Disciplinary Counsel's Response to Respondent's "Motion to Strike Extraneous Allegations and Commentary" (Motion to Strike)

Respondent has asked the Hearing Panel (Panel) to strike 10 of the 59 "Factual Allegations" /Evidence contained in the Petition of Misconduct (Petition) charging him with 5 violations of the Vermont Rules of Professional conduct. that disciplinary counsel selected from the affidavit of probable cause filed with the Probable Cause Review Panel. He argues these allegations are "unnecessary to a clear statement of the alleged misconduct" and that the language in the Petition "appears intended to disseminate inflammatory information prejudicial to the respondent."

Respondent has also asked the Panel to strike all 4 of the "Summaries" disciplinary counsel has written to explain how the allegations prove each charge in the Petition. He says the "Summaries" are improper "advocacy."

Finally, Respondent calls upon the Panel to strike 2 of the 4 footnotes in the Petition. He does not explain why he wants the footnotes stricken.

Disciplinary Counsel's Response

Disciplinary Counsel asks the Hearing Panel (Panel) to deny Respondent's Motion to Strike for the reasons set out below.

History of This Case

In effect, Respondent has claimed the right to edit the Petition of Misconduct which has been filed against him. This case is now well into its fourth year. The Panel should consider Respondent's motion in the context of the long and complicated process that led to the filing of the Petition.

As the Panel knows, under Rule 11 D (1) disciplinary counsel has two options in initiating formal disciplinary proceedings:

> (a) "by filing with the Board facts stipulated to by the respondent, along with any proposed legal conclusions and recommended sanction which disciplinary counsel and respondent, either separately or jointly, would like the hearing panel to consider;" or
>
> (b) by filing with the Board and serving upon respondent a petition of misconduct which is sufficiently clear to inform respondent of the alleged misconduct and the rules alleged to have been violated." (emphasis added)

In February 2013, Cynthia Mead, Andrea Poutre and Pamela Binette (complainants) filed complaints of professional misconduct against Respondent. Three years later, Respondent and former disciplinary counsel reached a proposed agreement under the process set out in Rule 11 D (1) **(a)**. They presented their agreement to a Hearing Panel for consideration some time later that month.

The proposed agreement would have resolved all charges of unprofessional conduct made by the complainants. Because Respondent had negotiated the agreement with disciplinary counsel, Respondent had been able to exercise some control over which of complainants' allegations he would accept responsibility for. For instance, under the proposed agreement, he did not accept responsibility for claims made by Ms. Binette. Respondent was also able to negotiate how charges that he accepted responsibility for were drafted. Finally, he was able to negotiate a provision which kept several of the specific allegations made by the complainants "under seal" and not available to the public.

The Hearing Panel assigned to the case rejected the proposed agreement on March 16, 2017.

After the Hearing Panel rejected the stipulated agreement, Respondent's counsel and current disciplinary counsel agreed to a process that would lead to a hearing on the merits, rather than attempt to reach another stipulated agreement.

This meant that disciplinary counsel would review the thorough, detailed, investigation conducted by former disciplinary counsel and make his own decision on what charges were warranted. Disciplinary counsel would then draft proposed charges and file them, together with an affidavit of probable cause and a memorandum of law, with a Probable Cause Review Panel (PCRP) assigned by the Board. If the PCRP found probable cause, disciplinary counsel would file a Petition of Misconduct (Petition) under Rule 11 D (1)**(b)**.

So far, the process has moved more rapidly than the process that led to the stipulated agreement. This is due in large part to the fact that former disciplinary counsel had already completed the investigation. It is also due in large part to the fact that the process disciplinary counsel followed leading up to the filing of the Petition "mirrored" the process followed in Vermont's criminal courts up to the finding of probable cause.

That is, in the process under Rule 11 D (1)**(b)**, as in the criminal process, there is no negotiation. The disciplinary counsel/ prosecutor exercises sole discretion as to what charges are brought, how those charges are written and what evidence is necessary to prove those charges.

