STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

In re: Norman E. Watts, Esq.
PRB File Nos. 102-2019, 011-2020

RESPONDENT'S MOTION FOR DISMISSAL OR ALTERNATIVELY FOR A NEW HEARING

NOW COMES the Respondent, Norman E. Watts, and respectfully moves for the dismissal of this matter or alternatively for a new hearing. This motion is based on the following memorandum, attachments and such other matters as may be considered by the Panel.

1. Special Assigned Disciplinary Counsel Was Required to Disclose All Communications with the Complainants

The Special Disciplinary Counsel (SDC) was under a continuing obligation to provide the Respondent with all her communications with the complainants. V.R.C.P. Rule 26(e); *Trevor v. Icon Legacy Custom Modular Homes, LLC*, 2019 VT 54, ¶ 41, 210 Vt. 614, 634, 217 A.3d 496 ("It is each party's responsibility to supplement discovery when the party learns it is incomplete or incorrect, regardless of a court order."). The Respondent's Request for Production propounded in May 2021 specifically requested all such communications. (Request #2, Doc. 21-0527). Even though the Panel's Order dated September 28, 2021, precluded the Respondent from offering into evidence any documents produced by SDC, there was no such Order that excused SDC's continuing discovery obligation or that precluded SDC from submitting evidence at the hearing in a manner that the claims as well as her evidence were not misleading or false. (Doc. 21-0928).

2. SDC Failed to Produce a Significant Number of Communications with Complainant Alibozek

On May 12, 2023, the SDC filed a memorandum with exhibit #3—an excerpt of Respondent's interrogatory answers in the pending legal malpractice suit brought by Mr. Alibozek. (Doc. 23-0512). It is well settled that discovery is not public. *Herald Ass'n v. Judicial Conduct Bd.*, 149 Vt. 233, 239, 544 A.2d 596, 600 (1988). It therefore became apparent there were communications between Mr. Alibozek/his counsel and SDC which had not been produced in the malpractice case despite a discovery request for all communications with others about attorney Watts. The lack of confidence in Mr. Alibozek's good faith discovery responses, prompted the issuance of a subpoena on May 18, 2023, in the malpractice case to SDC for all communications with Mr. Alibozek/his counsel. (Exhibit A, subpoena).

Disciplinary Counsel accepted service of the subpoena and extensions were granted to June 30, 2023. (Exhibit B). On June 30, 2023, Disciplinary Counsel requested "a few more days" to provide a description of the "about 3 or 4" emails that had SDC's supposed work product. (Exhibit C). Disciplinary Counsel effectively acknowledged having privately coordinated with Alibozek's counsel the subpoena response. He (Jon Alexander) noted that Alibozek's counsel was already provided with the responsive documents, several hundred pages, to review for *her* objections:

> *There are several hundred other emails and other documents responsive to the subpoena*, however, that Charlotte may deem to reflect her work product or that of her clients the Alibozeks. *Charlotte is now reviewing the documents* and will be making a determination as to which of these documents, if any, she will assert work product protection and whether to file a motion for protective order with respect to the subpoena production. I will leave it to

> you and Charlotte to negotiate a timeline for her privilege assertions and filing of any motion for protective order before we produce anything.

Id. Emphasis added.

Respondent's defense counsel replied to agree to the additional several days requested by Disciplinary Counsel to describe the 3-4 emails withheld as work-product but not for Alibozek's counsel to act. (Exhibit D). Given that the description of the 3-4 emails would have likely taken less time than the communication to/from Disciplinary Counsel and defense counsel, it is now evident the request was just a ploy to buy more time for Alibozek's counsel to take action.

On July 6, 2023, Disciplinary Counsel emailed to assert "I'm not raising any work product assertion on behalf of Charlotte or the Alibozeks, only Navah in her capacity as Special Disciplinary Counsel (SDC)" but nonetheless proceeded to educate Alibozek's counsel (cc'd) on potential legal authority by citing two federal decisions, breached his commitment to respond to the subpoena in a couple of days from June 30th, and unilaterally gave Alibozek's counsel more time to file a motion for protective order. (Exhibit E).

On July 7, 2023, Disciplinary Counsel stated his objections to the subpoena as to "5 emails—dated 1/29/23, 3/20/23, 3/23/23, 4/18/23, and 4/23/23" on the grounds of work product and lack of relevance. (Exhibit F, email and its attachment, privilege log). These were all emails from SDC to Mr. Alibozek or his attorney. Disciplinary Counsel added he intended to produce 400+ documents:

> As for the remaining documents in the possession of SPEC Spero and my Office that are responsive to the Subpoena, which number approximately 400 emails, their attachments, and a handful of text messages, we are prepared to produce them to you in compliance with the Subpoena, subject to Plaintiff Alibozek's right to timely challenge the Subpoena before the Superior Court

> on the basis that it seeks his own privileged documents, or that of his legal counsel, Ms. Dennett.

