

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Joint Petition of Central Vermont Public Service Corporation )  
 (“CVPS”), Danaus Vermont Corp., Northern New England )  
 Energy Corporation (“NNEEC”) for itself and as agent for Gaz )  
 Metro Limited Partnership and its parents, Green Mountain Power )  
 Corporation (“GMP”) and Vermont Low Income Trust for )  
 Electricity, Inc. (“VLITE”), for approval of: (1) the merger of )  
 Danaus into and with CVPS; (2) the acquisition by NNEEC of )  
 CVPS and certain other Vermont companies; (3) the amendment )  
 to CVPS’s Articles of Association; (4) the merger of CVPS into )  
 and with GMP; and (5) the acquisition by VLITE of a controlling )  
 interest in Vermont Electric Power Company, Inc. )

Docket No. 7770

REPLY TO DEPARTMENT OF PUBLIC SERVICE AND PETITIONERS’ OPPOSITION TO  
RATEPAYERS INTERVENTION<sup>1</sup> AND PETITION FOR APPOINTMENT OF INDEPENDENT  
COUNSEL

NOW COMES Vincent Illuzzi (“Ratepayers”)<sup>2</sup> and files this rebuttal memorandum in support of Intervention and Appointment of Independent Counsel. Ratepayers submit this Memorandum in further support of their motion filed October 17, 2011 and to respond to the arguments presented in the Response and Opposition filed by the Petitioners and Department of Public Service (“DPS” or “Department”) and to explain more thoroughly why Independent Counsel is essential to assure the integrity of the process.

BACKGROUND AND DUTIES OF LAWYERS AND PUBLIC OFFICIALS

This Docket confronts the Public Service Board (“Board”) with an unprecedented situation that calls for the appointment of Independent Counsel to protect the integrity of the Board’s process and public confidence in the result.

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<sup>1</sup> The Department does not oppose Ratepayers intervention on permissive grounds. DPS Response at p.11.

<sup>2</sup> And those ratepayers who stand in substantially similar position as I and who signed a signature page agreeing with my position, all filed with the Public Service Board with my motion and petition. I am representing myself in this filing due to time constraints but note that the signatories agreed with my filing and are deserving of the same affirmative ruling.

The Petitioners would have the Board give its blessing to the creation of one single investor owned utility that would control over 70 percent of all relevant electric markets in Vermont - retail, wholesale, and the VELCO transmission utility - and do so without the trustworthy participation of the Department as Public Advocate. In these extraordinary circumstances, the Board should exercise its sound discretion and appoint a member of the bar as Independent Counsel to represent the interests of the Public under 30 V.S.A. § 217. (This section provides in pertinent part: “In any proceeding, the Board may request the appearance of the attorney general or appoint a member of the Vermont bar to represent the interests of the public or state.”)

The Ratepayers are viewed by the Department and Petitioners as inappropriate and unnecessary to the process. Both the Department and Petitioners claim that they, the other utility participants<sup>3</sup> and public entities are better equipped to protect the public interest than Independent Counsel.<sup>4</sup> Under the facts and circumstances in this case, I disagree.

Before the keys to the state’s electric interstate highway system are transferred to Gas Metro, Ratepayers respectfully request this Board assess whether any conveyance or sale is appropriate, and if a sale is approved, that appropriate long-term and continuing conditions are attached to be followed by Gas Metro, GMP and their successors and assigns. While the Department and even the Petitioners claim existing parties are assessing the VELCO portion of the transaction to ensure proper conditions, no one, not the Department or any of the approximately dozen other interveners have announced a

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<sup>3</sup> Based on information received by the undersigned, cooperatives and municipal utilities are always fearful of fighting with VELCO because VELCO has latitude and discretion in deciding whether certain appliances and connection costs or other labor and materials are the financial responsibility of VELCO, or the impacted municipal utility or cooperative.

<sup>4</sup> The Department claims the process is underway as if Ratepayers filed out of time and identifies its achievements and strengths - the experience of its lawyers, the 89 separate requests for information, the retention of Michael Dworkin to assess the VELCO portion of the merger, as well as the retention of a financial expert and ability to assess difficult policy issues as support for retaining the DPS as the public advocate (DPS Memorandum at pp. 2-3). It fails to appreciate the problem it faces and the importance of its credibility in the public arena in this on-going process. None of these accomplishments or achievements confronts or overcomes the political pre-judgment and personal conflict issues surrounding the Commissioner and the Department.

desire or shown any effort to challenge the underlying transaction.<sup>5</sup> This is a unique proceeding that will change the face of the Vermont utility industry, with unknown and long-term implications for its ratepayers. Independent counsel is not only appropriate; it is essential.

Based on the following facts and arguments, Ratepayers believe they have demonstrated a situation where Independent Counsel should be appointed.

I. Appointment of Independent Counsel under 30 VSA §217 is Appropriate to Ensure that the Petition is Thoroughly Reviewed

As a quasi-judicial body, the Board, like a court, relies on the advocacy – and sometimes adversity -- of the parties to draw out the issues, test the evidence, and expose any criteria for conditional approval. The Board’s decision must be supported by the record evidence.

Usually, the Board looks to the Department to examine and challenge the petitioner’s case. Yet now, in a docket that will re-shape Vermont and its electric industry for generations, the commissioner of the Department of Public Service is hobbled by circumstances which cast doubt on the Department’s ability to develop and present a case for the Public which the Board needs in order to make the very best possible decision in deciding whether to approve or disapprove, and if to approve, to impose the most effective conditions that will protect the ratepayers.

Here, the commissioner labors under the double burden of both a political pre-judgment and a personal interest conflict. Because of these burdens, it would be difficult if not impossible for the commissioner to provide detached advice and direction to the Public Advocate and his consultants. The standards for a commissioner in this case, who is both a lawyer and a public official, demand independence.

II. The State Administration has Prejudiced the Position of DPS

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<sup>5</sup> It may be unfair to characterize all intervenors’ positions at this early juncture but we are faced with a tight schedule already agreed to by the Department and others. As BED stated in its Reply Memorandum of Oct. 25, 2011, BED should not be precluded from raising and litigating any such issues for failure to have discovered them in advance.

While the Department prefers to point to an initial press release to support its position and the Petitioners prefer to reference the Governor's June 23, 2011 comments, the record shows that Governor Shumlin made his position clear during a conference call with reporters on July 11, 2011 while attending a meeting of Eastern Premieres in Halifax N. S. -- that he intended to support the Petitioners' request.

According to contemporary news reports:

The Shumlin administration strongly supports a marriage between the state's two largest utilities. The Governor says merging GMP and CVPS will be better for customers.

The news report may be found at this URL. <http://www.wcax.com/story/15062261/shumlin-reiterates-support-for-gmp-cvps-merger> (collected October 23, 2011). Attachment A.

The chain of command at the Department starts in the Governor's office and runs through the commissioner to the Public Advocate and his staff. No politically aware person can think that the Governor's position will not influence the work of the Department in this docket.

### III. The Commissioner is Compromised by a Personal Conflict of Interest

The great difficulty for the Department is far greater than simply the Governor's predisposition for the merger. The State Ethics Code cited by DPS at pp. 6-7 is dispositive. The Employee here, Commissioner Miller, has a member of her immediate family with a direct interest in the outcome of the litigation. Her husband, attorney Eric Miller, is the managing partner of Petitioners' law firm, Sheehey, Furlong & Behm, which is virtually the outside general counsel to GMP; indeed, the firm has managed to represent all of the Petitioners in Docket No. 7770 simultaneously. It is reasonable to infer that his firm was deeply involved in structuring the merger and preparing the attendant corporate documents, along with GMP personnel. It is also reasonable to infer that his firm will continue corporate, business and regulatory representation after this docket is closed.