A brief chronology of the case to date is set out below.

Process Under Rule 11 D (1) (a) - Stipulated Agreement

- **2/2/2013** - Cynthia Mead, a former divorce client, filed a complaint against Respondent.
- **2/2/2013 – 2/12/2016** – Respondent and former disciplinary counsel conducted discovery. They negotiated, and ultimately submitted, a stipulated agreement to a Hearing Panel as provided under Rule 11 D (1) **(a).**
- **12/5/2016** – Respondent filed a 10-page "Motion for Panel Consideration of Reduced Sanction" which argued that the sanction that he and disciplinary counsel had jointly agreed to should be reduced. Respondent's motion was effectively *ex parte* because the two-disciplinary counsel who had negotiated the agreement had left the Professional Responsibility Program earlier in 2016 and they had not been replaced.
- **12/13/2016** – Current disciplinary counsel[1] was retained by Bar Counsel to take over the case.
- **12/2016** - Respondent withdrew his Motion for Panel Consideration of Reduced Sanction.
- **3/16/2017** - The Hearing Panel assigned to Respondent's case issued a carefully-reasoned 15-page opinion which rejected the parties' stipulated agreement.

Process Under Rule 11 D (1) (b) - Probable Cause – Petition- Hearing

- **3/17/ 2017 – 4/30/2017**- Disciplinary counsel conducted the "Review" called for under Rule 11 B. Disciplinary counsel concluded, after reviewing evidence collected during the investigation

[1] Bob Simpson - I worked as a prosecutor in the Chittenden County State's Attorney's Office from 1994-2006. I served five years as State's Attorney (2001 -2006). Since 2007, I have worked occasionally as a hearing officer for several Vermont administrative Agencies including the Office of Professional Regulation, Board of Medical Practice, Board of Health, Department of Financial Regulation and the Department of Vermont Health Access (Hospital Tax Appeals)

conducted by former disciplinary counsel, that five charges of professional misconduct should be filed against Respondent.

- **5/1/2017** - Disciplinary counsel filed a request for a "finding of probable cause." The request consisted of three documents[2]:
    - (1) Disciplinary counsel's proposed charges (Counts I-V);
    - (2) Disciplinary counsel's affidavit of probable cause, consisting of 116 "factual allegations" which disciplinary counsel believed established probable cause ("a fair probability") that Respondent had committed the violations of the Rules of Professional Conduct charged in Counts I-V;
    - (3) Disciplinary counsel's memorandum of law which explained why disciplinary counsel believed the charges in Counts I-V were warranted and why the evidence/ "factual allegations" set out in the affidavit established probable cause.
- **5/10/2017 -5/22/2017** – A Probable Cause Review Panel (PCRP) conducted the review called for under Rule 11 C and issued a finding of probable cause on May 22.
- **6/1/2017** – Disciplinary counsel filed the Petition called for in Rule 11 D (1) (b). Counts I-V in the Petition are the same Counts I-V that were presented to the PCRP. Likewise, the "factual allegations" that disciplinary counsel included are taken from the probable cause affidavit filed with the PCRP.

Similarities with the Criminal Process

- Disciplinary counsel filed proposed charges (Counts I-V) with the PCRP and asked for an independent review to determine whether there was probable cause. These "Counts" serve the same purpose as the "Information" which is filed with the judge who is being asked to find probable cause in a criminal case.
    - The "Counts" that were filed with the PCRP are identical to the "Counts" that are included in the Petition.
- The probable cause affidavit submitted to the PCRP serves the same purpose as the probable cause affidavit submitted to a judge in a criminal case.
    - There were 116 numbered paragraphs in the probable cause affidavit that was filed with the PCRP. Disciplinary counsel included 59 of these numbered paragraphs in the Petition.
- Disciplinary counsel filed a 15-page memorandum of law with PCRP when he filed his proposed charges and probable cause affidavit. The memorandum was intended to explain disciplinary counsel's theory of how the "factual allegations"/ evidence in the affidavit tended to prove the misconduct alleged. Although prosecutors rarely file memoranda of law when they file an "information" and affidavit of probable cause with a judge, it does happen occasionally when the allegations raise an unusual legal problem.[3]

[2] Copies of these documents were sent to Respondent's counsel on the same day they were sent to the Probable Cause Panel.

