STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

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

ORDER DENYING RESPONDENT'S MOTION FOR CONTINUANCE OF MERITS HEARING AND REQUEST TO DISQUALIFY SPECIAL DISCIPLINARY COUNSEL

I. Background

Disciplinary Counsel filed a Petition of Misconduct against Respondent on March 18, 2021. After seeking and obtaining an extension from the Hearing Panel, Respondent filed an Answer to the Petition on May 21, 2021.

Disciplinary Counsel filed a number of motions from July 2021 through March 2022 to address Respondent's failure to fully respond to her discovery requests. Respondent filed a number of motions during this period requesting additional time to respond to Disciplinary Counsel's discovery requests and motions. He also filed a motion to depose Disciplinary Counsel's expert witness after the discovery deadline. The Panel was unable to rule on all outstanding motions until January 26, 2023. Among other rulings, the Panel granted Respondent's motion to depose the expert witness, giving him thirty (30) days to complete the deposition, and denied Disciplinary Counsel's motion for sanctions but ordered Respondent to produce certain documents within fourteen (14) days.

Throughout March 2023, Hearing Panel Counsel worked with the Panel, the parties, and the Professional Responsibility Program Administrator to schedule a three-day merits hearing in this matter. The Program Administrator spent significant time securing the services of an operations assistant and court reporter for all three hearing days. On March 24, 2023, the Program Administrator served a Notice of Merits Hearing on the parties. The Notice advised the parties that the merits hearing would take place June 7, 8, and 9, 2023. The Notice further

advised, "Respondent is entitled to be represented by a lawyer, to cross-examine witnesses, and to present evidence at the hearing."

On April 10, 2023, Respondent filed a motion to depose Disciplinary Counsel's expert witness after the deadline set by the Hearing Panel. He had canceled the expert witness's previously-scheduled deposition because he had many deadlines to meet for his clients and did not feel he had adequate time to prepare for the deposition. Disciplinary Counsel opposed the motion. In an order dated May 3, 2023, the Hearing Panel denied Respondent's motion, concluding, "this matter is five weeks from the merits hearing, and permitting Respondent to depose the witness at this time could prejudice Disciplinary Counsel's ability to otherwise prepare for the merits hearing and risk further delay in the proceedings."

In a letter filed May 5, 2023 ("May 5 Letter"), Respondent advised the Hearing Panel that he made a decision to retain Kaveh S. Shahi, Esq. to represent him "for the balance of these PRB proceedings," and that "Attorney Shahi has agreed to represent me in this action." Respondent further advised that "considering the extent and volume of documentation, pleadings, recordings and rulings in the case, he will need time to review them and prepare for the final hearing and other actions in the case," that he has a jury draw on June 7, 2023, which conflicts with the first day of the merits hearing, and that he engaged Hearing Panelist Eric A. Johnson, Esq., as a mediator in numerous cases and the firm of Panelist Thomas J. Sabotka, CPA, for accounting services.

On May 9, 2023, Attorney Shahi filed a Notice of Limited Appearance, stating he was representing Respondent for the purpose of seeking a continuance of the merits hearing in this matter. He filed a Motion for Continuance of Merits Hearing ("Motion for Continuance") on behalf of Respondent the same day, arguing for a continuance of the merits hearing to "the latter

part of June 2023." He argued that Respondent has a right to be represented by counsel, that he (Attorney Shahi) has a jury draw scheduled for June 7, 2023, and that he (Attorney Shahi) needs at least six weeks to prepare for the merits hearing due to other commitments. The Motion for Continuance was not accompanied by an affidavit or attorney certificate stating both the reason for the continuance and the time when the reason was first known.

On May 12, 2023, Disciplinary Counsel filed an Opposition to Respondent's Motion to Continue June 7-9 Trial ("Opposition"). She argued against a continuance on grounds the request was untimely, that sufficient time remains for Respondent's counsel to prepare for the hearing, that the jury draw is unlikely to proceed as scheduled, and that the interests of the public and the complaining witnesses mandate proceeding as scheduled.

On May 15, 2023, Respondent's counsel filed a Reply in Support of Motion for Continuance of Merits Hearing ("Reply"), in which he included a request to remove and substitute Navah C. Spero, Esq. as Disciplinary Counsel. He alleged that, in the Opposition, she perpetrated falsehoods on the Panel, impugned the integrity of a judge, and personally attacked him because of discriminatory animus toward his Middle Eastern heritage, in violation of the Vermont Rules of Professional Conduct. Respondent's counsel reiterated his need for preparation time and his June 7, 2023, jury draw conflict. He concluded that both he and a new disciplinary counsel would need additional time to prepare for the merits hearing.