The DPS attempts to divert attention from the conflict by referring to Eric Miller as a mere “employee” or an ordinary “partner” but in reality he is the managing partner of the firm and stands to gain personally from this transaction. His role is candidly stated on the firm web site at this URL <http://www.sheeheyvt.com/lawyers/eric.miller> (collected October 23, 2011). As such, attorney Eric Miller is responsible for the business success of the law firm, and thus has a powerful interest in the success of the merger. His firm stands to represent what would be the largest electric economic entity in Vermont, which would generate a large and steady volume of business for the Sheehey law firm and secure the success of the firm for which Mr. Miller, as managing partner, is responsible. Revenue from such representation will either flow directly to Mr. Miller in partnership compensation, or help to support the business overhead and hence increase the profit available to distribute to the partners, including Mr. Miller. In short, his law practice would be gilded for the foreseeable future, and perhaps for a very, very long time.<sup>6</sup> Commissioner Miller stands to profit from this arrangement.

The situation is virtually the same if the CEO of a petitioner were a family member of the Commissioner. That situation would be patently untenable. Legal ethics would require disqualification of the commissioner, who is a member of the bar, and vicarious disqualification of the Department legal staff. *See, e.g., Kirk v. First Amer. Title Ins. Co.* 138 Cal Rptr. 620, 649 (Cal. Ct. App. 2010) (one tainted attorney results in automatic vicarious disqualification of entire firm.)<sup>7</sup>

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<sup>6</sup> Petitioners have cited to *U.S. v. Tierney*, 947 F.2d 854 (8<sup>th</sup> Cir.1991), reh’g denied, (8<sup>th</sup> Cir. 1991). In *Tierney*, the Court found the law firm could not benefit from a private law suit for damages. That is **not** the situation in Docket No. 7770, where not only GMP but its counsel will benefit on an on-going basis from a merger between the state’s two largest electric utilities, providing the law firm substantially more legal work in the future. *See Cody v. Cody*, 2005 VT 116, 179 Vt. 90, 97 (disputed ethical facts may require fact finding).

<sup>7</sup> However, that may not necessarily be the case in all instances under the Vermont Rules of Professional Conduct. *See* Rule 1.7, **Comment 11**; also **Reporter’s Notes-2009 Amendment**, comment 11 (“The cross reference to Rule 1.10 reminds lawyers that these personal interest conflicts ordinarily will not be imputed to members of the disqualified lawyer’s firm.”) However, in *In re: Margaret Strouse, infra*, the Supreme Court noted that Rule 1.10 found that “In general, if one lawyer in a firm would be prohibited by Rule 1.7 from representing a client, all are prohibited. *See id.* 1.10(a). This rule is subject to an exception, however, when the prohibition ‘is based on a personal interest of the prohibited lawyer’ if that interest ‘does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.’” *In re Strouse*, 2011 VT 77, \_\_\_ Vt. \_\_\_, \_\_A. 3<sup>rd</sup> \_\_; also *See Rules of Professional Conduct, 1.10(a)*.” Attachment B. In the present case the exception would not appear to apply since the Commissioner has been reviewing this application for some

Rather than order such drastic action, the Board has available the middle course of appointing an independent counsel while the Department continues to participate as representative of and counsel for the state. This would address both the Governor's predisposition to support the merger and the personal interest conflict of his commissioner by allowing the Governor to waive that personal conflict. This is just the sort of situation in which discretion should be exercised under Sections 20 and 217.

The General Assembly has attempted to provide some representation of the citizenry when no private parties come forward to contest the issues involved, or if they do step forward are not in a financial position to adequately contest the issues, or do not fairly represent the needs of most Vermonters. 30 V.S.A. §217. *In re VPPSA*, 140 VT. 424 at 444 (1981).

The General Assembly has deemed cases of this nature to be so serious that appointment of special counsel is explicitly authorized in hearings regarding "merger, consolidation, or acquisition," under 30 V.S.A. §20(b)(3). Where potential or apparent conflicts exist within the Department, independent counsel is available under Section 217.

The Petitioners would frighten the Board with the specter of routine appointment of independent counsel. The Board understands, however, that such appointment is to be made sparingly.<sup>8</sup> Indeed, the Maine Supreme Court emphasized this approach holding that each case depends on its own facts and cannot serve as precedent for the future:

No definite rule can be given indicating the line of demarcation between that which is proper and that which is unlawful.

*Tuscan v. Smith*, 130 Me. 36, 46, 153 A. 289, 294 (1931).

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time (and been aware of it for much longer) and has conference with and influenced the Public Advocate and his staff relative to their strategies and positions.

<sup>8</sup> Of course, if the same or substantially similar situation arises then this analysis would result in the same conclusion.

For this reason, questions concerning whether there is a conflict of interest violative of law are not susceptible of generalized answers. Essentially, each case will be “law” only unto itself. *Opinion of the Justices*, 330 A.2d 912, 913-15 (Me. 1975).

It is difficult to imagine a clearer set of circumstances for the appointment of Independent Counsel than those revealed in this case, so it may be unlikely that the Board will have frequent occasion to appoint outside counsel. As the authority cited by the Department makes clear, such counsel is appropriate when the Department’s position undermines confidence in its ability to advocate vigorously for the Public. Department Memo in Opposition at p. 4, n. 2. A healthy, passionate assessment and presentation to the Board is essential in a docket of this significance.

Moreover, the State Ethics Code to which the Department refers is not the only standard applicable to the Commissioner.

#### IV. The Role of the Commissioner as a Lawyer and “Personal Interest Conflicts”

The commissioner is both a public official and a lawyer. Each presents additional obstacles for the commissioner and the Department under the circumstances of this case. The commissioner directs the Department and in doing so she directs the Public Advocate and determines the planning and strategy for his office. In turn, she receives direction from the Governor.

The Department is not the commissioner’s client; the Public is. Although an attorney-client relationship exists with the Public, it cannot be said that the role of the commissioner apropos of the “public” is akin to the traditional role of private counsel apropos of a client. *Cf Environmental Protection Agency v. Pollution Control Bd.*, 69 Ill. 2d. 394, 401-02, 372 N.E. 2d 50, 52-53 (1977) (“...although an attorney client relationship exists between a state agency and the Attorney General, it cannot be said that the role of the Attorney General apropos of a state agency is precisely akin to the

traditional role of private counsel apropos of a client.”) Nevertheless, attorneys in public office must adhere to the Rules of Professional Conduct.<sup>9</sup>

Rule 1.7 of the Vermont Rules of Professional Conduct provides in pertinent part:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict exists if:

\* \* \* \* \*

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer. [Emphasis added.]

The Comments provide direction and insight to the meaning and application of this section.

Comment 10 provides in pertinent part:

...if the probity of a lawyer’s own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer’s client, or with a law firm representing the opponent, such discussions could materially limit the lawyer’s representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily not imputed to other lawyers in a law firm.)<sup>10</sup>

Comment 11 provides further insights when members of the same family are in different firms and represent different clients. It provides:

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<sup>9</sup> To the extent the State’s Executive Ethic’s Code imposes a higher standard it applies. However, to the extent the Rules of Professional Conduct imposes a higher standard to a lawyer, then the Professional Rules apply.

<sup>10</sup> Rule 1.7 and comment 10 were discussed in a recent Vermont decision involving a lawyer who had a relationship with a client of the opposing law firm. In that case, the lawyer’s superior directed her to end her personal relationship. She agreed to do so but later started the relationship again without informing her law firm. The law firm terminated her employment for deceit and violation of Rule 8.4(c). The Supreme Court, however, noted the importance of Rule 1.7 relative to the “ethical difficulty caused by respondent’s conduct.” Since law firms need to protect confidences and strategies they had a right to require that she end her relationship and when that did not occur to terminate her employment. A “concurrent conflict of interest exists if there is significant risk that the representation of one or more clients will be materially limited ... by personal interest of the lawyer.” See *In re Margaret Strouse, Esq.*, October term 2011. Original Jurisdiction from the Professional Responsibility Board, Opinion Filed July 15, 2011.

When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood, marriage or civil union, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling, spouse, or civil union partner, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent.<sup>11</sup> The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated.<sup>12</sup>

However, that does not end the analysis. The commissioner of the Department of Public Service is not in a traditional lawyer-client relationship where the commissioner can pick up the phone and ask if her clients (i.e. the "public") are troubled by the family relationship where her husband's law firm is asking for approval of the sale of most of Vermont's electric utility infrastructure and service territories and could be expected to benefit from such sale. In fact, as both a lawyer and a public official, her duty is higher than a private lawyer and the standards imposed on her are far greater.