[3] e.g. Charge is murder but the bodies of the alleged victims have not been recovered; victim in alleged homicide lived for more than "a year and a day" before dying from injuries caused by defendant

- Disciplinary counsel included 4 "Summaries" in the Petition. The "summaries" make some of the points that disciplinary counsel had made in the memorandum of law he had filed with the PCRP.

- If a Vermont judge reviews the information and affidavit of probable cause filed by the prosecutor and makes an independent finding that there is probable cause (a "fair probability"), the information and the affidavit of probable cause are provided to the individual who has been charged in the information (defendant).
  - The information and the affidavit are provided to the defendant as "due process notice" of: (1) the charges against him and (2) the evidence the prosecutor intends to rely on to prove the case against him.[4]

  - The judge who has found probable cause in a criminal case is not barred from staying with the case. It is common for this judge to go on to rule on motions and preside over the trial.

- Once the PCRP finds probable cause and disciplinary counsel has filed the Petition of Misconduct (Petition) required under Rule 11 D (1)**(b)**, the person charged with misconduct (Respondent) is provided with a copy of the Petition. The Petition gives the Respondent "due process notice" of: (1) the charges against him and (2) the evidence the prosecutor intends to rely on to prove the case against him.

  - Once the Respondent has been served with the Petition, the Petition is available to the public under Rule 12 B.[5]

<u>The Content of the Petition Is Not Unfairly "Prejudicial" to the Respondent</u>

Respondent claims that he has been "prejudiced by the "dissemination" of "inflammatory" information contained in the Petition.

First, Respondent was not prejudiced by the fact that the all allegations in the Petition are available to the public as provided in Rule 12 B. This is not a situation in which the pool of members of the public who might serve on a jury could be "tainted" by learning of the deeply disturbing allegations contained in the Petition.

This case will not be heard by a jury composed of members of the public who might be outraged by the allegations in the Petition. As provided in Rule 11 (2), the hearing on the merits in this case will be conducted by a standing hearing panel, consisting of two lawyers and a member of the public. This Panel is aware that regardless of the disturbing nature of the allegations, disciplinary counsel has the burden of proving the alleged misconduct through "clear and convincing evidence."

There is no reasonable possibility that Respondent suffered unfair prejudice because this Panel was exposed to this Petition prior to the hearing on the merits. Judges and administrative panels are routinely exposed to a prosecutor's theory of how s/he intends use the admissible evidence to prove the case at trial or a hearing on the merits. This happens daily in criminal cases when a judge decides a

[4] This memorandum is available to the public in criminal cases.

[5] Rule 12 B. Availability of Information after Filing of Formal Charges says in pertinent part that: "All Professional Responsibility proceedings and all records pertaining thereto formally submitted to a hearing panel after the filing of formal charges or stipulation shall be public unless the complainant, disciplinary counsel, or respondent obtains from a hearing panel or the Board a protective order for specific testimony, documents, or records. . ."

defendant's motion to dismiss or a defendant's motion to dismiss for lack of prima facie case. It is also a common occurrence in administrative cases when an administrative panel is asked to consider a motion to dismiss or a motion for summary judgment which has been filed by a Respondent.

Disciplinary counsel wrote the Petition with the intent to give Respondent the same type of information that a defendant would receive in a criminal case. That is, the Petition was written to give Respondent specific notice of: (1) the charges against him; (2) some of the strongest evidence disciplinary counsel has against him and (3) how disciplinary counsel intends to use that evidence to prove the charges against him.

Respondent here has filed a motion to dismiss Count II in the Petition. By doing so, he has effectively demanded that disciplinary counsel explain to the Panel how the "factual allegations"/ evidence set out in the Petition tend(s) to prove count II.