On May 18, 2023, Disciplinary Counsel filed a Motion for Permission to File Surreply and Surreply in Opposition to Motion for Continuance of Merits Hearing ("Surreply"). She reiterated that the merits hearing has been long delayed, that Respondent's counsel has sufficient preparation time, and that Respondent's counsel failed to articulate specific reasons why Respondent waited so long to obtain counsel or why Respondent's counsel needs six weeks to

prepare for the merits hearing. Disciplinary Counsel proposed that, as an alternative to denying a continuance outright, the Panel continue only the June 7, 2023 hearing date to accommodate Respondent's counsel's jury draw.[1] She also denied personally attacking Respondent's counsel, discriminating against him, or making false statements in the Opposition.

At a previously-scheduled pre-merits-hearing conference on May 24, 2023, Respondent, his counsel, and Disciplinary Counsel argued in support of and in opposition to their respective positions on the Motion for Continuance and request for disqualification. Respondent's counsel also clarified that he needs until early July 2023, not late June 2023, to prepare for the merits hearing.

Shortly after the conference, Respondent himself filed a Memorandum in Support of Motion for Continuance ("Memorandum"), denying he obtained counsel for the purpose of delaying the merits hearing and indicating he decided that he needed independent counsel after enduring months of Disciplinary Counsel making false accusations against him. He also expressed a desire to conclude this matter sooner rather than later. He did not address his counsel's request for disqualification.

On May 25, 2023, per the Panel's request at the conference, Disciplinary Counsel filed a response opposing Respondent's counsel's request for disqualification ("Opposition to Disqualification"). She again denied engaging in personal or discriminatory attacks on him, violating her duty of candor to the Panel, or impugning the integrity of a judge.

On May 26, 2023, Respondent's counsel filed a reply in support of disqualifying Disciplinary Counsel ("Reply in Support of Disqualification"). He reiterated that Disciplinary Counsel discriminated against him, despite never referring to his heritage in the Opposition,

[1] The Hearing Panel did not receive the Surreply until May 24, 2023.

arguing that "bias and discriminatory prejudice here can be found not only in the disproportionate accusations directed at the undersigned compared to the Respondent but also the disrespectful and debasing tone of the accusations." He further argued that, to the extent she treated him no differently than she treats other attorneys, she nonetheless showed a lack of credibility and regard for the rule of law in the Opposition and should therefore be disqualified.

II. Respondent's Motion for Continuance

The Vermont Rules of Civil Procedure apply in disciplinary proceedings. A.O. 9, Rule 20(B). The Rules of Civil Procedure provide, "Motions for continuance shall be accompanied by an affidavit, or a certificate of a party's attorney subject to the obligations of Rule 11, stating the reason therefor and the time when such reason was first known." Vt. R. Civ. P. 40(d)(1). Respondent's Motion for Continuance was not accompanied by an affidavit or attorney certificate stating both the reason for the motion and the time when the reason was first known.

Granting or denying a continuance is a matter of discretion for the Hearing Panel. *See Segalla v. Segalla*, 129 Vt. 517, 525, 283 A.2d 237, 241 (1971); *State v. Rickert*, 124 Vt. 380, 382, 205 A.2d 547, 549 (1964). The Hearing Panel has discretion to deny a continuance if the moving party does not comply with the applicable rules of procedure. *See Thorburn v. Town of Norwich*, 141 Vt. 242, 244, 448 A.2d 141, 142 (1982); *Segalla*, 129 Vt. at 524, 205 A.2d at 241; *Rickert*, 124 Vt. at 381-82, 205 A.2d at 549. In certain circumstances, the Panel also has discretion to grant a non-compliant motion for continuance. In *State v. Heffernan*, 2017 VT 113, ¶¶ 21-23, 206 Vt. 261, 270-71, 180 A.3d 579, 585 (2017), the Vermont Supreme Court held that the trial court abused its discretion when it denied the defendant's motion for continuance to accommodate a critical witness who was unavailable due to illness *solely* on grounds the motion did not include a physician's affidavit, as required by the applicable rule of criminal procedure.

The Court noted there was no factual dispute about the witness's illness, and the motion included an affidavit from the defendant's attorney regarding his unsuccessful efforts to obtain the required affidavit and a signed but unnotarized affidavit from the witness's mental health counselor. The Court warned, however, "We do not mean to imply that the affidavit requirement can be routinely ignored." *Id.* at ¶ 24.

