STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: Stuart Jay Robinson, Esq.
PRB File No. 2020-007

RULING ON MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

On or about December 11, 2020, Disciplinary Counsel filed a Petition of Misconduct alleging that Respondent, Stuart Jay Robinson, Esq., "presented, participated in presenting, or threatened to present criminal charges in order to obtain an advantage in a civil matter . . . in violation of Vermont Rule of Professional Conduct 4.5." Petition, 12/11/20, at 2. On or about December 30, 2020 Respondent filed a response to the petition and a separate motion pursuant to V.R.C.P. 12(b)(6) to dismiss the petition on the grounds that it fails to state a claim upon which this Hearing Panel could find a violation of Rule 4.5.[1]

The Petition of Misconduct alleges that Respondent, in connection with a pre-suit letter that he sent to a physician who had previously testified in a trial involving Respondent's client ("the Doctor"), violated V.R.Pr.C. 4.5. The text of the letter is cited in the petition.

In his motion to dismiss, Respondent attempts to incorporate by reference "all facts, exhibits [and] brief excerpts" in two civil actions he filed on behalf of the client, as well as the "responses and [e]xhibits" he filed in his Response in Opposition to the Petition. Respondent makes extensive factual allegations relating to the two civil lawsuits and his interactions with opposing counsel in those lawsuits and represents that he is continuing efforts to obtain reversal of decisions rendered in those lawsuits. Against this extensive set of factual allegations and representations, Respondent argues "there is no evidence of intent to violate Rule 4.5," Motion to

[1] The governing procedure in attorney disciplinary proceedings, Administrative Order 9, provides that the Vermont Rules of Civil Procedure are applicable "[e]xcept as otherwise provided in these rules." Rule 12(b)(6) allows a defendant in a civil action to file a motion to dismiss "failure to state a claim upon which relief can be granted." V.R.C.P. 12(b)(6). The Hearing Panel concludes that a Rule 12(b)(6) motion to dismiss is not inconsistent with any provision of A.O. 9 and that, therefore, it can be asserted in this proceeding.

Dismiss, ¶ 16, and further argues that his intent with respect to the letter is properly viewed as "offer[ing] an alternative to litigation in order to avoid putting his client through a Court experience that made her sick to her stomach for days . . . ." *Id*., ¶ 13.

Disciplinary Counsel initially opposes the motion on the grounds that Respondent's motion did not comply with the timing requirement in Rule 12(b). That rule requires a Rule 12(b)(6) motion to be filed "*before* pleading if a further pleading is permitted." (emphasis added). Disciplinary Counsel argues that Respondent's filing of the motion to dismiss at the same time as the response to the petition calls for summary denial of the motion. In the alternative, Disciplinary Counsel argues that the motion does not satisfy the rigorous standard that applies under Rule 12(b)(6).

In *Mintz v. Matalon*, 148 Vt. 442, 535 A.2d 783 (1987), the Vermont Supreme Court concluded that "[w]hile a strict interpretation of Rule 12(b) would not permit a motion to dismiss filed *after an answer is filed*," *id*. at 444, 535 A.2d at 784 (emphasis added), the trial court should nevertheless have considered the motion where the defendant had identified the defense in the defendant's previously filed pleading. *Id*. In reaching this conclusion, the Court cited a widely recognized treatise which has interpreted the parallel provision in the Federal Rules of Civil Procedure. Addressing the situation where a motion to dismiss under Rule 12(b) is filed *simultaneously with a responsive pleading* – as is the case here – that treatise concludes as follows:

> "[S]hould the defendant file a Rule 12(b) motion simultaneously with the answer, the district court will view the motion as having preceded the answer and thus as having been interposed in timely fashion.

5C Fed. Prac. & Proc. Civ. § 1361 (3d ed.), § 1361.

The Hearing Panel concludes that Respondent's motion was timely. It was filed at the same time as the response to the petition – it was not filed "after" the response to the petition and there is no compelling reason to treat it as having been filed afterwards. Moreover, the holding

in *Mintz*, though not directly on point, strongly suggests that the Supreme Court would not adopt a strict application of the rule's timing requirement where a motion has been filed at the same time.

However, for several reasons the Hearing Panel concludes that the motion to dismiss should be denied. The standard applied to a motion to dismiss for failure to state a claim is exceedingly demanding:

> 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. Motions to dismiss for failure to state a claim are disfavored and are rarely granted.

Colby v. Umbrella, Inc., 2008 VT 20, ¶ 5, 184 Vt. 1, 955 A.2d 1082 (2008) (quotations omitted).

The Panel must "accept as true all reasonable inferences that may be derived from plaintiff's pleadings and assume that all contravening assertions in defendant's pleadings are false." *Richards v. Town of Norwich*, 169 Vt. 44, 49, 726 A.2d 81, 85 (1999). And the Supreme Court has cautioned that "the legal theory of a case should be explored in the light of facts as developed by the evidence, and, generally, not dismissed before trial because of the mere novelty of the allegations." *Ass'n of Haystack Prop. Owners, Inc. v. Sprague*, 145 Vt. 443, 447, 494 A.2d 122, 125 (1985).

Under the circumstances presented, dismissal would not be appropriate. For purposes of a Rule 12(b)(6) motion, Disciplinary Counsel has sufficiently placed Respondent's intent in issue through his allegations concerning the letter to the Doctor. While Respondent may wish to take issue with whether he had the requisite intent in connection with the prohibition set forth in Rule 4.5, the text of the letter and the reasonable inferences that may be derived from it are sufficient at this stage of the proceeding to defeat the motion to dismiss. Moreover, Respondent has gone far

outside the allegations of the Petition in his attempt to argue that he did not have the requisite intent. He has made numerous representations and submitted numerous exhibits that are not referenced in the Petition – to give one example, his assertion that opposing counsel in one of the lawsuits threatened Respondent and his client. A motion to dismiss for failure to state a claim is not a vehicle to expand the factual allegations in a case.

Finally, the Panel is mindful that while Rule 4.5 has been recognized as a basis for attorney discipline, it is a somewhat novel claim in the sense that there is no Vermont Supreme Court case law interpreting that provision. This appears to be a case of first impression in Vermont. This circumstance favors the development of a full evidentiary record on which to base a merits decision.

For all these reasons, Respondent's Motion to Dismiss is hereby DENIED. Dated this 23nd day of February of 2021.

Hearing Panel No. 6

By: Richard R. Goldsborough
Richard R. Goldsborough, Esq., Chair

Steven A. Adler, Esq.

Nicole Junas Ravlin, Public Member