Respondent has made a similar demand in this motion. That is, by claiming the right to have 10 "factual allegations" stricken because they are "unnecessary," he has, in effect, demanded that disciplinary counsel explain to the Panel how these allegations are "necessary" to prove the misconduct charges against him.

Respondent Cannot Prove the Allegations in the Petition be Unfairly Prejudicial

Each of the ten allegations/ pieces of evidence Respondent wants stricken is "relevant" in that each piece either tends to prove an element that disciplinary counsel must prove in order to prove a violation of the Rules of Professional Conduct or it tends to defeat a defense raised by Respondent. (e.g. the alleged victims consented to Respondent's sexual conduct)

The Vermont Rules of Evidence (V.R.E.) give disciplinary counsel the right to introduce relevant evidence as long as it is not "unfairly prejudicial." V.R.E. 402, 403

V. R. E. 403 says:

> *Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice*, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. (emphasis added)

The Vermont Supreme Court has approved the following description of the kind of evidence which might qualify as "unfairly prejudicial":

> Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, "arous[e] its sense of horror, provok[e] its instinct to punish, or trigge[r] other mainsprings of human action [that] may cause a jury to base its decision on something other than the established propositions in the case." 1 J. Weinstein & M. Berger, Weinstein's Evidence § 403, at 403-33-39 (1991). (emphasis added)

State v. Bruyette, 609 A2d 1270, 1274 (Vt. 1992)

1. "Primary Purpose"

Disciplinary counsel's "primary purpose" for including the "factual allegations"/ pieces of evidence that Respondent wants to strike from the Petition is to comply with the "due process notice" requirements of Rule 11 D (1) (b) by informing Respondent of the evidence disciplinary counsel intends to rely on to prove the five violations of the Rules of Professional Conduct disciplinary counsel has alleged.

Disciplinary counsel has been on this case approximately four months. Respondent has been living with the case for over four years. He is undoubtedly familiar with the evidence. However, he is just learning of disciplinary counsel's view of the evidence. For instance, disciplinary counsel's view of the strength of certain pieces of evidence uncovered through former disciplinary counsel's investigation, differs significantly from that of former disciplinary counsel.

It is important to avoid further delay that might be prompted by claims that Respondent has been "blind-sided" by disciplinary counsel's "new theories of the case." It is in disciplinary counsel's best interest to be able to document that he has kept Respondent fully informed of the charges disciplinary counsel intends to file and the specific pieces of evidence disciplinary counsel intends to rely on to prove them.

That is why disciplinary counsel sent Respondent's counsel copies of the proposed charges, the affidavit of probable cause and disciplinary counsel's memorandum of law on May 2 - the same day disciplinary counsel filed these documents for submission to a Probable Cause Review Panel. That is also why disciplinary counsel went to such lengths in the Petition to lay out some of the most important pieces of evidence he intended to introduce at the merits hearing and explain disciplinary counsel's theories of how that evidence would prove the misconduct charges disciplinary counsel had filed.

2. "Primary Effect"

According to the passage from the treatise on evidence quoted above, relevant evidence is also "unfairly prejudicial" if its "primary effect" is to "cause a jury to base its decision on something other than the established propositions in the case." Disciplinary counsel understands, and expects, that the Panel will have no difficulty deciding whether disciplinary counsel has proven the charges he has brought.

3. Disciplinary Counsel Decides What Is "Necessary" to Include in the Petition

Respondent also argues that the 10 allegations should be stricken because they are "unnecessary" in that they go "beyond the parameters of a Petition of Misconduct as authorized" under Rule 11. He does not develop this argument any further and he cites no authority for his claim that he has the right to strike allegations in the document that charges him with misconduct because he finds they are "unnecessary."

As described in detail above, the disciplinary counsel's role in the process that led up to the filing was analogous to that of the prosecutor in a criminal case. The process, which is set out in Rule 11 B-D (1) (b), calls for disciplinary counsel, alone, to decide what charges will be brought and what evidence will be required to prove those charges. Under Rule 11D (1)(b) disciplinary counsel, alone, decides what is "necessary" to include in the Petition to "inform respondent of the alleged misconduct and the rules alleged to have been violated."

