

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

In Re: Norman Watts
PRB File Nos. 2019-102 and 2020-011

REPLY TO MOTION TO DISQUALIFY

Navah C. Spero, Esq., Special Assigned Disciplinary Counsel (“Special Disciplinary Counsel”) files this response in opposition to the request to disqualify her contained in Respondent’s Reply in Support of Motion for Continuance of Merits Hearing; Request For Disqualification and Removal of Specially Assigned Disciplinary Counsel (“Request for Disqualification”).

Introduction

Respondent has neither articulated nor satisfied a standard for disqualification of Special Disciplinary Counsel. The filing of a vigorous opposition to a motion to continue a final hearing with a date certain and a single inadvertent typo are insufficient basis for disqualification and removal.

Special Disciplinary Counsel is acting as a prosecutor on behalf of the Professional Responsibility Program (“Program”). She represents the interests of the Program in pursuing a prompt resolution of all disciplinary complaints. Special Disciplinary Counsel has not engaged in personal attacks against Attorney Shahi nor violated her duty of candor to this Panel. Special Disciplinary Counsel did not allege that Attorney Shahi was being dishonest or untruthful. Nor does Special Disciplinary Counsel have any animus or discriminatory bias towards Attorney Shahi. Indeed, to the best of Special Disciplinary Counsel’s knowledge, she has never met Attorney Shahi. A careful reading of Special Disciplinary Counsel’s Opposition to the Motion for Continuance (“Opposition”) should lead the Hearing Panel to the conclusion that there is no

legal basis for the Request for Disqualification. This request to disqualify Special Disciplinary Counsel is a distraction from this Panel's purpose – a final adjudication of the Petition of Misconduct. This Panel should deny Respondent's Request for Disqualification.

Background

On March 18, 2021, Special Disciplinary Counsel filed a Petition for Misconduct against Attorney Norman Watts. After many delays, on May 11, 2022, Special Disciplinary Counsel requested a status conference to address pending motions and to set a date for a final hearing. Additional delays ensued, but the Panel was able to decide all pending motions on January 26, 2023. On March 24, 2023, this matter was set for a merits hearing on June 7, 8, and 9, 2023.

Between March 18, 2021 and May 4, 2023 – over 2 years – Mr. Watts represented himself. On May 4, 2023, Mr. Watts submitted a Notice of Retention of Kaveh S. Shahi. On May 9, 2023, Attorney Shahi entered a limited notice of appearance on behalf of Mr. Watts. Additionally on May 9, 2023, Attorney Shahi requested to continue the set merits hearing to a later date in June.

On May 12, 2023, Special Disciplinary Counsel filed the Opposition. On May 16, 2023, Attorney Shahi filed the Request for Disqualification asking to remove Special Disciplinary Counsel. Special Disciplinary Counsel filed a sur-reply in opposition to the Motion to Continue on May 18, 2023, but did not address the disqualification request.

On May 24, 2023, the Panel held a pre-trial status conference for the June 7 trial start date. The Panel requested Special Disciplinary Counsel respond to Attorney Shahi's request that Special Disciplinary Counsel be disqualified and removed.

Respondent alleges that Special Disciplinary Counsel should be disqualified and removed for the following reasons:

1. Special Disciplinary Counsel has asked the Panel to discriminate against Attorney Shahi and argued “that he should be disbelieved, disrespected, and discredited because of his ethnicity.” (Request for Disqualification, 4);
2. Special Disciplinary Counsel misrepresented facts to the Panel; and
3. Special Disciplinary Counsel impugned the integrity of the judiciary.

Argument

It is professional misconduct for a lawyer to discriminate against any individual because of their race, color, religion, ancestry, or national origin. V.R.P.C. 8.4(g). “A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.” V.R.P.C. 3.2. “Legal argument based on a knowingly false representation of law constitutes dishonesty towards the tribunal.” V.R.P.C. 3.3, Comment [4].