Id.

On July 7, 2023, Alibozek's counsel filed a motion in the malpractice case for protective order of 15 emails as work-product; these are all emails from Mr. and Mrs. Alibozek and their counsel to SDC. (Exhibit G, motion for protective order, and the amended motion filed on July 19, 2023).

On July 11, 2023, Disciplinary Counsel finally made a production but claimed that with the documents withheld, there were some 371+ documents instead of 400+ indicated earlier:

> we are producing 371unredacted emails, email attachments and other responsive documents over which neither SDC Spero nor Plaintiff Alibozek have asserted work product protection or some other basis for non-discovery.

Ex H.

3. <u>SDC Promoted False Testimony at Panel Hearing</u>

Count I of the amended petition alleges that the Respondent failed to communicate with Mr. Alibozek the significance of GE's motion for judgment on the pleadings on Count II for breach of the covenant of good faith and fair dealing (GFFD) and allowed it to be dismissed without Mr. Alibozek's knowledge or consent. There is a factual dispute about the communications between the Respondent and Mr. Alibozek regarding count II (GFFD). At the hearing, Mr. Alibozek testified that he did not have any conversations with the Respondent or his paralegal, Margaux Reckard, about allowing count II to be dismissed:

> Q. Okay. So you're saying that about conversations with Mr. Watts. Did you have any conversations or emails with Ms. Richard about Count II and a motion for judgment on the pleadings or anything like that?
>
> A. No, she made us make rebuttals to each of them. Okay. And I realized that they were all separate entities there, but I didn't think that you could

separate one from the other in terms of dismissing it. I thought it was all one case. I feel -- fault me for being ignorant about it, but that's my recollection of it.

Q. Sure. *At any time, did you talk to Mr. Watts or Ms. Richard about allowing Count II of your complaint to be dismissed?*

A. All I can say is, I remember every single conversation topic I've ever had with Norman or Margo and none of them surrounded around Counts I, Counts II, or Counts III. It was one case. It wasn't -- they didn't disseminate one count from another. The strength of one -- *no conversation ever was about that*.

Q. So I want to ask you just a couple questions to make sure we're really being very clear about this because Mr. Watts has stated in this case that he spoke with you about whether Count II should be dismissed at either your deposition or another deposition. Did you discuss with Mr. Watts the concept of allowing Count II to be dismissed or the concept of not responding to a motion for judgment on the pleadings at any deposition, yours, or anyone else's?

A. I am 110 percent sure we did not.

(TR 6/7/23, 143:13-25, 144:1-15, emphasis added).

However, one of the text messages produced by Disciplinary Counsel on July 11, 2023, had the following exchange between Mr. Alibozek and SDC:

> I sent Margaux a msg when Watts dismissed count 2? I asked why it was dismissed!!??

(Ex I). Although the text message from Alibozek to SDC does not have a date on its face, it appears from context to have been sent on Friday June 9, 2023—the last day of the hearing. It readily follows that Mr. Alibozek's testimony two days earlier on June 7th that he had no conversations "ever" with Ms. Reckard about the dismissal of count II, was not true.

Whether Mr. Alibozek knowingly provided false testimony before the Panel on June 7, 2023, or made a mistake, it was very important for the Respondent and the Panel to

know about his text message to SDC. For a witness who had no difficulty testifying he was "110 percent sure" of his interactions with the Respondent and his paralegal, even incorrect testimony given because of faulty memory is important information for the trier of fact tasked with credibility determinations. The Respondent and the Panel were entitled to have this information, and the Respondent had the right to probe further by discovering the message Mr. Alibozek claims to have sent Ms. Reckard. Perhaps if such a message exists it would corroborate Mr. Alibozek's testimony and Respondent could have planned his presentation accordingly. But if Mr. Alibozek's message does not exist or if it can be found but contained a different narrative at the time, all would be important to the credibility issue at hand, and the Respondent's ability to shape his defense.

The Rules of Conduct make it clear that SDC should have disclosed Mr. Alibozek's text and should not have allowed his testimony that he did not ever discuss the dismissal with the Respondent or Ms. Reckard, to persist. The Rule states in part:

> Rule 3.3. CANDOR TOWARD THE TRIBUNAL
>
> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or *a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.* A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) *continue to the conclusion of the proceeding*, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Vermont Rules of Professional Conduct, Rule 3.3, emphasis added. As the Supreme Court observed:

> The general duty of candor to the tribunal continues. *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1546 (11th Cir.) ("All attorneys, as 'officers of the court,' owe duties of complete candor and primary loyalty to the court before which they practice. … This concept is as old as common law jurisprudence itself."), *cert. denied*, 510 U.S. 863, 114 S. Ct. 181, 126 L. Ed. 2d 140 (1993); *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 457-58 (4th Cir. 1993) ("The [judicial] system can provide no harbor for clever devices to divert the search, mislead opposing counsel or the court, or cover up that which is necessary for justice in the end."); *Griffis v. S.S. Kresge Co.*, 150 Cal. App. 3d 491, 197 Cal. Rptr. 771, 777 (Ct. App. 1984) ("The concealment of material information within the attorney's knowledge as effectively misleads a judge as does an overtly false statement."). "A review of the cases throughout the country clearly illustrate that the general duty of candor may be thwarted through an attorney's silence." *Gum v. Dudley*, 202 W. Va. 477, 505 S.E.2d 391, 400 & n.14 (W. Va. 1997) (collecting cases).

In re Wysolmerski, 2020 VT 54, ¶34, 212 Vt. 394, 408-09, 237 A.3d 706, 717.

SDC violated Rule 3.3 by the failure to disclose to the Respondent and the Panel Mr. Alibozek's text to her. At a minimum, Mr. Alibozek's claim to a "110 percent" memory would be undermined, while on the other hand, if Mr. Alibozek was untruthful about his contact with Ms. Reckard or his message offered additional relevant information, the evidence could have been shaped accordingly. The Respondent suffered prejudice because of the non-disclosure of important evidence by SDC.

4. <u>The Extent of Potentially Misleading Evidence Is Presently Unknown</u>

The Respondent has not had time since the production of the numerous emails and other documents by Disciplinary Counsel on July 11, 2023, to review them and to assess their impact on the evidence presented by SDC at the hearing. Further, the ability to obtain the true picture of the nature and extent of the communications with SDC was limited to the Alibozek complainant by virtue of the subpoena power in the malpractice case, and did not cover the other complainant, Judy Hiramoto.

Even as to Alibozek there are a number of emails and other communications that have been withheld from production as work product. The Respondent plans to challenge the objection and will be seeking court intervention. The full impact of SDC's failure to have disclosed all her communications with the complainants is therefore currently unknown. Needless to say, the extent and volume of the communication, coordination, and planning were not insignificant.

Respondent will need time to obtain court rulings on a number of emails and documents that have been withheld as well as many redactions. For example, 18 pages of the production are attached for the Panel to note the multiple redactions presumably as work product even though the subject matter of the messages do not describe a topic that would stand out as covered by work product. (Ex J). The Respondent requires time to assess the impact of these communications on other representations made by SDC. For example, in the attached pages, Mr. Alibozek on August 29, 2021, offered to provide SDC with "many emails" to/from the Respondent while SDC has been indicating to the Panel

that she did not have emails. Considerable work is required to understand the full impact of SDC's failure to disclose these communications.

5. The Respondent's Due Process Right And the Integrity of the Process Must be Respected by the Panel

The procedural history of this matter shows that the Panel has been unduly harsh with the Respondent and has imposed severe sanctions such as disallowing and limiting the evidence he could offer in his defense, all because of discovery issues early in the process. The Panel effectively deprived the Respondent of his right to be represented at the hearing. The Panel also disturbed due process considerations in the context of this proceeding by rushing to the defense of SDC and upstaging a disciplinary complaint against her while the "judge, jury and prosecutor" are all part of the PRB. The Panel rejected the removal of SDC when A.O. 9, Rule 20(J) required it.

And now it has become known that SDC failed to produce a considerable amount of evidence and presented, at least in one key instance, evidence from the complainant that was not correct. This admission did not come from SDC but rather the newly appointed Disciplinary Counsel who responded to a subpoena in a court case.

None of this behavior by SDC should be tolerated by the Panel. This is no longer a process that is consistent with the Respondent's constitutional protections and in the interest of justice. The only remedy that can correct the abusive overreach of SDC is dismissal of not only the Alibozek complaint but also Hiramoto as there must have been numerous communications that were also not disclosed. Alternatively, the Panel should require a new hearing after the Respondent has been given time to complete the necessary discovery that follows the disclosures by SDC and can properly prepare his defense.

Conclusion

In the interest of justice, this motion should be granted.

Dated this 24th day of July 2023.

s/s Norman E. Watts

Norman E. Watts - Respondent

STATE OF VERMONT

PROFESSIONAL RESPONSIBILITIES BOARD

In re: Norman E. Watts

PRP File Nos. 2019-102 and 2020-011

RESPONDENT hereby certifies that he sent the following pleadings to the Special Disciplinary Counsel of Professional Responsibility Board, Navah C. Spero, Esq., electronically at Gravel Shea.com:

- Proposed Findings and Conclusions
- Motion to Dismiss or Alternatively for a New Hearing and Ten Exhibits

Dated July 24, 2023

/s/ Norman E. Watts

Norman E. Watts

Respondent