The 10 "Factual Allegations" that Respondent Wants Stricken

Pamela Binette (Counts II and II)

The Petition contains 24 "factual allegations" informing Respondent of some of the strongest evidence disciplinary counsel intends to prove Counts II and III – the charges involving Respondent's treatment of Pamela Binette. Respondent seeks to strike 2 of these allegations.

The Petition alleges that: Respondent repeatedly subjected Ms. Binette, who was Respondent's employee, to unwelcome, demeaning and offensive conduct of a sexual nature, including masturbating in her presence in his law office. According to the Petition, Respondent then urged Ms. Binette, who was not represented by counsel, and who, by Respondent's own account had mental health problems that seriously impaired her decision-making, to sign a contract in which she waived her right to sue Respondent for

sexual harassment. The contract explicitly, and implicitly, obligates Ms. Binette to accept sexual harassment in the work place in exchange for Respondent's qualified promise of continued employment.

- Respondent says that paragraph 17 (Petition p. 4) should be stricken from the Petition because it is:

  "Another example of unnecessary but inflammatory statements is paragraph 17 of Count III in which the petition sets out, verbatim, *a statement that Pam Binette made to a police officer*. The relevant information had already been set out in paragraph 16. Paragraph 17 *merely serves to embarrass and humiliate respondent* with information that is beyond the parameters of the pleading required for the petition." Motion to Strike, p. 2 (emphasis added)

Respondent is confused about this allegation.

It is true, as he says, that Paragraph 16 is Ms. Binette's general description of one of several offensive, demeaning and intimidating acts that Respondent subjected her to -masturbating in her presence in the workplace,

However, paragraph 17 - the one which "merely serves to embarrass and humiliate respondent" - is **not** Ms. Binette's "verbatim statement to a police officer." It is the statement **Respondent** made to Detective Lance Burnham of the Vermont State Police after Detective Burnham asked him to respond to Ms. Binette's claims. Detective Burnham recounted what Respondent told him in a report the detective wrote in July 2013.

The Petition makes it clear that these are Respondent's words, not Ms. Binette's:

"17. Respondent did not deny that he had masturbated in front of Ms. Binette. He insisted, however, that she had led him on. He described an incident for Detective Burnham:

> He and Ms. Binette were in the office conference room. Ms. Binette said she needed to change her shirt. He told her to go ahead. According to Respondent, Ms. Binette took off her shirt with her back to him and then "turned to him facing him and rubbed her breasts." Detective Burnham wrote that Respondent said "Pam" (Ms. Binette) asked him if he "liked what he was seeing. Robinson told Pam that he did - so Pam danced for him and rubbed her breasts in front of him. Robinson stated he became excited and his penis became erect. During that time, Robinson advised that he masturbated in front of Pam in the conference room."

These words may be "embarrassing and humiliating" to Respondent now; but, when Detective Burnham interviewed him in July 2013 about Ms. Binette's allegations, these were some of the words that Respondent used to justify the fact that he masturbated in front of Ms. Binette in the law office conference room. They were also some of the words that Respondent used to explain the "consensual" nature of their "sexual relationship."

Respondent's own statements are some of disciplinary counsel's best pieces of evidence. In this one, he proves Ms. Binette is telling the truth by admitting he masturbated in front of her.

- Paragraph 4 (Petition, p. 3) - Ms. Binette describes her "psychological issues" - is the other "factual allegation" that Respondent wants stricken. He does not explain his reasoning in his Motion to Strike. But, it is "struck out" in his highlighted version of the Petition.

Paragraph 4 says:

"Ms. Binette told Lance Burnham, the Vermont State Police Detective who interviewed her in May 2013, that "nobody hires me around Orleans County because of who I am." She explained that it was "complicated" for her to work in public because of "psychological issues." She said she had "agoraphobia sometimes." She also told the detective that she had experienced issues with "self-harm" since she was young."