Respondent identified no legal standard in Vermont to disqualify and remove disciplinary counsel. A review of Vermont law did not reveal any case law or rule on the matter. A.O. 9 outlines some general principles but does not address this issue directly. In general, the standard for recusal of Disciplinary Counsel is one based on the conflict of interest standard in the Rules of Professional Conduct. V.R.P.C. 1.7 Conflict of Interest: Current Clients, 1.9 Duties to Former Clients. Neither is applicable here.

Rule 1.7 deals with conflict of interest to current clients, which is not applicable here. Prosecuting Mr. Watts does not adversely affect Special Disciplinary Counsel’s current client, *see* V.R.P.C. 1.7(a)(1), and there is no significant risk that Special Disciplinary Counsel will be prohibited from carrying out her responsibilities to another client – including the Panel. *See* V.R.P.C. 1.7(a)(2).

Rule 1.9 deals with the duty of loyalty to former clients, which also does not apply here. Special Disciplinary Counsel never represented Mr. Watts nor was she involved in a substantially related matter where a prior client is materially adversely impacted. V.R.P.C. 1.9(a). Special Disciplinary Counsel did not acquire any private or confidential information through a prior representation that would be materially adverse to Mr. Watts and overall unfair. V.R.P.C. 1.9(b).

The rules appear silent, however, on the appropriate standard where a respondent levies an informal complaint against disciplinary counsel during a pending action. Therefore, Special Disciplinary Counsel turned to other forums and the analogous situation of a criminal prosecutor for guidance on determining the appropriate standard for the Hearing Panel to apply in this instance. Few of those cases are directly on point. Here, the primary allegation is that Special Disciplinary Counsel has acted in a discriminatory manner toward a respondent's attorney, not a respondent or defendant.

I. OPPOSING COUNSEL CANNOT MEET THEIR BURDEN, AS THE MOVING PARTY, TO MAKE A RECORD AS TO WHY SPECIAL DISCIPLINARY COUNSEL SHOULD BE REMOVED.

Respondent has not met his burden to disqualify and remove Special Disciplinary Counsel. Defendant bears the burden, as the moving party, to make a record on which a decision to disqualify and remove Special Disciplinary Counsel can be reached. *State v. Putnam*, 164 Vt. 558, 563 (1996) (declining to impose a per se disqualification rule for a trial judge who has a spouse that is a police officer where that officer works in the same barracks as an officer that is a potential witness); *see also In re Disciplinary Proceeding Against King*, 246 P.3d 1232, 1234 (Wash. 2011) (denying a request to remove disciplinary counsel that was filed one day

before hearing officer released findings and request was based on supposition, conjecture, and arriving at unsupported conclusions).

Special Disciplinary Counsel, as a representative of the Program, has no client but the State and justice. V.R.Pr.C. 3.8 Comment [1]. Special Disciplinary Counsel's objective is to resolve disciplinary complaints against attorneys promptly and fairly. A.O. 9, Purpose, (2). Special Disciplinary Counsel is also tasked, on behalf of the Court, to investigate and discipline attorney misconduct. *Id.*, (3); Vt. CONST. ch. II, § 30 ("The Supreme Court shall have . . . disciplinary authority concerning all judicial officers and attorneys at law in the State.").

The basis to disqualify a prosecutor must be "very strong." *U.S. v. Santiago-Rodriguez*, 993 F.Supp. 31, 38 (D.P.R. 1998). In *Santiago-Rodriguez*, defendant sought specific performance of a preliminary cooperation agreement which the government backed out of, alleging that the government was being vindictive against defendant's counsel. *Id.* at 37. Defendant sought to disqualify the federal prosecutors because defendant alleged the prosecutors were biased against defendant's defense attorney. *Id.* at 38. Because of the adversarial nature of the legal system, the Court acknowledged that professional disputes may turn to personal animosity. *Id.* However, an acrimonious atmosphere was insufficient for disqualification and the Court expected the parties to work together in a professional matter. *Id.*

