 2020 and May 21, 2020, which are the dates that Respondent entered them into that program in order to produce a record of his activities in the billing format that would be most useful to the request made by disciplinary counsel and the issue Respondent thought disciplinary counsel was investigating. Admitted that late May 2020 is nearly four months after Respondent's representation of MK had ended. Admitted that the Freshbooks records were created in response to the disciplinary inquiry days before responding to the complaint. Admitted that Respondent's undersigned counsel referred in a letter to disciplinary counsel to the subject entries as "contemporaneous," but denied that there was any intention on the part of undersigned counsel or Respondent to mislead disciplinary counsel, denied that disciplinary counsel was in fact misled, and denied that the Petition accurately characterizes the meaning and use of the word "contemporaneous" in the context of the alleged

violation. Denied that Respondent engaged in conduct involving dishonesty or violated Rule 8.4(c).

Wherefore, Respondent respectfully requests that the Panel hold a hearing and DISMISS the Petition. In the alternative, Respondent submits that even if adjudicated in violation of Rules of Professional Conduct, the facts and mitigating circumstances warrant a private admonition.

DATED at Stowe, Vermont this 18th day of November, 2020.

BRETON & SIMON, PLC:

By: 

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