Disciplinary counsel included this allegation in the Petition to give notice that disciplinary counsel intended to use Ms. Binette's testimony on the issues she spoke of in paragraph 4 to contradict Respondent's claim that Ms. Binette knowingly and voluntarily waived her right to sue Respondent for sexual harassment and to contradict Respondent's claim Ms. Binette "consented" to conduct which caused to watch her employer masturbate in front of her in his law office.

The two "factual allegations" regarding his treatment of Ms. Binette that Respondent seeks to strike are not unfairly prejudicial to him.

Andrea Poutre (Counts IV and V)

Respondent asks the Panel to strike paragraphs 17 and 19 supporting Count IV on the general grounds that: "paragraphs relate details that are not necessary to a statement of misconduct but serve, instead to inject unnecessary prejudicial details into the text of the petition." Motion to Strike pp. 2-3

Respondent also seeks to strike paragraph 3 and 12. He gives no specific reason for this request.

- Paragraph 17 -Petition, pp. 8-9 -

This paragraph is taken from Ms. Poutre's deposition. It relates in detail how Respondent pushed her into a desk in his law office, "groped" her and then masturbated in her presence. The paragraph quotes Ms. Poutre's detailed description of how her young daughter entered the room as this was happening.

Respondent has denied this incident took place as Ms. Poutre described it.

Disciplinary counsel decided it was necessary to include this passage for two reasons. One, it is unlikely that Ms. Binette would make up such a detailed claim – particularly one that is so humiliating to Ms. Poutre and her daughter. Two, it provides notice that Ms. Poutre's daughter is a witness who can corroborate important parts of Ms. Poutre's version of what took place.

- Paragraph 19 – Petition, p. 9

Paragraph 19 is taken from Respondent's deposition[6].

> "19. Respondent did not deny that he had masturbated in Ms. Poutre's presence. However, he claimed, as he had with Ms. Binette, that he had been led on.
>
> Respondent explained that after Ms. Poutre had indicated to him that "she wanted to marry me" and had come to work for him, he spoke to her of the relationship he claims he had with Ms. Binette:

[6] Paragraph 19 is taken from the deposition Respondent gave on May 20, 2015, p.58: 6 through p.61:8. It is admissible at the hearing on the merits because it is relevant and it is a "non-hearsay admission" which is to be admitted by a "party opponent." VRE 801(d)(2)(a)
This rule also applies to Respondent's statement to Detective Burnham which is quoted in Paragraph 17 of the portion of the Petition dealing with Respondent's treatment of Ms. Binette (Counts II-III).

". . . And I had a conversation with Andrea (Ms. Poutre) about what happened between me and Pamela because after Andrea said what she wanted to do meaning she wanted to marry me and came to work for me, I felt it was important to disclose to her what had happened between Pamela and I so she didn't think I was some kind of creep, meaning that you know she didn't get the impression I am in the business of this sort of thing, meaning having a relationship with someone who works for me . . . And I told her that Pamela would pull off her clothes to excite me and that on a couple of occasions that resulted in me having an orgasm in my pants."

Respondent testified further that Ms. Poutre said:

"Tell me what she (Ms. Binette) used to do. And I said she used to, you know, and I told her. . . And she started to pull her shirt down. . . And she was like, no, really do what you used to do with her. And I did. I did basically the same thing that I did the first-time Pamela did that with me. And I had an orgasm in my pants and yeah, so I was wrong about what I said. That happened. That did happen."

Q. Okay

A. "I'm sorry about that. When you say masturbated in front of somebody that means pull your pants off and masturbate in front of somebody and I've never done that."

Again, as with Ms. Binette, Respondent's own words are some of disciplinary counsel's best evidence. Disciplinary counsel thought it was necessary to include this statement in the Petitions because in it, Respondent admits that he masturbated in Ms. Poutre's presence in the work place, thereby confirming the truth of Ms. Poutre's allegations. His claim that Ms. Poutre led him on and encouraged him after she had offered to marry him is false on its face and contradicted by Ms. Poutre's testimony at her deposition (see below).