Respondent's failure to file an affidavit or attorney certificate stating the reason for the continuance and when the reason was first known supports denial of a continuance. Unlike the defendant in *Heffernan*, Respondent has not offered any reason for his failure to comply with the Vt. R.Civ. P. 40(d)(1), nor has he advised the Panel when the reason for the continuance first became known.

Additional factors support denial of a continuance. One of the goals of the Professional Responsibility Program is "to resolve disciplinary complaints against attorneys through fair and prompt dispute resolution procedures." A.O. 9, Purpose. Hearing Panels oversee disciplinary proceedings consistent with A.O. 9, which contemplates a fairly short period between when a petition of misconduct is filed and when a merits hearing is held. For example, a respondent has 20 days to file an answer, after which the Hearing Panel may schedule a merits hearing, so long as the parties have 25 days' notice of hearing – or less if stipulated facts are filed. A.O. 9, Rule 13(D).

The Panel must balance Respondent's interest in a continuance – eleventh-hour representation and preparation by counsel of his choosing – against the "public interest in orderly and expeditious prosecutions," *State v. Hicks*, 167 Vt. 623, 625, 711 A.2d 660, 662 (1998), and the complaining witnesses' right to have their complaints "heard and decided in a reasonable fashion," *Leiter v. Pfundston*, 150 Vt. 593, 596, 556 A.2d 90, 92 (1988). "A reading of the full

text of V.R.C.P. 40 reflects the concern that courts must have for the orderly use of court facilities, provided at great expense to the taxpayer for the use of litigants. The design of that rule is directed at avoidance of unnecessary delay, and seeks out alternatives preferable to postponement of the trial if the rights of the parties can be accommodated." *Thornburn*, 141 Vt. at 244, 448 A.2d at 142.

The Panel finds the public interest in achieving resolution of this long-delayed disciplinary proceeding outweighs the reason Respondent gave for waiting for what appears to be more than two years to seek counsel. *See e.g., State v. Stenson*, 169 Vt. 590, 593, 739 A.2d 567, 571 (1999) (holding "the trial court concluded that defendant did not make a serious effort to obtain counsel, despite the fact that he had the time and ability to do so. There was therefore no abuse of discretion [in denying a continuance].") (internal citations omitted). Notably, the Rules of Civil Procedure provide, "Ordinarily, the only grounds for continuance after the second day of the term will be the sickness of counsel or parties, the unavoidable absence of a material witness or evidence, or the rulings of the Administrative Judge as to conflicting appointments of trial attorneys." Vt. R. Civ. P. 40(c)(2). While the Professional Responsibility Program does not have terms, the principle applies here. Respondent has neither argued nor proven that similar circumstances exist here to warrant a late continuance.

With respect to Respondent's counsel's June 7, 2023, jury draw, the Rules of Civil Procedure provide, "Engagement of counsel in other trial courts will not be considered cause for continuance as a matter of right." Vt. R. Civ. P. 40(d)(4). Moreover, the Panel made itself available to reschedule the June 7, 2023, hearing date to following weekend but was unable to secure Respondent's agreement to reschedule the hearing for June 11, 2023. The Panel is not

available for a three-day merits hearing until September 2023. Respondent's counsel's June 7, 2023, jury draw conflict does not warrant a three-month delay in resolving this matter.

III. Respondent's Counsel's Request for Disqualification

Respondent's counsel asked the Hearing Panel to disqualify Attorney Spero as Disciplinary Counsel in this matter based on the Opposition she filed. He alleged that she violated several provisions of the Vermont Rules of Professional Conduct regarding a lawyer's duty to maintain the integrity of the profession. He argued that the violations warrant her disqualification. The Hearing Panel takes allegations of discrimination and unprofessional conduct very seriously but concludes that Respondent's counsel's allegations do not warrant disqualification. The allegations pertain solely to the content of Disciplinary Counsel's Opposition, which speaks for itself, so no evidentiary hearing is required, although the Panel gave the parties an opportunity to be heard at the pre-merits-hearing conference.

Respondent's counsel argued that Disciplinary Counsel violated several Rules of Professional Conduct. V.R.Pr.C. 8.1 provides in relevant part that a lawyer "in connection with a disciplinary matter, shall not… knowingly make a false statement of material fact." V.R.Pr.C. 8.2(a) provides in relevant part, "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer." V.R.Pr.C 8.4 provides in relevant part, "It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct… (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation… (g) engage in conduct related to the practice of law that the lawyer knows or should know is harassment or discrimination on the basis of race, color, sex, religion, national origin, ethnicity, ancestry, place of birth, disability, age, sexual orientation, gender identity,

marital status or socioeconomic status, or other grounds that are illegal or prohibited under federal or state law."[2]

