STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

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

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

State of Vermont
Professional Responsibility Board

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Decision No. 214

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This proceeding was initiated by Disciplinary Counsel's filing of a petition of misconduct in June 2017. Evidence was received by the Hearing Panel over the course of an evidentiary hearing beginning in November 2017 and concluding in January 2018. The Hearing Panel issues the following decision.

FINDINGS OF FACT

RESPONDENT AND HIS LAW PRACTICE

Respondent, Glenn Robinson, was admitted to the Vermont bar in 1999 and has practiced as a licensed attorney in Vermont continuously since then. In March 2000, a law firm with a principal office in Montpelier, Vermont, opened a satellite office in Newport, Vermont. Respondent moved to the Newport area and worked at the firm's Newport office from approximately 2000 through 2005. Respondent's step-father traveled periodically to Newport during this period to work with Respondent; he did so less frequently after approximately three or four years had elapsed. The majority of Respondent's work during this period was in the areas of family law and criminal law.

In 2005, the Newport office became independent and Respondent began working as a solo practitioner. Respondent has continued to do business as a solo practitioner since then. During the period of time alleged in the petition of misconduct and presently, Respondent has conducted his law practice as Glenn Robinson, P.C. Since Respondent became a solo

practitioner, he has continued to practice in the areas of family law and criminal law and, in addition, he has done some work in the area of probate law. Approximately 85% of Respondent's practice over the years has been in the area of family law.

For some period of time, Respondent handled the administrative aspects of his law practice in Newport by himself. At some point, he began to employ administrative assistants to work in the office. During the time period alleged in the Petition, Respondent structured the administrative assistant's job as an "executive assistant" whose job was primarily to help him stay organized and meet deadlines. According to Respondent, he needs considerable assistance with managing his work schedule due to his suffering from attention deficit disorder. During this period, it was Respondent's practice to generate and complete all of his written work without any assistance. Respondent's administrative assistants performed other tasks, such as opening the mail, answering the phones, and providing some assistance to the law firm's bookkeeper. In addition, Respondent had his assistants attend meetings with clients, both in the office and elsewhere, and accompany him on a regular basis when he had court appearances. He often encouraged them to sit in his office and keep him company when they were not doing office work.

During the time period alleged in the Petition, Respondent's law firm paid wages to the various administrative assistants for their services; however, as detailed further below, the payments were not made on a regular basis – i.e. weekly or bi-weekly. The law firm employed a bookkeeper during this period of time who traveled to Newport approximately once a month. On occasion, Respondent paid out "advances" on a paycheck to an administrative assistant. If an advance on wages was paid out during the bookkeeper's absence, the advance did not account for the requisite withholding of income taxes and Social Security – in other words, the advance

was calculated by multiplying the number of hours worked and the hourly rate of pay, with no deductions. When the bookkeeper later reviewed the firm's books, she would perform the necessary calculations for withholding from the employee's wages and those calculations would be utilized to adjust future payments to the employee. This practice continued throughout the time period in question.

RESPONDENT'S CONDUCT RELATED TO CYNTHIA MEAD

In late October 2010, Cynthia Mead filed a divorce complaint in Orleans County. She represented herself at the time the action was filed. Her husband, Shawn Mead, hired an attorney to represent him in the divorce action. On December 9, 2010, Cynthia Mead met with Respondent to discuss the possibility of his representing her in the divorce action.

At the time, she was a 39-year-old mother of five children who had recently separated from her husband of sixteen years, and she was living alone in a trailer in Newport Center, Vermont. She had her first two children with a boyfriend, beginning at age 17. Those two children were grown up as of the filing of the divorce action. She had three teen-aged children from her marriage to Shawn Mead. During her marriage, Ms. Mead lived on the Mead family's farm, which grew to be one of the largest dairy farms, if not the largest, in the Newport Center area. During her marriage, Ms. Mead worked on the farm and ran a daycare business there. In addition, she worked part-time at the Department of Children and Families. Ms. Mead had dropped out of high school at age seventeen; however, as of the filing of the divorce action, she had obtained a General Educational Development (GED) diploma, as well as an associate's degree in Early Childhood Education from the Community College of Vermont and had worked towards earning a degree in K-6 Education at Johnson State College.