Paragraphs 3 and 12

Respondent "struck out" two other paragraphs from Count IV – paragraphs 3 and 12 (pp. 7 and 8). He does this in his highlighted copy of the Petition but he never explains why he does so.

- Paragraph 3 – Petition -p. 7

Paragraph 3, which is taken directly from Ms. Poutre's deposition says:

"3. Ms. Poutre was asked more specific questions about her feelings for Respondent by Respondent's attorney:

Q. Are you stating that you never told (Respondent) that you would like to have a relationship with him?

A. Never.

Q. You never told him you'd like to have his baby?

A. No.

Q. Never told him you'd like to have sexual relations with him?

A. No"

Disciplinary counsel included this statement in the Petition because it contradicts Respondent's sworn statement at his deposition (above) that he masturbated in Ms. Poutre's presence in an intimate moment that took place at some time after Ms. Poutre had asked to marry Respondent.

- Paragraph 12 (Petition, p.8)

This paragraph is also taken from Ms. Poutre's deposition:

> "12. Respondent often told Ms. Poutre that she was indebted to him. Most of the VOP charges were resolved in chambers with only the lawyers and the judge present. Respondent told Ms. Poutre on one occasion when Respondent came out of chambers that "they" had wanted her to "do 15 years" (underlying sentence on the DUI-fatal plea); but Respondent had "saved" her."

The Petition alleges elsewhere that Ms. Poutre was vulnerable (e.g. she was just out of jail and was addicted to opioids) when Respondent subjected his employee and longtime client to repeated unwelcome conduct of a sexual nature. Disciplinary counsel included this statement in the Petition because it tends to show that Ms. Poutre did not willingly agree to Respondent's conduct, as he claims. It tends to show that, to the contrary, she unwillingly endured his conduct because she thought she needed his help as a lawyer.

The four "factual allegations" regarding his treatment of Ms. Poutre that Respondent seeks to strike are not unfairly prejudicial to him.

Cynthia Mead (Count I)

Ms. Mead filed the original complaint against Respondent in February 2013. She and Respondent were in a long term consensual sexual relationship while Respondent was representing her in her divorce. Respondent ended the relationship a few days after the final hearing in the divorce.

Although Ms. Mead had been employed in Respondent's tanning salon, she did not claim that Respondent had subjected her to unwelcome sexual conduct in the workplace. She claimed he had done a very bad job representing her in her divorce.

The Petition alleges (p. 1) that:

> "During the period from March 2011 through mid-June 2012, Respondent violated Rule 1.7 (a) (2) by representing a divorce client, **Cynthia Mead**, when his representation involved a "concurrent conflict of interest": by engaging in a sexual relationship with Ms. Mead, under circumstances which created a significant risk that his representation would be materially limited by Respondents' personal interests."

Disciplinary counsel's theory is that Respondent had to failed to give Ms. Mead the objective assessment of the legal strengths and weaknesses of Ms. Mead's case that she was entitled to as his client. Instead, when Ms. Mead questioned Respondent as to why the result of a hearing appeared to have gone against her, he urged her not to worry because he would take care of her regardless of the outcome in the divorce. This created an unreasonable risk that Respondent would allow, what he and Ms. Mead both believed to be the strength of their relationship, to take the place of his professional obligation to provide Ms. Mead with a clear-eyed assessment of her case.

For instance, paragraphs 7 and 8 in the petition, which are taken directly from Ms. Mead's testimony, in her deposition say:

> "7. Respondent told Ms. Meade repeatedly throughout the more than a year that he represented her that she did not have to worry. He would fix things. He would take care of her and that she could live in his condo rent free.
>
> 8.Ms. Mead agreed to opposing counsel's settlement offer – pay off her car payments and no child support payments for two years - because, in part, Respondent told her that she could "live in his condo free" until she got back on her feet financially".