#### V. The Commissioner as a Public Official Has a Fiduciary Responsibility

In addition to her duties as a lawyer, the Commissioner of the Department stands in a fiduciary relationship. The Maine Supreme Court in *Tuscan v. Smith*, 130 Me. 36, 153 A. 289 (1931), quoting from *Lesieur v. Inhabitants of Rumford*, 113 Me. 317, 93 A. 838 (1915) held "that persons holding public office become subject, relative to the powers and duties of that office, to '... obligations as trustees for the public (which) are established as part of the common law, fixed by the habit and custom of the people.'" *Id.* at 46, 153 A. at 294. The Maine Supreme Court had earlier emphasized the sanctity of this relationship: "It is well established as a general rule that one acting in a fiduciary relationship . .

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<sup>11</sup> The "Public" cannot provide "informed consent" given the nature of the relationship. Accordingly, other mechanisms must be found to provide confidence in the process.

<sup>12</sup> See *ftnt.* 6.

. is required to exercise perfect fidelity to his trust, . . . .” *Lesieur v. Inhabitants of Rumford*, 113 Me. at 320, 93 A. at 839.

When evaluating a potential or apparent conflict of interest, it is appropriate to understand the interest of both the commissioner and her clients. Further, when there is a mechanism to allow a public official to step aside, or in this case to allow an independent counsel, the parties should find a way to allow “other independent persons to perform the duties involved as a means of avoiding the conflicts of the interest actually occurring....” *Opinion of Justices*, 330 A. 2d. 912, 913-15 (Me. 1975). Attachment B. This is a constitutional principle in Vermont. Vermont Constitution, Ch. I, Art. 6. [Officers servants of the people.] which provides:

That all power being originally inherent in and co[n]sequently derived from the people, therefore, all officers of government, whether legislative or executive, are their trustees and servants; and at all times, in a legal way, accountable to them.

Vermont courts have consistently viewed public officials as holding a public trust. *Fancher v. Sterns*, 61 Vt. 616, 617, 18 A. 455, 455-56 (1889). (“Public office is a public trust. The public generally is interested in the administration of this trust, and has the right to assume that persons in possession of an office under the forms of law, and holding commissions attesting thereto, are in fact, as they are in form, de jure officers.”) More recently, the Vermont Supreme Court held that “a public official’s overriding and undivided duty of loyalty is to the public he or she serves.” *In re Boardman*, 2009 VT 42, 186 Vt. 176, 184-85, 979 A.2d 1010, 1015-16 (2009). See also *Anderson v. Zoning Comm’n of Norwalk*, 157 Conn. 285, 253 A. 22d 16, 19 (1968) (“[A] man cannot serve two masters at the same time and the public interest should not be entrusted to an official who has a pecuniary, personal or private interest which is or may be in conflict with the public interest.”); *People ex rel. Smith v. Brown*, 356 Ill. App. 3d 1096, 293 Ill. Dec. 336, 828 N.E. 2d 306, 309 (2005) (“Public policy demands that an office holder discharge his duties with undivided loyalty.” (quotation omitted).” See

also *Ross v. Wilson*, 308 N.Y. 605, 127 N.E. 2d 697, 701 (1955) (observing that public officials are “temporary trustees” of public property.

The Legislature has recognized this potential problem, and established the mechanism to avoid it. 30 V.S.A. § 217. Independent counsel is essential and should be appointed.

VI. Ratepayers Participation as Interveners is Appropriate.

In *In re VPPSA*, 140 VT 424 (1981) the Public Service Board was reversed for denying intervention to a group of seven ratepayers under Section 208. The Court looked to the criteria of Vermont Rule of Civil Procedure 24, identical to the current PSB Rule 2.209, in holding the ratepayers could intervene as of right. The court explained:

30 V.S.A. §208 allows a single company or five individuals to attack utility practices. This provision clearly indicates the Legislature’s determination that those who wish to do so are allowed to have a voice in power supply issues. Intervention allows ratepayers to assert their own interests in appropriate cases.

*In re VPPSA*, 140 VT 424 at 143 (emphasis added)

The court brushed aside arguments that the ratepayers’ interest was “not direct, substantial and significantly protectable.” *In re VPPSA*, 140 VT at 441. The Court held that the ratepayers’ interest in their utility rates gave them “an interest relating to” the transaction which supported intervention as of right. 140 VT at 142. Although VPPSA involved bonded indebtedness that would directly flow through to rates, the decision is not restricted to pecuniary interest. Vermonters and the Ratepayer have an interest in more than just their immediate purse. In contemporary Vermont, issues of the political economic effects of the merger, the planning efforts of their public utilities, the positions utility officials are traditionally given on various state and regional commissions and organizations, and

environmental impacts that could be wrought by future VELCO decisions are highly salient and a legitimate basis for participation.

The Court noted that intervention is appropriate to protect ratepayers' interests upon showing of adversity of interests, collusion, or nonfeasance. *In re VPPSA*, 140 VT at 143, which on the face of the facts is the situation present in the instant proceeding due to the appearance of a conflict of interest described above. See also *Tuscan v. Smith, supra*; Chapter I, Article 6 of the Vermont Constitution, and *Fancher v. Sterns*, 61 Vt. at 617 ("The public is generally interested in the administration of this (public) trust, . . . .") In short, where there is an appearance of a conflict as set out above the ratepayers as the client whose interests are most vulnerable have an interest to protect their rights through intervention.

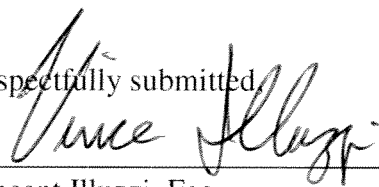
#### CONCLUSION

The Board should appoint a member of the Vermont Bar under 30 V.S.A. §§ 20 & 217 as independent counsel to represent the interest of the Public in this docket, with concomitant authority to engage experts and charge back fees and cost to the Petitioners.

Vincent Illuzzi<sup>13</sup> should be granted leave to intervene.

DATED: October 25, 2011

Respectfully submitted,

  
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Vincent Illuzzi, Esq.

cc: Certificate of Service

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<sup>13</sup> And the signatories to my original motion and petition.



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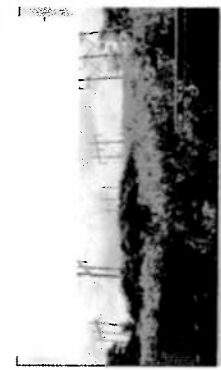
## Shumlin reiterates support for GMP, CVPS merger

Halifax, Nova Scotia - July 11, 2011

The Shumlin administration strongly supports a marriage between the state's two largest utilities. The Governor says merging GMP and CVPS will be better for customers.

The Governor made the comments in a conference call with reporters from Nova Scotia, Canada where he is attending a conference of New England Governor's and Eastern Premiers. GMP's parent company, Gaz Metro, is competing with another Canadian company, Fortis, to buy CVPS. But Governor Shumlin confirmed his staff is talking about the GMP deal with CVPS Board members as the board evaluates both offers. State regulators would have to approve any change in ownership.

WCAX News



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persons or property are not injured or damaged by impaired operators of equipment proceeding on a public highway.

*Reversed.*

*Notes to Text:*

\* The State also appealed the dismissal of the DLS charge, a misdemeanor. The State cannot, however, appeal a final judgment in a misdemeanor case; the applicable statute

restricts appeals in such cases to interlocutory appeals. 13 V.S.A. 7403(a); see *State v. Dann*, 167 Vt. 119, 127, 702 A.2d 105, 110 (1997); *State v. Saari*, 152 Vt. 510, 513, 568 A.2d 344, 347 (1989). At oral argument on appeal, the State acknowledged that it could not appeal the dismissal of the DLS charge. We interpret the State's acknowledgement as the withdrawal of the appeal of the DLS dismissal and do not consider that aspect of the original appeal.

Entry Order Docket No. 2011-226  
2011 VT 82

**Christine Crocker**

v.

