STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In Re: Glenn Robinson, Esq.
PRP File No. 2013- 172

Disciplinary Counsel's Reply to Respondent's Motion to Dismiss

Respondent has moved to dismiss Count II of the Petition of Misconduct (Petition) on grounds that it does not state a claim upon which relief can be granted.

The Hearing Panel (Panel) should deny Respondent's motion.

The Vermont Supreme has said that the purpose of Vermont's attorney disciplinary process is to (1) protect the public from misconduct; (2) maintain public confidence in the integrity of the legal profession and (3) maintain public confidence in Vermont's "legal institutions." *In Re Wysolmerski*, 702 A2d 73, 75 (Vt. 1997) If the Panel were to grant Respondent's motion for the reasons he has asserted, the Panel's decision would run counter to each of the goals the Court has set.

Respondent's Argument

Respondent has moved to dismiss Count II on grounds that it "fails to state a claim" under Rule 4.3 because: (1) the petition "fails to allege that Respondent gave any legal advice to Ms. Binette" and (2) the petition fails to allege that Respondent was "dealing on behalf of a client" when he had "communications" with Ms. Binette regarding the contract in which she waived her right to sue him for sexual harassment. Motion to Dismiss, pp. 1-2

Rule 12 (b)(6) Standard

The Vermont Supreme Court set out the "12 (b) (6) standard" in *Colby v. Umbrella Inc*, 955 A2d 1082, 1086-87 (Vt. 2008):

> "In determining whether a complaint can survive a motion to dismiss under Rule 12(b)(6), courts must take the factual allegations in the complaint as true, and consider whether "it appears beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." (citation omitted) 955 A2d 1086
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> The Court went on to say:
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> "Motions to dismiss for failure to state a claim are disfavored and are rarely granted." (citation omitted) 955 A2d 1087

Disciplinary Counsel's Argument

Count II of the Petition – the Count that Respondent wants dismissed – alleges:

> II. On or about September 28, 2012, Respondent violated Rule 4.3, by advising an "unrepresented person," his employee, **Pamela Binette**, a person who had an interest which Respondent knew was in conflict with his own interests, to sign a contract in which she agreed to waive any claim(s) she had to sue Respondent for sexual harassment

Rule 4.3, the rule that Respondent allegedly violated, says:

> "Rule 4.3. DEALING WITH UNREPRESENTED PERSON
> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. *The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."* (emphasis added)

According to the allegations in Count II:

Ms. Binette, who is not a lawyer, was employed in Respondent's law office from January 2012 to January 24, 2013 as a receptionist and legal assistant. She was happy in her work for the first four months of her employment. However, that changed starting in late May 2012, after she rejected Respondent's romantic advances. From that time on, Respondent repeatedly subjected her to unwelcome, demeaning and offensive conduct of a sexual nature. This unwelcome conduct included masturbating in Ms. Binette's presence while she was in Respondent's law office.

Ms. Binette told Detective Lance Burnham of the Vermont State Police that she had trouble finding work in Orleans County because of her "psychological issues." She explained that it was "complicated" for her to work in public because of these issues. She said she had "agoraphobia sometimes." She also told the detective that she had experienced issues with "self-harm" since she was young.

Respondent was aware of Ms. Binette's mental health concerns. He knew she was having a hard time with them. Respondent told Detective Burnham that at times Ms. Binette's mental health problems seriously impaired her decision making. He also told the detective that Ms. Binette had no legal skills.

Respondent admitted that he had masturbated in Ms. Binette's presence while they were together in his law office.

On September 28, 2012, Respondent urged Ms. Binette to sign a contract which Respondent had asked his brother, who was also a lawyer to draft. Respondent explained to Detective Burnham that when he and Ms. Binette began "dating" he had the contract drawn up "to protect Pam." Respondent explained further that he wanted the "contract to protect Pam" (contract) so the parties to the contract would not be able to sue one another in case the "relationship ended badly."

The contract is titled "Notice of Intent to Engage in Mutually Welcomed Romantic Relationship and Waiver of Claims."

The contract says in pertinent part:

> "2. Employee (Ms. Binette) agrees that the romantic relationship with Employer (Respondent) is by mutual consent. Employee agrees that her interest in pursuing a romantic relationship with Employer is done freely, voluntarily and without any undue coercion or duress."