The moving party "require[s] proof, by clear and convincing evidence, of a prima facie case of misconduct on the part of the [prosecutor]." *U.S. v. Heldt*, 668 F.2d 1238, 1276, n.80 (D.C. Cir. 1981). Disqualifying government's counsel is drastic and courts should hesitate to do so unless absolutely necessary. *Santiago-Rodriguez*, 993 F.Supp. at 38. Courts should not second-guess a prosecutor's discretion unless that discretion is based on an impermissible factor like race, religion, or another arbitrary or discriminatory classification. *Id.*

Here, Respondent cannot meet this standard. If a lawsuit against a prosecutor is insufficient grounds to disqualify a prosecutor, then an accusation of misconduct that does not make out a prima facie case, by clear and convincing evidence, should likewise be insufficient. In other words, unless the Hearing Panel reviewed Special Disciplinary Counsel's filing and instantly thought that on its face it violated V.R.Pr.C. 8.4, disqualification is inappropriate. As discussed in more detail below, Special Disciplinary Counsel's filings do not rise to the level of prosecutorial misconduct.

Furthermore, the Panel must conduct a balancing test between preserving government resources and ensuring the appearance of impartiality. "We must reconcile the governmental interests in concerning judicial and prosecutorial resources and in preserving the appearance of impartiality with the interest of the defendant in receiving a fair and evenhanded treatment from his accusers." *Heldt*, 668 F.2d, 1277. In this circumstance, a defendant needs to prove actual prejudice. *Id.* Here, Respondent has failed to show any prejudice to Mr. Watts. The dispute arose because Special Disciplinary Counsel opposed Attorney Shahi's motion to continue a trial with a set date. The parties agree such an opposition is generally "fair game." Request for Disqualification, p. 5. There is a "strong governmental interest in expedient proceedings." *Heldt*, 668 F.2d at 1277. Respondent has not provided anything that would justify disqualification of Special Disciplinary Counsel as balanced against the Program's interest in efficient resolution of this matter.

II. SPECIAL DISCIPLINARY COUNSEL DID NOT DISPARAGE OPPOSING COUNSEL, DID NOT IMPUGN ON OPPOSING COUNSEL'S HONESTY, NOR DEMONSTRATE ANY ANIMUS OR DISCRIMINATORY BIAS IN HER FILINGS.

"In addressing prosecutorial misconduct that is based on the denigration of opposing counsel, we view the prosecutor's comments in relation to the remarks of defense counsel, and

inquire whether the former constitutes a fair response to the latter.” *People v. Pearson*, 297 P.3d 793, 828 (2013). “Impunging [sic] opposing counsel’s integrity is a very serious matter; it should be undertaken only after careful analysis, particularly when the alleged misconduct is used to explain or mitigate one’s own.” *U.S. v. Kojayan*, 8 F.3d 1315, 1321 (9th Cir. 1993).

A plain reading of Special Disciplinary Counsel’s filings does not reveal any disparagement or animus towards Attorney Shahi. Nowhere does she mention Attorney Shahi’s race, ethnicity, religion or place of origin. Indeed, Special Disciplinary Counsel did not know Attorney Shahi’s race, ethnicity, religion or place of origin at the time of her filing. Additionally, nowhere does Special Disciplinary Counsel request that the Panel disbelieve Attorney Shahi at all, let alone because he is a person of color. That would be improper and irrelevant to Mr. Watts’s request for a continuance of the final hearing.

Special Disciplinary Counsel merely objected to a continuance – as is her right as an advocate on behalf of the Program. Objecting to a continuance is permissible. It is inconsistent with the factual record to suggest that Special Disciplinary Counsel is treating Attorney Shahi differently because of his background solely because she vigorously opposed Respondent’s Motion for Continuance.