**Daniel Crocker**

July Term, 2011

On Appeal from Windham Superior Court, Family Division

**Thomas A. Zonay, J.**

Opinion Filed July 18, 2011

• **Civil Procedure – Methods of Filing – Facsimile Copies**

Facsimile copy of notice of appeal sent to court is not proper means of filing unless approved by judge as provided in V.R.C.P. 5.

• **Appeal & Error – Time for Filing Notice of Appeal**

Notice of appeal was untimely when facsimile copy was received on 30th day but judge had not approved facsimile as method of filing and mailed copy was not received until 31st day after judgment.

Appeal from judgment. *Dismissed as untimely filed.*

PRESENT: Reiber, C.J., Dooley, Johnson, Skoglund and Burgess, JJ.

In the above-entitled cause, the Clerk will enter:

¶ 1. We conclude the notice of appeal was untimely filed in this case. A notice of appeal must be filed in the superior court within thirty days of the date of the entry of judgment or order appealed from. V.R.A.P. 4(a). Here, judgment was entered on May 13, 2011, and therefore the notice of appeal needed to be filed by June 13, 2011. A facsimile copy of the notice of appeal was received on June 13, but this is not an appropriate method for filing the notice of appeal. V.R.C.P. 5(e) (listing means by which filing may be accomplished to include delivery or sending by first-class mail or commercial carrier). Further, although the rule allows filing to be made with a judge "by any method permitted by the judge," the record does not indicate that any such permission was sought or received. See Reporter's Notes-2006 Amendment, V.R.C.P. 5 (explaining that rule is in line with current practice that may allow fax filing in particular case on showing of good cause). The original notice of appeal was not received by mail until June 14, 2011, one day beyond the deadline. Therefore, the appeal is dismissed.

Editor's Note: In the Supreme Court, the plaintiff-appellant was represented by Jeremy Dworkin, So. Londonderry; the defendant-appellee by Richard Coutant, Salmon & Nostrand, Bellows Falls. Trial court docket number was 178-5-08 Wmdm.

No. 2010-053  
2011 VT 77

**In re Margaret Strouse, Esq.**

October Term, 2010

Original Jurisdiction

from Professional Responsibility Board

**Harland L. Miller III, Chair**

Opinion Filed July 15, 2011

• **Attorneys – Professional Conduct – Findings of Fact**

Supreme Court reviews lawyer disciplinary hearing panel's findings of fact under clearly erroneous standard, upholding them if clearly and reasonably supported by the evidence, whether the findings are purely factual or mixed law and fact.

• **Attorneys – Professional Conduct – Sanctions**

Supreme Court gives deference to recommendations of lawyer disciplinary hearing panel but uses its own discretion and makes its own determination as to which sanctions are appropriate for violations of Rules of Professional Conduct.

• **Attorneys – Professional Conduct – Misrepresentation**

Lawyer violated Standard 5.1, which covers instances of conduct involving dishonesty, fraud, deceit, or misrepresentation, when she failed to disclose continued romantic relationship with man who was divorcing one of firm's clients after having told firm that she was ending relationship.

• **Torts – Fraud – Negative Deceit**

When there exists duty to speak, liability for fraud may be premised on failure to disclose material facts as well as on affirmative misrepresentations under doctrine of negative deceit.

Review of recommendation of six-month suspension for lawyer found to have violated V.R.Pr.C. 8.4(c). *Violation found; public reprimand issued.*

**Michael Kennedy, Disciplinary Counsel, Burlington, for Petitioner. Joel B. Harris and Ross Feldmann of Gravel and Shea, Burlington, for Respondent.**

PRESENT: Reiber, C.J., Dooley, Johnson, Skoglund and Burgess, JJ.

¶ 1. PER CURIAM. In this case, we review, on our own motion, a decision of a Hearing Panel of the Professional Responsibility Board, which concluded that respondent, Margaret Strouse, engaged in deceit, violating Rule 8.4(c) of the Vermont Rules of Professional Conduct. The Panel imposed a sanction suspending respondent from the practice of law for six months. By our order, the Office of Disciplinary Counsel has been designated appellant. Disciplinary counsel argues that we should uphold the finding of a violation of the disciplinary rule, but that the sanction is too lenient, and respondent should be disbarred. Respondent argues that the finding of a violation should be reversed, and if upheld, the sanction should be reduced to a reprimand. We affirm the finding of a violation and impose a public reprimand.

¶ 2. The relevant facts are not in dispute. Respondent was admitted to practice law in Vermont in 2001 and was hired to work for a Burlington law firm in January 2006. In November 2007, a client hired the firm to represent her in a divorce from her then-husband. In early February 2008, before becoming aware of her firm's representation of the client, respondent met

the client's husband and began dating him. On or about February 19, 2008, respondent saw her firm's client list and realized that she was dating the husband of her firm's client and that the firm was representing the client in a divorce proceeding against the husband. Within several hours of discovering this information, respondent informed the firm's senior attorney that she had recently become romantically involved with the husband. Respondent requested that the firm create a "conflict wall," which she believed would prevent her from participating in any representation of the client and allow her to continue dating the husband.

¶ 3. The day after meeting with respondent to discuss her conflict, the senior attorney left respondent a message indicating that respondent's employment would be terminated if she refused to end her relationship with the husband. The next day, respondent told the senior attorney that she had terminated the relationship. In reliance on this representation, the senior attorney disclosed the situation to the client. After consulting with another lawyer, and relying on the senior attorney's representation that respondent had terminated the relationship with her husband, the client decided to continue using the firm to represent her in the divorce.

¶ 4. However, respondent did not entirely cease contact with the husband. On February 26, 2008, she ordered a gift of chocolates to be delivered to the husband. At some point between February 21 and March 8, 2008, respondent and her children spent time with the husband and his children at a local health club pool. Respondent and the husband were also together on other occasions during this period.

¶ 5. On March 8, 2008, the client left the state to seek treatment for her health. The client and her husband had previously negotiated an agreement stating that the husband could move into the marital home to care for the children in the client's absence. On the same day that the client left for treatment, respondent and her children joined the husband and his children at the marital home and spent the night. Members of the client's family learned about respondent's stay and contacted the senior attorney about it on March 11, 2008.

¶ 6. The senior attorney confronted respondent about her overnight stay with the husband, and respondent admitted to it and admitted that her relationship with the husband had resumed. The senior attorney immediately terminated respondent's employment with the firm. Respondent and her children continued to live with the husband for several months after the termination of her employment.

¶ 7. In its decision and order addressing respondent's conduct, the Panel found that respondent's relationship with the husband had been romantic in character at all times. The Panel also concluded that actual harm - stress on the client and her children - had resulted from the relationship and that the relationship had created the potential for more serious harm. Furthermore, the Panel was concerned that respondent did not acknowledge the "wrongful nature" of her conduct and felt that she was either evasive or nonresponsive to questions about the details of her relationship with the husband. Ultimately, the Panel concluded that during her relationship with the husband, respondent had engaged in deceit in violation of Rule 8.4(c) and suspended her from the practice of law for a period of six months.

¶ 8. This Court reviews a disciplinary hearing panel's findings of fact under a clearly erroneous standard. A.O. 9, Rule 11(E); *In re Farrar*, 2008 VT 31, ¶ 5, 183 Vt. 592, 949 A.2d 438 (mem.). A panel's findings are upheld if "clearly and reasonably supported by the evidence," whether the findings

are purely factual or mixed law and fact. *In re Blais*, 174 Vt. 628, 629, 817 A.2d 1266, 1269 (2002) (mem.) (quotations omitted). We give deference to the recommendations of a disciplinary panel but use our own discretion and make our own determination as to which sanctions are appropriate for violations of the Rules of Professional Conduct. *Id.* at 630, 817 A.2d at 1269; *Farrar*, 2008 VT 31, ¶ 5.