Following her meeting with Respondent, a retainer agreement was executed, which provided for Ms. Mead to make an initial payment, followed by monthly payments of $ 500 per month for Respondent's services. Respondent continuously represented Ms. Mead in her divorce action from December 2010 through settlement of the action in June 2012. The settlement was reached in the courthouse on the day that the final merits hearing in the divorce action was scheduled to take place.

Ms. Mead paid Respondent an initial "retainer" of approximately $2,000 by cashing in a "403(b)" retirement account. At the time, she was struggling to pay her monthly car payment and rent payment. She stopped making monthly payments to Respondent at some point over the course of Respondent's representation of her in the divorce proceeding.

In February 2011, while Respondent was representing Ms. Mead in her divorce action, they began a consensual sexual relationship. The relationship continued throughout Respondent's representation of Ms. Mead in the divorce action and ended in June 2012, shortly after the final settlement was reached in the divorce action.

Prior to entering into the sexual relationship with Ms. Mead, Respondent discussed with her the issue of whether he could ethically enter into a sexual relationship with her while at the same time representing her in the divorce action, and he told her that he believed he could do so. However, Respondent presented no evidence that he ever provided Ms. Mead with a description of the types of risks that are presented when a lawyer enters into a sexual relationship with a divorce client. Moreover, at no point did Respondent obtain a written consent from Ms. Mead setting forth any disclosure to her and authorizing Respondent to represent her in the divorce

action while he was in a sexual relationship with her.[1]

During the course of the relationship, Ms. Mead and Respondent went on various weekend outings together, including hiking and camping, and they attended various social gatherings in the homes of Respondent's family members and visited some of Respondent's friends. Ms. Mead maintained a friendship with Respondent's mother that continued throughout Respondent's representation of Ms. Mead. Although Respondent and Ms. Mead maintained separate residences, they regularly stayed overnight at Respondent's residence and ate meals together.

Ms. Mead and Respondent only went on dates outside the Newport area because Respondent did not want anyone in the Newport area to know that they were in a relationship. To Ms. Mead's knowledge, Respondent was not dating anyone else during the time she and Respondent were together and, from her perspective, they were "as close to a couple as you can really get."

During the pendency of the divorce action, Ms. Mead was experiencing considerable financial strain. At the outset of the divorce, Ms. Mead's children had expressed a preference to reside with their father, who lived in a house, due to the limitations of Ms. Mead's mobile home residence and Ms. Mead had assented to that request. As a result, the magistrate in the divorce action granted a request by Shawn Mead to increase the child support amount Ms. Mead had been paying. A motion for temporary spousal support filed by Respondent was denied by the court. Ms. Mead was struggling to make ends meet. At some point, she obtained a loan from

[1] Respondent testified that he told Ms. Mead in January 2012 that he wanted to end the relationship, but that she asked him to continue the relationship and to continue to represent her in the divorce proceeding and that he assented to her request. Ms. Mead testified that Respondent did not broach the subject of ending the relationship until after the settlement was reached in June 2012. The Panel concludes that it does not need to resolve this dispute.

her landlord to make her rent payments. She regularly expressed to Respondent her frustration, disbelief, and anger that she was not able to secure better financial terms through the divorce action. She perceived that Shawn Mead was receiving support from his family that was not sufficiently reflected in the child support calculation and that she should receive some amount of property distribution based on the family farm business's assets.

As lawyers often endeavor to do, Respondent tried to reassure Ms. Mead when she raised concerns related to her case. On one or more occasions, those efforts included telling her that she could alleviate some of her financial concerns by staying with him at his condominium.