The tone and content of the Opposition are consistent with the tone and content of other filings on this docket. In this instance the Opposition was largely driven by the content of Respondent’s request and the background of this matter: (1) Mr. Watts was seeking a continuance for a matter that should have gone to trial in early 2022; (2) the matter had been set for a final hearing since March 2023; (3) it had been quite difficult to schedule the final hearing because of the number of people involved; (4) Mr. Watts had not retained an attorney during the

first 26 months of the proceeding; (5) Mr. Watts retained his attorney four weeks and six days prior to the final hearing; and (6) the attorney was only asking for a one week and one day continuance. The Motion for Continuance did not have any explanation for the significance of those extra eight days and why the existing 34 days would not be enough.¹ The vigorousness and tone of the Opposition were due to the specifics of the request, and the history of this case.

Respondent obviously disagrees and has alleged in his Request for Disqualification that Special Disciplinary Counsel has acted in a discriminatory manner and made eight “False Statements.” Special Disciplinary Counsel will attempt to respond first to the general allegation of discrimination and then to each of the eight points.

Respondent states that Special Disciplinary counsel directed her filing at Attorney Shahi because he is “of color with Middle Eastern heritage from a predominantly Muslim region.” Reply at 4. Nowhere does Special Disciplinary Counsel imply that non-white, non-Christian attorneys should be disbelieved. Indeed, Special Disciplinary Counsel would fall outside the category.

Turning to the first listed false statement, Respondent alleges that the statement “Attorney Shahi has Sufficient Time to Prepare. . . .”, Opp. at 3, is false. This is a heading in Special Disciplinary Counsel’s filing, and it is an argument. Both Attorney Shahi and Special Disciplinary Counsel need time to prepare – the question is whether there is a material difference between the six weeks Attorney Shahi requested and the four weeks and six days he had

¹ At the recent hearing, Attorney Shahi stated that he meant to ask for a continuance of six weeks beyond June 7. That is not what the Motion for Continuance says – it seeks a continuance to “the latter part of June 2023.” Motion for Continuance, p. 1. Special Disciplinary Counsel takes Attorney Shahi at his word that June should have read July, but Special Disciplinary Counsel was responding to what the filing said. Attorney Shahi did not call Special Disciplinary Counsel in advance of requesting the extension to discuss the request or her position, as is convention.

available. Special Disciplinary Counsel stands by her argument – not statement of fact – that the one week difference is not material based on the facts presented in the Motion for Continuance. The Panel provided 75-days’ notice of the final hearing. Respondent waited 40 of those days before retaining counsel. Special Disciplinary Counsel believes that an experienced attorney can sufficiently prepare in the remaining 34 days. This is surely just a matter of opinion, where the requesting attorney has provided little to no justification for the request.

The second alleged false statement was: “Attorney Shahi’s familiarity with this matter should obviate the need to continue the June 7 trial date.” Again, this is argument. Special Disciplinary Counsel pointed out based on documents filed in this case by Respondent and a publicly available docket sheet that Attorney Shahi is not a stranger to the basic facts of this disciplinary matter. Attorney Shahi’s statements in the Request for Disqualification confirm the basic premise of this argument – he consulted as an expert in this case, Opp. at 6, and he represents Mr. Watts in the related civil case.

Respondent goes on to argue in this section: “The suggestion by Special Counsel that ‘this matter’ has been fully explored in the discovery process of a legal malpractice case which itself has been mired in marginal and irrelevant matters, is false and misleading.” Opp. at 6. Nowhere does Special Disciplinary Counsel say that discovery is complete in the related malpractice case brought by complaining witness Alibozek, where Attorney Shahi is defending Mr. Watts. She merely argued that Attorney Shahi is familiar with part of this case due to his involvement in a related civil matter that has been pending for a year. Most attorneys would be

familiar with the basic facts of a case one year after having entered their appearance on the docket and made filings.²