3. *Employee agrees to waive any and all claims or other actions against the employer for gender discrimination and/ or sexual harassment pursuant to Tile VII of the Civil Rights Act, and, as amended, Vermont's Fair Employment Practices Act, or any legal or equitable claim arising against employer by virtue of their romantic relationship with Employer and her employment by Employer."*
4. Employer hereby acknowledges that employee suffers from a condition that sometimes makes it difficult for her to be on time for the start of her workdays. Employer has in the past given Employee some amount of latitude regarding her showing up for work on time. The parties to this agreement hereby acknowledge Employee will continue to be afforded latitude regarding her showing up for work on time. Employee has and will continue to make reasonable efforts to see that she comes to work on time in spite of her condition." (emphasis added)

Respondent urged Ms. Binette to sign the "contract to protect Pam." She signed it on September 28, 2012,

I. A Lawyer Who Urges An "Unrepresented Person" to Waive Her Right to Sue That Lawyer for Sexual Harassment Is Offering "Legal Advice" As Contemplated in Rule 4.3

Respondent argues that Count II "does not state a claim" because Respondent "did not give any legal advice to Ms. Binette." Motion to Dismiss, p.2 This argument fails under the test set by the Vermont Supreme Court.

Under the standard set out by the Supreme Court in *Colby Umbrella* (cited above), Respondent's motion must fail unless after taking all "the factual allegations in the complaint as true" … it appears beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." (citation omitted) 955 A2d 1086

A reasonable person could conclude that Respondent gave Ms. Binette "legal advice" when he urged her to sign what he referred to as the "contract to protect Pam." By Respondent's own account, Ms. Binette "had no legal skills" and suffered a from mental condition that at times seriously impaired her decision-making. She was being urged to a sign a contract which said:

> 3. Employee agrees to waive any and all claims or other actions against the employer for gender discrimination and/ or sexual harassment pursuant to Tile VII of the Civil Rights Act, and, as amended, Vermont's Fair Employment Practices Act, or any legal or equitable claim arising against employer by virtue of their romantic relationship with Employer and her employment by Employer."

A reasonable person could conclude that by urging Ms. Binette to sign a document which purported to have binding legal effect and required an understanding of what certain statutes meant, Respondent was giving Ms. Binette "legal advice."

A reasonable person could conclude that Ms. Binette did not fully understand what the contract meant and that in urging her to sign the contract Respondent was urging her to trust him because he was a lawyer, he knew what the contract meant and that the was contract for her protection. A reasonable person could conclude that this too constituted giving legal advice.

II. Lawyers Who Take Advantage of "Unpresented Persons" to Further Their Own Interests Violates Rule 4.3

Respondent argues that the Petition does not "state a claim" for a relief under Rule 4.3 because he was "not representing and acting on behalf of a client" when he "communicated with" Ms. Binette about the contract. Motion to Dismiss, p. 2 This argument also fails under the test set out by the Supreme Court in *Colby Umbrella.*

The focus of Rule 4.3 is on the lawyer. The purpose of the rule is to prevent a lawyer from using his/her legal knowledge, training and experience to gain an unfair advantage over a person who does not legal knowledge, training and experience. Given the purpose the rule, it does not matter whether the benefits of the unfair advantage flow to a lawyer's client or to the lawyer himself, who is, in effect, his own client.

The Court in *Monsanto v. Aetna Casualty and Surety*, 593 A.2d 1013 (Del. Super. 1990) cited with approval, a treatise that explained the purpose of rule 4.3:

> Professor Hazard in his treatise, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct, comments on the disclosure required under Rules 4.2 and 4.3. Professor Hazard states:
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> "This short Rule is taken virtually verbatim from DR 7-104(A)(1) of the Code of Professional Responsibility. In tandem with Rule 4.3, it prevents a lawyer from *taking advantage of a lay person* to secure admissions against interest or *to achieve an unconscionable settlement* of a dispute. The scheme of the two Rules is that while Rule 4.3 prevents a lawyer from overreaching an unrepresented person, Rule 4.2 prevents a lawyer from nullifying the protection a represented person has achieved by retaining counsel. . ."
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> Hazard & Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct, at 434 (Supp.1989)" (emphasis added)

593 A2d 1017

According to the treatise, one of the purposes of Rule 4.3 is to prevent a situation where a lawyer takes advantage of his training and experience to reach an "unconscionable settlement of a dispute." A reasonable person could conclude that Respondent used his knowledge and experience as a lawyer, and that of his brother who is also a lawyer, to take unconscionable advantage of Ms. Binette by getting her to waive her right to sue Respondent for sexual harassment. This violation of Rule 4.3 preempted the need to go for an "unconscionable settlement."

Under Respondent's reading of Rule 4.3 the fact that the unconscionable advantage did not flow to a third person client is determinative. For instance, under his reading of the rule, if Respondent had advised an employee of a client – an employee who the client had been sexually harassed by the client - to sign a contract waiving her right to sue the client for sexual harassment, Respondent would have violated Rule 4.3. However, again as he reads the rule, Respondent did not violate Rule 4.3 because the benefit of the unconscionable advantage that he, and his brother, gained over Ms. Binette flowed to him – not a third-party client.