Ms. Mead took an active role in the divorce proceeding and questioned Respondent throughout the proceeding. The property distribution issues were complicated, involving the valuation of a family farm business enterprise that was also subject to considerable debt. Not surprisingly, Ms. Mead was anxious before the final divorce hearing. The night before the scheduled final hearing, during a preparation session, Respondent became upset with Ms. Mead's answers during a preparation session and she expressed frustration: "I was answering questions that [were] wrong, apparently, and he was getting frustrated. And, I asked him, I go, I don't know what you want from me . . . ."

Ms. Mead worked at various jobs during the divorce action. From approximately March 2011 through September 2012, Respondent hired her to work as an employee of a tanning salon business that he owned. Over that period of time she was paid approximately $9,800 in wages. She also worked for a time in a Head Start program and as a hostess at a local restaurant in Newport.

Under the basic terms of the divorce settlement agreement reached in June 2012, the parties agreed that Ms. Mead's ex-husband would pay the car loan payments associated with her

motor vehicle for a number of years. In addition, the parties resolved the child custody and support issues by agreement at the final divorce hearing.

Ms. Mead was obligated to pay regular child support in the final divorce decree and a specified amount was set for a period of years. Ms. Mead further agreed, among other things, to relinquish any other claims on her ex-husband's property, including any claims associated with Shawn Mead's interest in the Mead family farming enterprise.

On the date of the scheduled merits hearing in the divorce action, the presiding judge reviewed the terms of the settlement agreement with the parties. Ms. Mead indicated that she understood and agreed to the terms and conditions of the settlement.

Throughout the divorce action, Ms. Mead was concerned about obtaining a fair property settlement. She justified entering into the eventual settlement agreement at least in part based on her understanding that the terms of the settlement agreement could be adjusted in the future to be more favorable to her. In particular, Ms. Mead was under the impression that notwithstanding the issuance of the final divorce decree, she could subsequently apply for reduction of the child support obligation and that Respondent would assist her in obtaining a reduction. Ms. Mead believes that Respondent verbally provided such assurances to her prior to her agreeing to enter into the settlement. The Panel does not question the sincerity of Ms. Mead's belief; however, the Panel is unable to find by clear and convincing evidence that any unqualified communication along those lines was provided by Respondent to Ms. Mead. The Panel finds that her understanding was more likely the product of a misunderstanding in the communications between Respondent and Ms. Mead that preceded the settlement agreement.

No later than one month before the divorce settlement in June 2012, Respondent was planning to terminate his relationship with Ms. Mead upon the completion of the merits hearing.

While on a trip to Colorado with his step-father in May 2012, he "was trying to figure out how I was going to tell Cindy that our relationship was ending and that's what was coming up when her final hearing was going to happen." In addition, on the same trip to Colorado he indicated to his step-father that he was interested in pursuing a romantic relationship with his then-administrative assistant, Pamela Binette. Soon after returning from that trip, in late May or early June (and before Ms. Mead's final divorce hearing), Respondent participated in a conference call with his step-brother and Ms. Binette in which he discussed putting in place an agreement that would facilitate a sexual relationship between Respondent and Ms. Binette.[2]

When Respondent informed Ms. Mead that he was ending the relationship, Ms. Mead was angry and felt that she was being abandoned by Respondent both personally and in connection with her expectations as to receiving ongoing support from Respondent on divorce-related issues going forward.

Respondent and Ms. Mead had sexual relations on one occasion during the week following the divorce settlement and then one final time in the fall of 2012.

Ms. Mead believes – rightly or wrongly – that Respondent failed to devote sufficient time to representing her interests in the divorce proceeding; that he did not take sufficient actions to protect and advance her financial interests in the proceeding; that he misled her into agreeing to the final settlement; and that he abandoned her after convincing her to agree to a settlement in the divorce proceeding. In his testimony, Respondent disputed all of those contentions.