Within this section Respondent claims that Special Disciplinary Counsel accused Attorney Shahi of lying as it related to his disclosure as an expert in this case. There is no such accusation in the Reply. Special Disciplinary Counsel only pointed out that Mr. Watts, a licensed attorney, submitted to the Panel a witness list that identified Attorney Shahi as an expert witness in this case. Again, typically someone does not take on a role as an expert and allow a party to present them as an expert to a tribunal without having reviewed some part of the case. Furthermore, Attorney Shahi indicates that they “readily concluded that an expert witness was not needed for what appeared to be actually frivolous charge.” Opp., p. 6. This would support Special Disciplinary Counsel’s *argument* – which is exactly what her filing was – that Attorney Shahi was familiar with the case. He was familiar enough to offer his opinion as an experienced attorney that an expert was not needed. To be clear, this argument is based on what Mr. Watts did by presenting Attorney Shahi as an expert, not an accusation against Attorney Shahi.

Although Respondent places quotations around the phrase “these people” in this section, Reply at 7., that phrase never appears in Special Disciplinary Counsel’s filings. She is not sure what the quote references but for an attempt to further allege discriminatory animus – which is unfounded.

² This is everything Special Disciplinary Counsel wrote about the pending related civil matter:

Of great note, Attorney Shahi already represents Mr. Watts in a civil matter brought by one of the complaining witnesses in this matter, G.A. See excerpts of Docket Summary for *Alibozek v. Watts*, 22-cv-00493 (Exhibit 4) (noting Attorney Shahi’s entry of appearance in that case on April 11, 2022, more than a year ago). Attorney Shahi is therefore very familiar with Mr. Alibozek’s (G.A.) allegations.

The third allegedly false statement is: “More recently, the Hearing Panel can assume that Attorney Shahi re-reviewed the general facts and circumstances of this case before agreeing to enter a limited appearance on behalf of Mr. Watts.” Opp. at 7. Here, Special Disciplinary Counsel explicitly asked the Panel to make an assumption. That is argument. Attorney Shahi argues that Special Disciplinary Counsel called Attorney Shahi untruthful here, but that is completely absent from the filing. Asking a tribunal to assume that an attorney would not agree to represent a client in a matter without reviewing the general facts and circumstances of a case is not an accusation that someone is untruthful.

The fourth allegedly false statement is: “[A]ttorney Shahi states he will need time to prepare due to the volume of discovery.” Attorney Shahi is correct that his motion to continue does not mention the volume of discovery. On May 4, 2023, Attorney Watts – while still representing himself – filed a letter with the Panel indicating that he had retained Attorney Shahi. Mr. Watts notified the Panel about several issues including “[f]irst, considering the extent and volume of documentation, pleadings, recordings and ruling in the case, [Attorney Shahi] will need time to review them and prepare for the final hearing and other actions in the case.” While discovery was not specifically mentioned in the Motion for Continuance, Attorney Watts had made that argument first. Special Disciplinary Counsel should have been more precise in her response in terms of who made the statement, however. Of course, it was also implied in the Opposition, which states that additional time is needed “to prepare for this hearing.” Motion for Continuance, p. 1. A new attorney on any case would have to review the documents exchanged in discovery to get up to speed. A thorough review of the produced discovery is therefore implied in that statement.

The fifth allegedly false statement is: “In other words, Attorney Shahi has plenty of time to prepare for a matter with a limited number of documents, where he is already intimately familiar with half of the case, and has more than four weeks to prepare for the rest.” This is just argument. There are no facts alleged here, and it is a restatement of information that had been presented above.