Respondent does not give a "policy reason" to justify his interpretation of Rule 4.3 because there is none. The result from Respondent's reading of Rule 4.3 runs counter to the goals the Supreme Court set in *Wysolmerski* (cited above). Rule 4.3 would not protect the public; it would protect the lawyer. The rule would not generate public confidence in the legal profession and its institutions. It would generate more public resentment of the profession and its institutions.

The most reasonable way to read Rule 4.3 is to read "client" in the phrase "conflict with the interests of the client" to include situations in which the lawyer represents himself and is, in effect, his own "client." He has "himself for a client."

The Petition, itself, makes this point:

> "Ms. Binette is not a lawyer. A lawyer could have explained what the Vermont's Fair Employment Practices Act was, and what it meant to her. More importantly, a lawyer would have advised her not to sign the contract. A lawyer would have told her that the contract was not a "contract to protect (her)" as Respondent had claimed in his interview with Detective Burnham. But, Ms. Binette did not have a lawyer. Her employer, the Respondent, was a lawyer. But, Respondent was *representing himself* and it was in his best interest to have her sign the contract." Petition, p.6 (emphasis added"

If the Panel is inclined to grant Respondent's motion because the Petition does not use the word "client," disciplinary counsel requests permission to amend the charge in the Petition's, as permitted under V.R. C. P 15a, to read:

Count II

> On or about September 28, 2012, Respondent violated Rule 4.3, by advising an "unrepresented person," his employee, **Pamela Binette**, a person who had an interest which Respondent, *who was representing himself, and had himself for a client*, knew was in conflict with his own interests, to sign a contract in which she agreed to waive any claim(s) she had to sue Respondent for sexual harassment.

The proposed amendment would be justified for the reasons *Colby* gives for granting amendments "liberally":

> "The principal reasons underlying the liberal amendment policy are (1) to provide maximum opportunity for each claim to be decided on its merits rather than on a procedural technicality, (2) to give notice of the nature of the claim or defense, and (3) to enable a party to assert matters that were overlooked or unknown to him at an earlier stage in the proceedings."

955 A2d 1086

There is another view of the of the "circumstances that would entitle (Ms. Binette) to relief" even under Respond's reading of the rule. It is a reasonable to see Respondent, who asked his brother to write the "contract to protect Pam," as his brother's client.

Under this view, Respondent's brother, a lawyer, violated Rule 4.3 by giving Ms. Binette, a person he knew was not represented by a lawyer, legal advice that gave his client (Respondent) an unconscionable advantage over Ms. Binette. Respondent is responsible for the acts of his agent done on his behalf and therefore shares in his brother's violation of Rule 4.3.

III. Charging Respondent with Sexual Harassment Under Rule 8.4 g Does Not Preclude Disciplinary Counsel from Also Charging Respondent with a Violation of Rule 4.3

Finally, Respondent suggests there was no need to charge a violation of Rule 4.3 because the conduct covered in Count II is also covered by the allegations in Count III – violating Rule 8.4 (g) by engaging in sex discrimination by engaging in sexual harassment in violation of 21 VSA § 495 d (13) (A). That is, he says "special Counsel has sought to break into two counts conduct that is covered by Count III."

Respondent has failed to state a basis for dismissing Count II. Disciplinary counsel chose to charge a violation of Rule 4.3 as well as a violation of Rule 8.4 g because he can prove the elements of a violation of Rule 4.3 without having to prove all the elements of a violation of Rule 8.4 g. That is, there are elements in a violation of Rule 8.4 g that are not included in Rule 4.3. To use a principle of the criminal law as an analogy, Rule 4.3 is not a "necessarily lesser-included offense" in a violation of Rule 8.4g. *State v. Forbes*, 523 A2d 1232, 1234-1236 (Vt. 1987)

To prove Respondent violated Rule 4.3 disciplinary counsel must prove that Respondent, a lawyer: (1) gave legal advice; (2) to an Ms. Binette, a person who was not represented by a lawyer and (3) that the lawyer knew, or reasonably should have known, that Ms. Binette's interests in the matter that was the subject of the legal advice - in this case waiver of the right to sue for sexual harassment - were in conflict with those of the Respondent who was representing himself and, in effect, was his own client.

In short there is misconduct under Rule 4.3, once the legal advice is given.

However, to prove Respondent violated Rule 8.4 (g) by engaging in sex discrimination by engaging in sexual harassment 21 VSA § 495 d (13) (A), Disciplinary Counsel must prove that: (1) Respondent subjected Ms. Binette to unwelcome acts and words of a sexual nature which created an offensive and intimidating work environment and (2) that Respondent explicitly made being subject to that offensive and intimidating work environment a condition of Ms. Binette's employment with Respondent. However, Disciplinary Counsel does not have to prove that Ms. Binette was an "unrepresented person" as required under Rule 4.3

There was a reasonable basis for disciplinary counsel to charge a violation of Rule 4.3.

Dated at Burlington, Vermont on July 13, 2017

Robert V. Simpson, Jr.
Disciplinary Counsel