RESPONDENT'S CONDUCT RELATED TO PAMELA BINETTE

In December 2011, Pamela Binette contacted Respondent's office seeking legal advice. Respondent assisted her in connection with a couple of matters. One of the matters concerned a

[2] The conference call and agreement are addressed further in the findings related to Pamela Binette.

pending criminal proceeding, in which Ms. Binette was a co-defendant, that alleged the crime of grand larceny ("the grand larceny charge"). Ms. Binette was being represented by another lawyer in connection with that charge. However, Respondent helped Ms. Binette obtain temporary relief from the conditions of release imposed at her arraignment so that she could visit her brother in Florida during the Christmas holiday in December 2011. Respondent did not charge Ms. Binette for any of his legal services.

In January 2012, Respondent contacted Ms. Binette and offered her a job at his law firm. Respondent's departing administrative assistant, who had gone to high school with Ms. Binette and who was leaving her job to attend to family matters, recommended Ms. Binette to Respondent. Ms. Binette accepted the job offer and started work that same month.

At the time, Ms. Binette was unemployed and having difficulty finding a job. She was twenty-nine years old and was living with her parents in Beebe Plain, Vermont. At that time and throughout her employment in Respondent's office, Ms. Binette was aspiring to gain admission to a training program to work as a border patrol agent. She understood from her communications with a recruiter that, because she did not have a college degree, she would need to be able to demonstrate some law-related employment for a minimum of one year in order to qualify for admission to the program. The job offer was appealing to her for that reason. In addition, subsequent to her hiring and while she was employed by Respondent, the prospect of being able to meet what she understood to be the one-year employment requirement remained an incentive for her to remain employed in Respondent's office for at least one year.

The grand larceny charge against Ms. Binette remained pending at least through the majority, if not the entirety, of Ms. Binette's employment. The charges against her were

eventually dismissed. Respondent was aware that the grand larceny charge remained pending during Ms. Binette's employment.

Ms. Binette was employed by Respondent from approximately January 2012 through January 2013. Her last paycheck was issued January 25, 2013. Exhibits DC-8 & DC-20.

Ms. Binette's Education and Prior Work Experience

When Ms. Binette was hired by Respondent, her educational background consisted of graduating from high school in approximately 2000. She had no experience or training as an administrative assistant and had never worked in a business run by a professional. Her work experience, beginning in high school, consisted of working as a clerk in a local pharmacy and a local photo shop and, while living in Florida after high school, working in a Walmart.

Ms. Binette's Mental Health Diagnoses and Treatment

Ms. Binette was diagnosed in approximately 2005 as having attention deficit hyperactivity disorder (ADHD) and post-traumatic stress disorder (PTSD). She has been a regular patient of a psychiatrist, Dr. Elliot Kaufman, and has worked with various therapists on a regular basis since approximately 2007.

ADHD is a mental disorder that is thought to be inherited. It entails either a lack of capacity to respond when encountering multiple stimuli or "hyper focus" on one issue to the exclusion of others. It can also entail impulsive behavior. PTSD is derived from stress to which a person has been exposed. When PTSD is exacerbated, a person can react to it by becoming hypervigilant and even paranoid. When PTSD and attention deficit disorder are both present, they can result in chaotic functioning.

Prior to being hired by Respondent and throughout her employment by Respondent, Ms. Binette had regular visits with her psychiatrist to monitor her condition and adjust her

medications if necessary. During the course of these appointments, Dr. Kaufman would ask her how she was doing, observe her appearance, and otherwise evaluate her condition. Ms. Binette has regularly taken a psycho stimulant for ADHD; an antidepressant for depression and ADHD; and a tranquilizer to deal with anxiety.

Over the course of her treatment for these mental health disorders, Ms. Binette has at times utilized a variety of what are referred to in psychiatry as "coping mechanisms" in response to exacerbation of her PTSD. These include, at times, "cutting" – using one's fingernails or other instruments, such as pins or tweezers, to cut or scratch one's skin as a calming mechanism – and also avoidance of social engagements and withdrawal. Ms. Binette experienced incidents of cutting before she worked for Respondent. Psychiatrists have determined that cutting activity coincides with having a negative view of oneself. Dr. Kaufman explained the mechanisms associated with cutting as follows:

> [T]he [more] negative view you have of yourself, the more likely it is that you're going to cut. Enormous implications, because then it matters what happens to you and feeds into a negative view of yourself and you start cutting.