The alleged sixth false statement is: “Attorney Shahi’s Schedule Is Not a True Conflict.” And the seventh accusation is that this argument “impugns” the integrity of the judiciary. This was a heading in the Opposition and is obviously an argument. Arguing that there is potential that a case scheduled for jury draw – while competing for trial time with other cases – will not go to trial is not a lie. Nor does it show disregard to a judge or court. Courts regularly put more cases on a jury draw than can be heard. According to the notice of jury draw provided by Attorney Shahi, there are only five available trial dates in June. There are four multi-day trials competing for limited trial days. To try all the pending cases on the notice of hearings, the Court would need 13.5 days (including the back up 1.5 day trial case). It is proper to *argue* that there are limited trial days in June and therefore unlikely that Attorney Shahi’s other matter will actually proceed. To suggest that Special Disciplinary Counsel stated that the Court was committing a fraud on the public is just preposterous.

The eighth alleged false statement was: “Presumably, Attorney Shahi was aware of the scheduling conflict before agreeing to represent Mr. Watts. Therefore, a decision must have been made that either one of his partners could attend the jury draw or he could move to continue the jury draw.” Again, this is argument. The use of the word presumably should make it clear that Special Disciplinary Counsel is again asking the Panel to make an assumption based on its

experience. Of course, it could choose not to make that assumption. It could disagree with the argument. Nothing in quoted language is a statement of fact.

There are many other allegations in the filing that state that Special Disciplinary Counsel accused Attorney Shahi of lying. The allegations are all unsupported by the actual text of the Opposition.

III. THE REQUEST FOR DISQUALIFYING AND REMOVING SPECIAL DISCIPLINARY COUNSEL IS MERITLESS AND DISTRACTS FROM MR. WATTS'S MISCONDUCT; AS ALLEGED, DISQUALIFICATION AND REMOVAL WOULD SET AN INTOLERABLE PRECEDENT FOR THE PROGRAM, THE PROTECTION OF THE PUBLIC, AND THE INTEGRITY OF THE JUDICIAL SYSTEM.

As a policy matter, removing a prosecutor when a complaint is made would be inefficient and wasteful by interfering with the performance of their duties. More importantly, this request to disqualify Special Disciplinary Counsel is a distraction from Mr. Watts's misconduct. *See Imbler v. Pachtman*, 424 U.S. 409, 424-25 (1976) (explaining how public trust in prosecutors would suffer if prosecutors would have to make charging decisions with an eye towards their own liability; “[s]uch suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State’s advocate.”).

If the Panel grants Attorney Shahi’s request, the delay in this matter would be extraordinary and the precedent set would be damning to the Program. This matter was originally scheduled to be tried in October 2021. It has been trial ready since December 2021. If Special Disciplinary Counsel was removed, a new Specially Assigned Disciplinary Counsel

would need to be appointed.³ That process of finding and retaining a new Specially Assigned Disciplinary Counsel can take months, in light of conflict checks, availability and schedules. Unlike Attorney Shahi who has the benefit of Mr. Watts, who was involved in this matter from the beginning, the new Disciplinary Counsel would have to start from the very beginning in preparing for trial. In the meantime, Mr. Watts would continue to practice law and endanger the public. More importantly, the harm that Mr. Watts caused his past clients will remain unaddressed. Thus, further undermining the integrity of the judicial system as a self-regulating profession under the auspices of the judiciary.

This Hearing Panel would have also set a precedent that any time a Respondent or their lawyer accuses Disciplinary Counsel of misconduct, that attorney will have to be removed regardless of the merits of the accusation. This will weaponize the disciplinary complaint system in such a way that respondents will get to choose their prosecutor. Rules of Professional Conduct, I, Preamble, Scope, Comment [20] (“The purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons.”)

As discussed above, there is simply no basis to the allegations here. Respondent has articulated no standard for the Panel to consider. The out-of-state cases found by Special Disciplinary Counsel stand for the proposition that prosecutors should not be removed lightly and only after sufficient proof is presented. A removal at this time is contrary to the legal

³ The newly hired Disciplinary Counsel likely has an ethical conflict that would preclude him from representing the Program on this matter.

precedent and public policy related to criminal prosecutors and would be detrimental to the Program and harm the public. The Hearing Panel should deny the request.

Dated: May 25, 2023

/s/ Navah C. Spero

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