There are 11 paragraphs in the Petition relating to Ms. Mead. Respondent seeks to strike 4 of them. That is, he seeks to strike paragraph 5 and paragraphs 9-11 He does not address each paragraph individually. Instead he argues generally that these paragraphs are "not essential" to the Petition and serve only "to prejudice respondent." Motion to Strike, p.2

Respondent seeks to strike paragraph which is taken from Ms. Mead's deposition. It says:

> "5. Respondent told Ms. Mead she was the only woman he had ever loved."

Respondent also asks the Panel to strike paragraphs 9-11.

Paragraph 9, which is taken from Respondent's deposition says:

> "9. Respondent testified at deposition that it was not until "really late in my representation of her (Ms. Mead)" that Respondent realized that Ms. Mead "wasn't in good financial shape." He learned that she had not been paying her rent. She had borrowed money from several people and had "cashed in a retirement account."

Paragraphs 10 and 11 are taken from Ms. Mead's deposition:

> "10.Ms. Mead was angry when Respondent ended the relationship. "How is he going to fix anything if I am not seeing him anymore?"
>
> "11.Ms. Mead filed her Professional Conduct Complaint against Respondent in February 2013. When Respondent's attorney asked Ms. Mead why she filed the complaint, she said: "Because he represented me wrong. He used me. He made me promises, and he never followed through. Even with the child support, the spousal maintenance, the everything. Nothing. He said he would take care of everything and he took care of nothing."

The four "factual allegations" regarding his handling of Ms. Mead's divorce that Respondent seeks to strike are not unfairly prejudicial to him.

Summaries

Pamela Binette - "Summary" (Petition pp. 5-6) - Respondent asks the Panel to strike this "Summary" because it constitutes improper "advocacy" and is effectively a "closing argument."

Disciplinary counsel included this "Summary" to give Respondent notice of how, in disciplinary counsel's opinion, the evidence he has selected tends to both prove the misconduct charged in Counts II and III and disprove Respondent's defense to those allegations. It was particularly necessary to include

this more detailed explanation of how the evidence proved the charges because charges involving Ms. Binette were "new" to Respondent. Former disciplinary counsel had elected not to bring charges based on Ms. Binette's complaint.

Because the summary is disciplinary counsel's theory of how the evidence supports the charge, it may qualify as "advocacy" as Respondent has claimed. However, as argued above, it is not reasonable to believe that the fact that the Panel has been exposed to disciplinary counsel's view of how the evidence supports the charges will cause the Panel to relieve disciplinary counsel of his obligation to prove his case.

Respondent "struck out" the other three summaries that disciplinary counsel included in the Petition without going beyond the explanation that they constitute improper "advocacy." These summaries are much shorter than the one involving Ms. Binette.

For instance, he "struck out" the "Summary" for Count IV. It reads:

> "During the five to six weeks that Ms. Poutre worked for him, Respondent violated Rule 8.4 (g) by subjecting her to unwelcome verbal and physical conduct of a sexual nature which had the effect of creating an intimidating and offensive work environment."

Respondent has not proven that he has been unfairly prejudiced by any of the summaries.

Footnotes

Respondent "struck out" footnotes 1 and 2 (Petition, pp.1-3) without giving a reason.

Footnote 1 (p.1) advises that the Probable Cause Review Panel's (PCRP) finding of probable cause on each of the proposed "Counts" (I-V) is "attached" as Exhibit O. Disciplinary counsel could not have filed a petition without the PCRP's finding of probable cause.

This footnote is not unfairly prejudicial to Respondent.

Footnote 2 (p.3) documents the fact that disciplinary counsel provided Respondent's counsel with all the documents (proposed charges, probable cause affidavit and memorandum of law) that disciplinary counsel submitted to the Probable Cause Review Panel (PCRP) at the same time they were submitted to the PRCP.

This footnote is not unfairly prejudicial to the Respondent.

Conclusion

Respondent's Motion to Strike should be denied for the reasons stated above.

Dated at Burlington, Vermont on July 12, 2017

Robert V. Simpson, Jr.
Disciplinary Counsel