As the parties have noted, there is a dearth of controlling authority to guide the Panel's resolution of Respondent's counsel's request. Accordingly, the Panel has also considered decisions from other jurisdictions that address requests to disqualify counsel or judges in civil or criminal proceedings. Disqualification of counsel is "a drastic measure which courts should hesitate to use except when absolutely necessary." *Cody v. Cody*, 2005 VT 116, ¶ 23, 179 Vt. 90, 97, 889 A.2d 733, 739; *see also Lasek v. Vt. Vapor, Inc.*, 2014 VT 33, ¶ 37, 196 Vt. 243, 260, 95 A.3d 447, 459. The burden is on the moving party to clearly demonstrate that continued representation would be impermissible. *See Shade v. Great Lakes Dredge & Dock*, 72 F.Supp.2d 518, 520 (E.D. Pa. 1999). Motions to disqualify counsel "should be resolved with extreme caution because they may be used abusively as a litigation tactic, when, for example, a movant is facing a formidable opponent." *Nelson v. Green Builders, Inc.*, 823 F.Supp. 1439, 1444 (E.D. Wis. 1993).

As an initial matter, the Panel is not persuaded that Respondent's counsel has standing to request the removal and replacement of Attorney Spero as Disciplinary Counsel in this matter. *See Great Lakes Construction, Inc. v. Burman*, 186 Cal.App.4th 1347, 1356, 114 Cal.Rptr.3d 301 (2010) ("A 'standing' requirement is implicit in disqualification motions."). Respondent's counsel represented that he is only representing Respondent for purposes of seeking a continuance, and as he stated during the pre-merits-hearing conference, he did not consult with

[2] Respondent's counsel quoted V.R.Pr.C. 8.4(g) as it existed prior to 2017 ("A lawyer shall not… "discriminate against any individual because of his or her race, color, religion, ancestry, national origin, sex, sexual orientation, place or birth or age, or against a qualified handicapped individual, in hiring, promoting or otherwise determining the conditions of employment of that individual"). Reply at 2. As quoted, the provision does not prohibit a lawyer from discriminating against opposing counsel in a matter, assuming there is no employment relationship between the lawyer and opposing counsel.

Respondent before asking the Panel to disqualify Disciplinary Counsel. Notably, Respondent did not address his counsel's request in the Memorandum he filed after the pre-merits-hearing conference. Respondent's counsel did not articulate any prejudice to Respondent himself that would result from Disciplinary Counsel's continued participation in this matter. Rather, he argued that the "disqualification and removal of Special Counsel will send the message that the job of regulating other lawyers requires respectful, dignified and nondiscriminatory behavior." Motion for Continuance at 4. At minimum, however the moving party must show harm to a legally-protected interest which is concrete, particularized, and actual or imminent rather than conjectural or hypothetical in order to have standing. *Id.* at 1358. A general interest in ensuring the fair administration of justice does not confer standing. *Id.*

Even to the extent Respondent's counsel has standing, he has nonetheless failed to demonstrate that disqualifying Attorney Spero as Disciplinary Counsel in this matter is warranted. Respondent's counsel has not established that Attorney Spero is so biased against him personally that, if she continued as Disciplinary Counsel, Respondent would be deprived of a fair and impartial hearing. *See State v. Hohman*, 138 Vt. 502, 505-07, 420 A.2d 852, 854-55 (1980).

Respondent's counsel argued that Disciplinary Counsel discriminated against him because he "is of color with Middle Eastern heritage from a predominantly Muslim region." Reply at 4. No direct, indirect, or veiled reference to color, ethnicity, national origin, or religion appears in Disciplinary Counsel's Opposition. Moreover, a review of Disciplinary Counsel's pleadings in this matter demonstrates there is no significant difference between the tone and tenor of her Opposition and the tone and tenor of the pleadings she filed before Attorney Shahi's involvement in this matter. Arguably, Disciplinary Counsel's writing evinces an adversarial style, but it is well within professional bounds. The Panel cannot conclude that a reasonable

reading of the Opposition demonstrates "conduct related to the practice of law that [Disciplinary Counsel] knows or should know is harassment or discrimination." *See* V.R.Pr.C 8.4(g). Moreover, there is no dispute Disciplinary Counsel and Respondent's counsel have had no prior interactions. To the extent Disciplinary Counsel is biased, the bias appears wholly based on the conduct of Respondent and his counsel in this matter. *See State v. Millsap*, 704 N.W.2d 426, 432 (Iowa 2005) ("Only personal bias or prejudice stemming from an extrajudicial source constitutes a disqualifying factor… Judicial predilection or an attitude of mind resulting from the facts learned by the judge from the judge's participation in the case is not a disqualifying factor") (internal citations omitted).