¶ 9. On appeal, disciplinary counsel argues that respondent violated Rule 8.4(c) because her conduct involved deceit and that, based on the American Bar Association standards and aggravating factors, this Court should disbar respondent. Respondent, in turn, claims that her conduct did not constitute deceit and that, at most, she should have been reprimanded, not subjected to suspension or disbarment. We agree with the Panel's decision that respondent's conduct involved deceit and constitutes a violation of Rule 8.4(c); however, we hold that a public reprimand, not disbarment or suspension, is the appropriate sanction.

¶ 10. It is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." V.R.Pr.C. 8.4(c). The rule is meant to reach only conduct "that reflects on an attorney's fitness to practice law." *In re PRB Docket No. 2007-046*, 2009 VT 115, ¶ 12, 187 Vt. 35, 989 A.2d 523.

¶ 11. We begin with an evaluation of the ethical difficulty caused by respondent's conduct. Rule 1.7 of the Rules of Professional Conduct prohibits a lawyer from representing a client without the client's written consent if the representation involves a "concurrent conflict of interest." V.R.Pr.C. 1.7(a). Such a conflict exists if "there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer." *Id.* 1.7(a)(2). In general, if one lawyer in a firm would be prohibited by Rule 1.7 from representing a client, all are prohibited. See *id.* 1.10(a). This rule is subject to an exception, however, when the prohibition "is based on a personal interest of the prohibited lawyer" if that interest "does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." *Id.* The Comment explains the exception as follows:

The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

*Id.*, cmt. [3].

¶ 12. Under Rule 1.7(a)(2), there is a conflict of interest if the firm's senior attorney represented the client in her divorce and, at the same time, another attorney in the firm has a romantic relationship with the client's husband. Such a situation raises serious concerns about loyalty to the client and misuse of confidential information. See *id.*, cmts. [6], [10]. This conflict is closer to the hypothetical from Comment [3] where disqualification is imputed to all firm members, than to the hypothetical where it is not. The situation created a sig-

nificant material risk that the client's representation would be limited. Continuing representation of the client would have risked violating Rule 1.7(a)(2) had the client's representation continued once respondent recommenced the relationship with the husband.

¶ 13. We recognize that the conflict of interest was not present at the onset of the representation of the client. In these circumstances, the lawyer is required to withdraw from representing the client if "the representation will result in violation of the rules of professional conduct." *Id.* 1.16(a)(1); see also *id.* 1.7, cmt. [3]. We also recognize that in some instances a lawyer may seek consent for continuation of representation despite a conflict of interest. See *id.* 1.7(b). We doubt that such consent would apply where the client wife was in direct litigation with the husband, but, in any event, the senior attorney chose not to seek consent.

¶ 14. This brings us to whether respondent engaged in "dishonesty, fraud, deceit or misrepresentation" by failing to inform the senior attorney that her relationship with the husband had resumed. *Id.* 8.4(c). We conclude that respondent's failure to inform the senior attorney about her renewed relationship with the husband can be characterized as deceitful; she was aware that her relationship with the husband put the firm into a conflict of interest with its representation of its client. Respondent had a duty to disclose the continuing relationship so that the firm could take the action necessary to cure the potential ethical violation. See *Velardo v. Ovitt*, 2007 VT 69, ¶ 29, 182 Vt. 180, 933 A.2d 227 (holding that father was entitled to new custody trial because assistant judge in case was sister of guardian ad litem, and relationship was not revealed until after trial; this Court emphasized "that the appearance of impropriety here is substantial and the conduct that created it is inexcusable. . . . [T]he assistant judge had actual knowledge of the source of the conflict . . . [and thus] had an independent duty to disclose the relationship that created the conflict of interest and failed to do so").

¶ 15. Respondent urges us to view her conduct in relation to the common law of fraud and deceit, arguing that her conduct did not meet that standard. We conclude otherwise. When there exists a duty to speak, "Vermont has long recognized the doctrine of negative deceit." *Sutfin v. Southworth*, 149 Vt. 67, 70, 539 A.2d 986, 988 (1987); see also *Crompton v. Beedle*, 83 Vt. 287, 295, 75 A. 331, 333 (1910) (same). Thus, liability for fraud may be premised "on the failure to disclose material facts as well as on affirmative misrepresentations." *Sugarline Assocs. v. Alpen Assocs.*, 155 Vt. 437, 444, 586 A.2d 1115, 1119 (1990); see also *White v. Pepin*, 151 Vt. 413, 416, 561 A.2d 94, 96 (1989) ("Where [an affirmative] duty is present, the failure to disclose a material fact coupled with an intention to mislead or defraud rises to the level of material misrepresentation."); *Standard Packaging Corp. v. Julian Goodrich Architects, Inc.*, 136 Vt. 376, 381, 392 A.2d 402, 405 (1978) (stating fraud "must consist of some affirmative act, or of concealment of facts by one with knowledge and a duty to disclose"). A duty can arise from the relations of the parties, or superior knowledge, or means of knowledge. See *Silva v. Stevens*, 156 Vt. 94, 103, 589 A.2d 852, 857 (1991). Here, there are multiple sources of a duty to disclose. As in *Velardo*, respondent created a conflict of interest for the firm by her conduct, and had a duty to disclose it. The senior attorney made clear that the firm would not tolerate the situation and would terminate respondent as the remedy.

¶ 16. Respondent argues that there was no scienter - that is, an intent to mislead - because she was not required to cease all

contact with the husband. See *White*, 151 Vt. at 416, 561 A.2d at 96. This argument ignores the fact that she did not disclose the renewal of her romantic relationship with the husband. The evidence strongly supports the conclusion that she intended to mislead the senior attorney through nondisclosure. We have a similar reaction to respondent's arguments that there was no justifiable reliance upon her nondisclosure and there was no damage caused by it. The senior attorney relied upon respondent's promise to terminate the relationship with the husband by continuing to represent the client - oblivious to the conflict of interest - and by continuing to employ respondent. As the Panel found, respondent's actions damaged the client. They damaged the firm by exposing it to an ethical violation. They damaged the senior attorney's relationship with the client. Thus, even if we view this case through a prism of common law deceit, we find the elements of a violation of Rule 8.4(c).

¶ 17. Respondent argues that even if her behavior is found to have been dishonest, it does not rise to the level of reflecting on her fitness to practice law. See *PRB Docket No. 2007-046*, 2009 VT 115, ¶ 12. We disagree. This Court provided extensive analysis of Rule 8.4(c) in *PRB Docket No. 2007-046*. In that case, we declined to hold that the respondents' action, misleading a potential witness about whether they were recording a telephone conversation, rose to the level of violating Rule 8.4(c). *Id.* ¶ 1. However, our decision in *PRB Docket No. 2007-046* was significantly influenced by factors not present in the current case. In that case, we specifically noted that the respondents "earnestly believed that their actions were necessary and proper" and that they were motivated by a desire to defend their client. *Id.* ¶ 17. Given these motives, we concluded that respondents' actions did not reflect adversely on their fitness to practice law. *Id.*

¶ 18. In the current case, respondent put the firm in danger of an ethics violation. She knew the firm sought to prevent a problem by requiring her to end the relationship with the husband. She acted deceitfully when she concealed her renewed relationship. Respondent's actions were motivated by a self-serving desire to keep both her employment and her relationship. We hold that respondent's choices and actions reflect adversely on her fitness to practice law, and we affirm the Panel's decision that respondent violated Rule 8.4(c).

¶ 19. We look to the ABA's Standards for Imposing Lawyer Sanctions to "guide our determination of the appropriate sanction in an attorney disciplinary matter." *In re Neisner*, 2010 VT 102, ¶ 14, 21 Vt.L.W. 462, 16 A.3d 587; see also ABA Center for Professional Responsibility, Standards for Imposing Lawyer Sanctions (1986) (amended 1992) [hereinafter ABA Standards]. We weigh four factors when deciding upon the appropriate sanction: "(1) the duty violated, (2) the attorney's mental state, (3) the actual or potential injury caused by the misconduct, and (4) the existence of aggravating or mitigating factors." *Neisner*, 2010 VT 102, ¶ 14; see also ABA Standards § 3.0, at 26 (listing same). Depending on the importance of the duty violated, the level of the attorney's culpability, and the extent of the harm caused, the standards provide a presumptive sanction. *In re Fink*, 2011 VT 42, ¶ 35, 22 Vt.L.W. 198, \_\_\_ A.3d \_\_\_. The presumptive sanction can then be tailored to the case, based on the existence of aggravating or mitigating factors.