At various times, Ms. Binette has experienced agoraphobia – a fear of being involved with people – which causes the afflicted person to withdraw from social situations. Another coping mechanism associated with PTSD is to try to make things better by engaging in that which the person feels threatened by. This is referred to in psychiatry as "counterphobic" behavior. Dr. Kaufman explained it this way: "you're afraid of that so a way to deal with it is to be involved with it and make things better as a result of altering whatever that threat is."

Payment of Ms. Binette's Wages

Respondent initially paid Ms. Binette at the rate of $9 per hour for her work. The rate was increased over time to $10 per hour, then $10.50 per hour, and towards the end of her

employment, $11.00 per hour. Over the course of her employment, none of her paychecks were issued on a regular schedule. Moreover, there were long intervals between the issuance of paychecks. Some of the paychecks were issued approximately monthly, but even then with some variation in the number of days that elapsed between paychecks. Moreover, some of the intervals between paychecks were more than six weeks in duration. Exhibits DC-8 & 20.[3] As a result, Ms. Binette was dependent on Respondent to provide her with advances in between her paychecks. Ms. Binette received six advances over the course of her employment that were later applied by the bookkeeper to reduce her eventual paycheck. Exhibit DC-22.

Ms. Binette's Job Performance

Ms. Binette was a capable employee. At the outset of her employment, she was excited to learn about the various administrative systems used in the office and about the legal system. She was hard-working and enjoyed her job. In the first few months after she started working for Respondent, she expressed enthusiasm to her mother and father about her job and she appeared to be happy. Respondent was skilled at her job duties throughout her employment.

During the time that Ms. Binette worked for Respondent, she requested and was given permission to arrive late for the start of the work day as an accommodation for her agoraphobia. She had difficulty leaving home in the morning and she compensated by working later in the day.

The Workplace Environment During Ms. Binette's Employment

During the time Ms. Binette worked for Respondent, the office personnel consisted of Respondent and Ms. Binette. The only other person present in the office on a regular basis was

[3] Respondent does not dispute that the practice used to pay Ms. Binette violated 21 V.S.A. § 342. *See id.* (requiring employers to pay wages at regular weekly intervals or, upon notice, at intervals no longer than "bi-weekly or semi-monthly").

the bookkeeper, who only came to the office approximately one day every month to attend to the books and payroll.

Respondent had Ms. Binette spend a significant amount of time keeping him company and socializing with him in his office when she was not otherwise occupied with work. In addition, he encouraged a relaxed atmosphere that extended to what Respondent described as "joking" exchanges with Ms. Binette. These exchanges encompassed verbal banter, teasing, and flirtatious conduct. Respondent regularly called Ms. Binette "Sketch Patrol" and "Squirrel Head" in his dealings with her. He tolerated, participated in, and encouraged flirtatious conduct in the office. Respondent actively participated in such conduct with Ms. Binette. By his conduct, Respondent sent signals to Ms. Binette that were at the very least, confusing, as to the norms of conduct in the office and employer expectations. For example, in one undated exchange, when Ms. Binette called him "a Dork," he replied "I am a Smokin' Hottie!" Exhibit R-5 (JJJ).

The "Paper Clip" Incidents

After considering all of the evidence and judging the credibility of the witnesses, the Panel finds that beginning in April or May 2012, and on more than occasion thereafter, Respondent threw paper clips at Ms. Binette and in so doing targeted her breasts and cleavage area with the paper clips. The Panel is unable to determine, by clear and convincing evidence, precisely how many times the paper clip conduct occurred and whether any other individuals were present when the conduct occurred. But it is convinced based on all the evidence that Respondent intentionally targeted Ms. Binette's chest and cleavage area with paper clips on

multiple occasions over the course of her employment.[4]

The Panel makes additional findings with respect to these incidents at a later point in these findings of fact.