With respect to Respondent's counsel's allegations that Disciplinary Counsel perpetrated falsehoods in the Opposition, the Panel disagrees. With one exception, the statements Respondent's counsel identified as falsehoods were mere opinion and argument under any reasonable reading. *See Lasek*, 2014 VT at ¶ 36 (affirming denial of defense attorney's disqualification for allegedly threatening plaintiff's attorney because defense attorney's "letter cannot reasonably be interpreted as threatening a claim of litigation against [plaintiff's attorney] personally"). The statements Respondent's counsel identified as false include: "Attorney Shahi has sufficient time to prepare and further delay is prejudicial;" "Attorney Shahi's familiarity with this matter should obviate the need to continue the June 7 trial date;" "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;" "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;" "Attorney Shahi's schedule is not a true conflict;" "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." *See* Reply at 4-10; Opposition at 3-4.

Disciplinary Counsel's statement that "Attorney Shahi states he will need time to prepare due to the volume of discovery" is inaccurate. *See* Reply at 7; Opposition at 4. During the pre-merits hearing conference, Disciplinary Counsel acknowledged that Respondent's counsel did not state in the Motion for Continuance that he needs more time to prepare due to the volume of discovery. She explained that she inferred his reason for needing more time was due to the volume of discovery, at least in part. Notably, Respondent advised that, "considering the extent and volume of documentation, pleadings, recordings and rulings in the case, [Attorney Shahi] will need time to review them and prepare for the final hearing and other actions in the case." May 5 Letter. Disciplinary Counsel's imprecise language does not rise to the level of unprofessional conduct warranting disqualification. Moreover, as required by V.R.Pr.C. 8.1(b), she promptly corrected the record.

A reasonable reading of the Opposition shows that Disciplinary Counsel in no way impugned the qualifications or integrity of any judge. She simply argued about the likelihood the trial for which Respondent's counsel has a June 7, 2023, jury draw would proceed to trial, given the other trials also scheduled for a June 7, 2023 jury draw.

Moreover, the Panel notes that engaging in professional misconduct does not, by itself, warrant disqualification. "[A] violation of professional ethics does not in any event automatically result in disqualification of counsel." *W. T. Grant Co. v. Haines*, 531 F.2d 671, 677 (2nd Cir. 1976); *see also Hohman*, 138 Vt. at 506, 420 A.2d at 855 (holding prosecutorial bias without prejudice does not constitute reversible error). Even if the Hearing Panel found that Disciplinary

Counsel engaged in misconduct, "the question of whether disqualification is an appropriate sanction is resolved through balancing various competing interests." *In re Rite Aid Securities Litigation*, 139 F.Supp.2d 649, 656, n. 7 (2001). Disciplinary Counsel has been engaged in this matter for more than two years. The content of the Opposition does not warrant removing and replacing Attorney Spero with an attorney who is unfamiliar with the facts and law weeks before the merits hearing, as doing so would inevitably cause an unacceptable delay in concluding this disciplinary proceeding. *See W. T. Grant Co.*, 531 F.2d at 677.

Finally, Respondent's counsel also argued, "[t]he question before the Panel is not whether Special Counsel's conduct violated the Rules of Conduct but whether to allow the continued prosecution of a disciplinary matter with the necessary credibility and regard for the Rule of Law [sic] that it must embody." Reply in Support of Disqualification at 4. To the extent Respondent's counsel seeks Disciplinary Counsel's disqualification due to an appearance of impropriety, "courts have generally rejected the argument that an appearance of impropriety, standing alone, is a sufficient ground for disqualification of an attorney." *Stowell v. Bennett*, 169 Vt. 630, 632, 739 A.2d 1210, 1212 (1999). The Hearing Panel similarly rejects the argument that any appearance of impropriety in this matter is grounds for Disciplinary Counsel's disqualification.

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Having considered the parties' submissions and arguments at hearing and the records on file in this matter, the Hearing Panel hereby ORDERS:

1. Respondent's Motion for Continuance of Merits Hearing dated May 9, 2023, is DENIED. The merits hearing in this matter will proceed on June 7, 8, and 9, 2023.

2. Respondent's Counsel's Request for Disqualification of Disciplinary Counsel dated May 18, 2023, is DENIED.

Dated May 30, 2023.

Hearing Panel No. 9

By: _____
Karl C. Anderson, Esq., Chair

By: _____
Eric A. Johnson, Esq.

By: _____
Thomas J. Sabotka, Public Member