¶ 20. Based on the ABA Standards, disciplinary counsel argues that disbarment is the "presumptive sanction." Respondent, on the other hand, concludes that, according to the ABA Standards, the punishment for this first-time offense should be a reprimand. Both interpretations are plausible because the

language used in the ABA Standards is relatively broad and subjective, and, when applied to this case, different ABA Standards appear to advocate the use of different sanctions.

¶ 21. Disciplinary counsel urges us to look at three ABA Standards which, counsel argues, each support a sanction of disbarment: Standards 7.1, 4.6 and 5.11. The Panel concluded that Standards 7.1 and 4.6 apply and support suspension. Respondent argues that neither standard 7.1 nor 4.6 apply and that Standard 5.11 does not support disbarment or suspension.

¶ 22. We start with Standard 7.1, which appears to be the primary standard relied upon by the Panel. It pertains to "Violations of Other Duties Owed as a Professional," and it provides for disbarment if such conduct is intended "to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system." We agree with respondent that this standard does not apply to this case. As stated in the introduction to the standard, it is meant to apply to "cases involving false or misleading communication about the lawyer or the lawyer's services, improper communication of fields of practice, improper solicitation of professional employment from a prospective client, unreasonable or improper fees, unauthorized practice of law, improper withdrawal from representation, or failure to report professional misconduct." ABA Standards § 7.0, at 46. None of these behaviors matches respondent's conduct here.

¶ 23. We have a similar view of Standard 4.6. It sanctions disbarment when the lawyer "knowingly deceives a client with intent to benefit the lawyer" and "causes serious injury or potential serious injury to a client." ABA Standards § 4.61, at 36. The standard states that it is invoked when the lawyer "engages in fraud, deceit, or misrepresentation directed toward a client." *Id.* § 4.6, at 36. We recognize that respondent's conduct caused harm to the client, but the fraud, as we defined it above, was aimed primarily at the senior attorney and the firm, and not directly at the client. If respondent had used confidential information from the client or the senior attorney to benefit the husband, the situation would be different and Standard 4.61 could apply. There was, however, no evidence of such conduct.

¶ 24. This leaves us with Standard 5.1, which does clearly apply because it covers other instances of conduct "involving dishonesty, fraud, deceit, or misrepresentation." Disciplinary counsel and respondent point to different sub-sections of ABA Standard 5.1. Standard 5.11(b), advocated for by disciplinary counsel, states that disbarment is generally appropriate if a lawyer engages in intentional conduct involving "dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice." Standard 5.13, advocated for by respondent, states that reprimand is generally appropriate "when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice." The difference between these two ABA Standards is the seriousness of the reflection on the lawyer's fitness to practice. This standard, however, contains no option between reprimand and disbarment, such as suspension. The sanction to be applied, therefore, be it disbarment, reprimand, or something in between, requires an exercise of judgment.

¶ 25. In deciding between 5.11(b) and 5.13, we agree with respondent that 5.13 is the more fitting. While we conclude her actions reflected adversely on her fitness to practice law, we do not agree that the reflection was so serious as to merit disbarment. This opinion is supported by a review of the Commentary to ABA Standard 5.11, which discusses a number

of cases where disbarment was proper, all of which involved significantly more serious conduct. See ABA Standards § 5.11, at 38, Commentary (citing cases where lawyers were convicted of serious felonies and disbarment was imposed, including *In re Grimes*, 326 N.W.2d 380 (Mich. 1982) (disbarring lawyer convicted of two counts of federal income tax evasion and one count of subordination of perjury) and *Sixth Dist. Comm. of the Va. State Bar v. Hodgson*, No. 80-18 (Va. Disciplinary Bd., 1981) (disbarring lawyer who advised client that he could make arrangements to have her husband killed in lieu of bringing child custody suit)).

¶ 26. Like the Panel, we find that the ABA Standards offer guidance but are not dispositive in this case. We note that the sanctions are intended to leave "room for flexibility and creativity in assigning sanctions in particular cases." ABA Standards, Preface at 2. Also, as the Panel did, we turn to precedent from this Court to augment our analysis under the standards. While our precedents do not preclude disbarment as a sanction in a case like this, neither do they compel it as a remedy. Rather, on careful review, our precedents suggest that a public reprimand is most appropriate.

¶ 27. We have generally deemed disbarment to be warranted only in cases of very serious misconduct, such as significant criminal activity, misuse of client information or funds, or deceit in the handling of client information. See, e.g., *In re Hunter*, 171 Vt. 635, 639, 769 A.2d 1286, 1291 (2000) (mem.) ("We conclude that disbarment is the appropriate sanction to protect the public. Respondent engaged in serious criminal conduct, misused clients' funds for his own benefit, and lied to clients, attorneys and the court to cover up his misconduct."); *In re Burgess*, 169 Vt. 533, 533, 725 A.2d 302, 302 (1999) (mem.) (disbarring already-suspended attorney where suspension stemmed from federal convictions in California on charges of contempt, interstate transportation of stolen property, and fraud, and after incarceration, he violated probation and was again incarcerated; in spite of probation condition prohibiting him from practicing law, he accepted job with a law firm and ultimately defrauded the firm, resulting in additional incarceration); *In re Abell*, 166 Vt. 620, 697 A.2d 340 (1997) (mem.) (disbarring attorney who embezzled \$408,260 from his law firm); *In re Mitiguy*, 161 Vt. 626, 641 A.2d 362 (1994) (mem.) (disbarring attorney who was convicted of four counts of embezzlement for embezzling client funds and two counts of false swearing); *In re Joy*, 158 Vt. 646, 650, 605 A.2d 850, 853 (1992) (mem.) (disbarring attorney where he "abandoned [client] and then lied to her about the status of her case," despite attorney's knowledge of obligations to client; attorney's abandonment of client's case resulted in preclusion of client pursuing legal remedies in court). In contrast to the cases where we have ordered disbarment, the conduct at issue here involved no criminal activity - either charged or uncharged. Furthermore, the conduct at issue was not related directly to the handling of client matters or funds. While respondent's behavior did involve harm to a client, the harm did not result from direct misconduct with relation to a client's case; it resulted from respondent deceiving her employer, and thereby indirectly deceiving the client. We believe that these distinctions make disbarment an inappropriate response.

¶ 28. The suspension ordered by the Panel also fails to follow our earlier cases. ABA Standard 7.2 suggests that a lawyer be suspended when the lawyer "knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to . . . the public or the legal system." If, however, the conduct is an isolated instance of

negligence that causes little or no actual or potential injury, the ABA Standards recommend an admonition. *In re Warren*, 167 Vt. 259, 261-62, 704 A.2d 789, 791 (1997).

¶ 29. This Court generally has ordered suspension only in cases involving behavior more egregious than the conduct in this case. In *In re Hongisto*, the respondent received two six-month suspensions, to run concurrently, for failing to cooperate with investigations of a client-trust-account overdraft and several client ethics complaints, failing to represent her client with reasonable diligence, failing to communicate with a client, and violating attorney licensing rules. 2010 VT 51, ¶¶ 11-12, 21 Vt.L.W. 216, 998 A.2d 1065 (mem.). In *Hongisto*, the hearing panel found a pattern of misconduct and a significant disciplinary record as aggravating factors. In *In re Blais*, the respondent was suspended for five months for misconduct consisting of five separate instances of neglect of client matters and three instances of misrepresentation. 174 Vt. 628, 630, 817 A.2d 1266, 1269 (2002) (per curiam). We also recognized as aggravating factors that the respondent had a dishonest or selfish motive in committing this misconduct in that the neglect resulted from his concern with bringing in money for himself and his firm, and it demonstrated a pattern of misconduct. *Id.* He also had two prior disciplinary offenses and was found to have substantial experience in the practice of law (twenty-five years). *Id.*

¶ 30. In *In re Wenk*, the respondent had received a private reprimand for his first violation for neglect and misrepresentation, a public reprimand for his second violation for the same behaviors and, finally, a six-month suspension for his third disciplinary proceeding, again on the same basis: neglect and misrepresentation. *In re Wenk*, PCB File No. 96.50, Decision No. 14 (Oct. 16, 2000), available at: <http://libraries.vermont.gov/law/prb/prbdecisions>; see also *In re Wenk*, 165 Vt. 562, 678 A.2d 898 (1996) (mem.) (public reprimand for second professional conduct violation). He did not appeal from the third disciplinary proceeding resulting in his suspension. In the third proceeding, the hearing panel noted the respondent's substantial experience in the practice of law (twenty-two years). *Wenk*, PCB File No. 96.50, Decision No. 14. Most recently, in *Neisner*, this Court upheld the hearing panel's finding that the respondent violated Rule 8.4(b) based on his conviction for impeding a public officer, a felony. 2010 VT 102, ¶ 13. The Court ultimately determined that a two year suspension, commencing on the date of the respondent's interim suspension and concluding a few weeks after this Court's opinion issued, was appropriate. *Id.* ¶ 26. As an aggravating factor we considered that respondent had been in practice for nearly twenty years. *Id.* ¶ 19.

¶ 31. In each of the above examples, this Court found suspension to be an appropriate sanction when the respondent had been found to violate the Rules through neglect of a client and serious misrepresentation directly to the client of matters being handled by the attorney. In *Neisner* we found the respondent's behavior involved "the 'serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, and fraud.'" *Id.* ¶ 26 (quoting ABA Standards § 5.11(a), at 38).

¶ 32. The critical question, therefore, is whether respondent's misconduct was of a similar character. This determination is informed by reviewing the aggravating and mitigating factors and the Panel's application of ABA Standards 9.2 and 9.3. The Panel found that respondent's behavior included several aggravating factors listed in ABA Standard 9.22: (1)

respondent appeared to have little remorse for her behavior; (2) the motive behind respondent's behavior was selfish; (3) the client harmed in this case was a vulnerable victim; and (4) respondent's answers to questions were vague and nonresponsive. The Panel found respondent's lack of a prior disciplinary record was a mitigating factor.

¶ 33. The record evidence provides limited support for the Panel's finding that respondent "appeared to have little remorse for the situation." On the one hand, respondent initially responded to the disciplinary investigation by flatly denying any ethical misconduct, accusing her firm's senior partner of engaging in "payback" and "inappropriate conduct," and castigating the client's "presumption." On the other hand, respondent later testified, "these aren't things that I'm very proud of, and certainly not things that I, you know - I tried to take this situation and learn from it what I could and really not dwell on any of it, so I'm terribly regretful." This is an expression of remorse.

¶ 34. The Panel found that respondent's behavior was selfish, and it was. But it was mitigated, to be sure, by the fact that she acted not for greed or glory, nor for malice or lucre, but apparently for romantic reasons. The harm to the firm and the client, however, remained the same.

¶ 35. Ultimately, we conclude that respondent's relatively brief professional experience and her lack of other disciplinary actions militate in favor of the more lenient sanction of a public reprimand. The ABA Standards suggest that public reprimand "is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law." ABA Standards, in ABA Compendium of Professional Responsibility Rules and Standards 429 (2008 ed.). Recently, in *Fink*, the respondent was found to have violated duties he owed as a professional to put a contingent fee agreement in writing and to charge a reasonable fee for his services. 2011 VT 42, ¶¶ 19-23. This Court found that there was injury to the public at large and to the legal profession because lack of written contingent agreements and excessive fees increased public distrust of lawyers and decreased public confidence in the profession. *Id.* ¶ 36. Having found actual injury to the public and potential injury to the client, this Court sanctioned respondent with a public reprimand. In *Warren* the respondent was publicly reprimanded for repeatedly contacting the wife of a man with whom the respondent's estranged wife was living, informing her of the situation, and offering to help her get a divorce from her husband "at no cost to you but at great expense to him." 167 Vt. 259, 260, 704 A.2d 789, 790 (1997) (per curiam) (quotation marks omitted). The matter at hand is similar to *Warren*. Warren had a selfish motive for revenge, respondent had a selfish motive for revenge. Neither disciplinary counsel, nor the Panel has provided a compelling reason for treating respondent differently than *Warren*.

¶ 36. There is no question that respondent was deceitful. While her deceit concerned how she was conducting her personal life, this was not a purely personal failure, but a professional one. See *PRB Docket No. 2007-046*, 2009 VT 115, ¶ 15 (reading Rule 8.4 as "applying only to misrepresentations that reflect adversely on a lawyer's fitness to practice law" and citing other jurisdictions). Her deceit harmed her firm and the client. However, respondent was immediately fired when the senior attorney learned she had continued her relationship with the client's husband. Representation of the client went on unaffected. Respondent briefly exposed the firm to a potential ethical violation, but, again, that potential was soon extin-

guished. There was no actual injury to the public. She is a relatively new attorney, in practice for less than seven years, with no prior disciplinary record.

*The decision of the Professional Responsibility Board's Hearing Panel that respondent violated Rule 8.4(c) is affirmed. Respondent is hereby publicly reprimanded for her conduct.*

¶37. **DOOLEY, J., dissenting.** I concur with the majority's conclusion that respondent engaged in deceit and violated Rule 8.4(c) of the Rules of Professional Conduct. However, given the level of deceit involved, I cannot agree that a public reprimand is the appropriate sanction. I believe the suspension imposed by the Panel is more fitting. Accordingly, I respectfully dissent.

¶38. The majority correctly identifies the ethical problem caused by respondent's conduct but inaccurately downplays the harm caused by her actions. By carrying on a romantic relationship with the client's husband, respondent clearly created a conflict of interest that was imputed to her entire firm, causing it and its members to violate Rule 1.7(a)(2) of the Rules of Professional Conduct. She did this knowingly and intentionally - she did it surreptitiously after promising to terminate the relationship.

¶39. The majority seeks to justify its decision to impose a public reprimand instead of a suspension by minimizing the seriousness of respondent's conduct, concluding that respondent only "briefly exposed the firm to a potential ethical violation, but . . . that potential was soon extinguished." *Ante*, ¶36. While it is true the firm's exposure to potential ethical violations was short, that is because the senior attorney learned of respondent's actions independently and terminated her. Had the client's family not informed the senior attorney about respondent's overnight visit, there is no indication respondent would have taken any action on her own to end the firm's exposure to the ethical violation.

¶40. The misconduct in this case involved deceit, and the impropriety of the behavior was obvious. After definitively being told that she could not maintain both her position at the firm and her relationship with the opponent of the firm's divorce client, respondent chose to continue or restart relations with the opponent-husband, while failing to disclose the ongoing relationship and the conflict of interest it created. The senior attorney relied upon respondent's promise to terminate the relationship with the husband and continued to employ respondent and to represent the client, unaware of the renewed conflict of interest. Respondent understood the conflict of interest that was created by her conduct as shown by her misguided request for a "conflict wall." As the Panel found, and the majority recognized, respondent's actions damaged not only the client, but also damaged the firm and the senior attorney's relationship with the client. Respondent's behavior illustrates a serious lack of judgment and lack of moral character that reflects adversely on her fitness to practice law.

¶41. As the majority recognizes, we give deference to the Panel's decision. In giving deference, I concur with the Panel's decision that a reprimand is too lenient a sanction, given the level of deceit and the severity of the potential ethics violation here. Although I agree with the majority that the ABA Standards are broad and subjective and do not lead conclusively to any one sanction in this case, I believe they support a suspension. See ABA Center for Professional Responsibility, Standards for Imposing Lawyer Sanctions (1986) (amended 1992). ABA Standard 5.1 is the most applicable standard as it deals with conduct "involving dishonesty, fraud, deceit, or misrepresentation." As the majority notes, the parties point to

different subsections of Standard 5.1. Disciplinary counsel advocates for ABA Standard 5.11(b), which states disbarment is generally appropriate for "intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice." ABA Standard 5.13, for which respondent advocates, states that a reprimand is "generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law." The majority correctly acknowledges that whether or not the seriousness of an attorney's actions rises to the level covered by Standard 5.11(b) is an extremely subjective determination. Because this ABA Standard does not provide for suspension, the severity of the sanction varies tremendously based on the difference in the degree of conduct.

¶42. I agree with respondent and the majority that Standard 5.13 is more appropriate than 5.11(b); however, as the majority notes, the standards are intended to leave "room for flexibility and creativity" in imposing sanctions. ABA Standards, Preface at 2. Taking into account the aggravating factors present in this case, I believe a suspension is more appropriate than a reprimand under the ABA Standards. Respondent's deceit was intentional, and it compromised the position of her firm and the senior attorney. Adding to the seriousness of this underlying offense are the following aggravating factors: (1) respondent appeared to have little remorse; (2) the motive behind respondent's behavior was selfish; (3) the client harmed in this case was a vulnerable victim; and (4) respondent's answers to questions were vague and non-responsive.\* Given the severity of the underlying offense and the added aggravating factors, a suspension is appropriate.

¶43. The imposition of a suspension is also most consistent with prior precedent from this Court, which suggests a public reprimand would be too lenient. In general, meaningful comparisons of attorney sanction cases are difficult as the behavior that leads to sanctions varies so widely between cases. That said, because respondent's conduct involved obvious deceit and she knowingly put all members of her firm in violation of ethical standards, the conduct at issue here is more serious than behavior for which we have issued reprimands.

¶44. The majority tries to liken respondent's actions to the behavior that resulted in a public reprimand in *In re Warren*, 167 Vt. 259, 704 A.2d 789 (1997) (per curiam). In that case, the respondent sent three letters to the wife of the man with whom his estranged wife was living. These letters asked the wife repeatedly to contact the respondent and offered the wife help in getting a divorce from her husband "at no cost to you but at great expense to him." *Id.* at 260, 704 A.2d at 790. We found the respondent violated the Code of Professional Responsibility in *Warren* because the content of his letters made sense only as an offer to use his knowledge of the law and legal experience in an unethical manner, *id.* at 262, 704 A.2d at 791; however, we also noted there was little actual injury as a result of the respondent's conduct. *Id.* at 262, 704 A.2d at 792. The majority suggests that this case is controlled by *Warren* because the respondent in *Warren* "had a selfish motive for revenge," and "respondent had a selfish motive for romance." *Ante*, ¶35. While the subject matter and motives involved in the two cases might be similar, the actions taken by respondent here were significantly more egregious. In *Warren*, the respondent violated the Code of Professional Responsibility, and he alone risked suffering any consequences. He allowed his emotions to drag him into a violation of

the Code, as opposed to respondent in this case, who allowed her emotions to drag her entire firm into a serious ethical violation. Furthermore, while evidence from his letters suggested the respondent in *Warren* knew his conduct was improper, he did not act with the same level of deceit as respondent here. Here, respondent was told, point blank, that she must end her relationship, and she assured the senior attorney that she had done so. Realizing that the senior attorney had relied on her representation that the relationship had ended, respondent then recommenced relations with the husband without making any effort to inform the senior attorney or her firm.

¶ 45. Other cases from this Court have also imposed reprimands for less serious behavior than the conduct at issue here. See, e.g., *In re Sinnott*, 2004 VT 16, ¶ 10, 176 Vt. 596, 845 A.2d 373 (mem.) (assigning sanction of public reprimand and restitution when "the panel concluded that respondent had violated Vermont Rules of Professional Conduct 1.5 by charging an unreasonable fee which it labeled as a 'nonrefundable retainer'"); *Farrar*, 2008 VT 31, ¶¶ 3, 12 (concluding public reprimand appropriate where attorney's bookkeeper transferred money each month from firm's business account to client trust account and then back to business account to ensure there would be sufficient funds in business account each month to meet payroll - bookkeeper reconciled trust account monthly and respondent had no selfish or dishonest motive for commingling money with clients' property).

¶ 46. I agree that there are some cases in which this Court has ordered suspension for more egregious behavior than the actions in this case. See, e.g., *In re Hongisto*, 2010 VT 51, ¶¶ 11-12, 21 Vt.L.W. 216, 998 A.2d 1065; *In re Neisner*, 2010 VT 102, ¶ 13, 21 Vt.L.W. 462, \_\_\_ A.3d \_\_\_. However, respondent's behavior is on a par with other behavior that has resulted in the imposition of a suspension. For example, in *In re Taylor*, this Court considered a recommendation from the Professional Conduct Board that the respondent be suspended from the practice of law for six months based on his conduct before the family court, which included his failure to pay spousal maintenance and child support and his failure to comply with related family court orders. 171 Vt. 640, 640-41, 768 A.2d 1273, 1274 (2000) (mem.). We imposed a six-month suspension in *Taylor* based on a determination that the respondent's behavior demonstrated conduct prejudicial to the administration of justice, conduct adversely reflecting on fitness to practice law, and a disregard of court orders. *Id.* I believe the conduct at issue here is comparable to that in *Taylor*. While respondent here did not openly violate court orders, she acted deceitfully and violated the agreement she made with her senior attorney. I again emphasize that an important factor in this case is that respondent knowingly put her entire firm into an ethical violation. Other cases from this Court have also imposed suspensions for behavior that calls into question an attorney's fitness to practice to the same degree as respondent's conduct here. See, e.g., *In re Free*, 159 Vt. 625, 625-26, 616 A.2d 1140, 1140-41 (1992) (mem.) (suspending respondent for six months for three counts of knowingly failing to file Vermont income tax returns where respondent provided full and free disclosure to bar counsel and exhibited cooperative attitude in proceedings, where penalties for criminal conduct were also imposed, but where respondent had a disciplinary record, multiple offenses, and substantial experience in practice of law).

¶ 47. The Panel imposed a suspension in this case, and we must give deference to that decision. The seriousness of

respondent's actions, combined with aggravating factors, make a period of suspension the most appropriate sanction. Accordingly, I respectfully dissent.

¶ 48. I am authorized to state that Chief Justice Reiber joins this dissent.

*Notes to Text:*

\* I accept the Panel's analysis of the aggravating and mitigating factors as supported by the evidence. The majority ignores the standard of review and does not provide sufficient support to suggest that these findings were clearly erroneous. See A.O. 9, Rule 11(E); *In re Farrar*, 2008 VT 31, ¶ 5, 183 Vt. 592, 949 A.2d 438 (2008) (mem.). The Panel was in a much better position than this Court to determine whether respondent showed remorse or whether her answers were evasive.

Entry Order Docket No. 2011-152  
2011 VT 67

**In re Rosemary A. Macero, Esq.**

June Term, 2011

Original Jurisdiction from Professional Responsibility  
Board

Opinion Filed June 20, 2011

Review of disciplinary action against Vermont lawyer in  
Massachusetts. *Identical one year suspension ordered.*

PRESENT: Reiber, C.J., Dooley, Johnson, Skoglund and Burgess, JJ.

In the above-entitled cause, the Clerk will enter:

¶ 1. In late April 2011, the Court received notice from disciplinary counsel that respondent, an attorney admitted to the practice of law in Vermont, had been suspended from the practice of law in Massachusetts for a period of one year, the suspension to begin on May 8, 2011. Pursuant to A.O. 9, Rule 20.B, the Court issued an order notifying respondent of the suspension and offering respondent an opportunity to inform the Court, within 30 days of the order, why the imposition of identical discipline in this State would be unwarranted. Respondent failed to respond. Accordingly, pursuant to A.O. 9, Rule 20.D, the Court finds the Massachusetts adjudication of misconduct to be conclusive, and warrants imposition of the identical discipline in Vermont.

¶ 2. Respondent is hereby suspended from the practice of law in Vermont for a period of one year, commencing on May 8, 2011. Respondent shall comply with all of the requirements of A.O. 9, Rule 23.

Editor's Note: In the Supreme Court, the petitioner Office of Disciplinary Counsel was represented by Beth DeBernardi, Burlington; the respondent attorney appeared pro se. PRB docket number was 2011.213.