The Draft Agreement Between Respondent and Ms. Binette and Related Communications

In late May or early June 2012, while on a trip to Colorado, Respondent stated to his step-father that he thought Ms. Binette was interested in dating him and that, in turn, he was interested in dating her. His step-father suggested that, before dating Ms. Binette, Respondent "get something in writing" to the effect that the relationship was consensual. Soon after the trip, in late May or early June 2012, Respondent's step-brother telephoned Respondent and conferred over the phone with Respondent and Ms. Binette.

During the conference call, Respondent asked his step-brother, who is also an attorney, to draft an agreement that would facilitate a dating relationship between Respondent and Ms. Binette. Respondent requested that the agreement reflect that the relationship was "mutual and welcoming;" that it contain a release of sexual harassment or gender discrimination claims; and that the document otherwise incorporate "mutuality." Most of the conversation during the call was between Respondent and his step-brother.

Within a day or days after the conference call, Respondent's step-brother transmitted a draft agreement to Respondent entitled "Notice of Intent to Engage in Mutually Welcomed

[4] Respondent testified that he and Ms. Binette engaged in a game of throwing paper clips at each other to get each other's attention and that, at some point he threw a "scoop of paper clips" at Ms. Binette in response to a paper clip she threw at him and that "one of them" landed by accident in the area of her cleavage. Respondent testified that he threw the scoop of paper clips paper clip "up in the air and they all landed on her and it was funny." Respondent's testimony that he did not intend to target her cleavage area was not credible. He never explained why, even assuming Ms. Binette had thrown a paper clip at him, he threw a "scoop of paper clips" at her or why he would not have reasonably expected to strike her in the area of her chest by doing so. In addition, his account is inconsistent with the evidence of his engagement in flirtatious conduct towards Ms. Binette.

Romantic Relationship and Waiver of Claims." Exhibit DC-2. Respondent then provided a copy of the draft agreement to Ms. Binette.

Ms. Binette was confused and intimidated by the conference call, had a hard time following the discussion and understanding the issues, and did not understand the need for a written agreement. Ms. Binette had a limited education and certainly no experience of any significance that would have prepared her to understand the discussion between Respondent and Respondent's step-brother or the draft agreement that was later presented to her by Respondent following the conference call.

The draft agreement was provided to Respondent by his step-brother in a form that would require the insertion of Ms. Binette's name in a blank and the insertion of signature blocks. Exhibit DC-2. After receiving the draft agreement, neither party signed it. No further action was taken towards concluding an agreement between Respondent and Ms. Binette until the fall of 2012.

The July 2012 Masturbation Incident

In July of 2012, while Respondent and Ms. Binette were together in the law office, an incident occurred in which Ms. Binette unbuttoned her shirt, exposed her bra, and lowered her bra strap while Respondent proceeded to masturbate to ejaculation in his pants. While he masturbated, Respondent asked Ms. Binette to reach over and pull his tie and she proceeded to do so. Ms. Binette participated in the "striptease" at Respondent's request.

Immediately after the masturbation incident, Ms. Binette went home and broke down in front of her mother, Diane Binette, when her mother arrived home from work that evening. Diane Binette found Pamela to be very upset and Pamela told her that Respondent had

masturbated in front of her, including the fact that she had unbuttoned her shirt and lowered her bra strap at his request and that Respondent had asked her to pull his tie while he masturbated.

The Panel makes additional findings with respect to this incident at a later point in these findings of fact.

Ms. Binette's Statements to Dr. Kaufman and His Observations

Beginning in late April 2012 and then again in July 2012, Ms. Binette told her psychiatrist, Dr. Kaufman, on several occasions that her boss was making unwanted advances towards her or otherwise causing her stress. Dr. Kaufman made contemporaneous notes recording these statements along with his observations:

- On April 24, 2012, Ms. Binette stated that her boss was making "unwanted unwelcome advances towards her"; Dr. Kaufman noted that Ms. Binette was "anxious" and "upset about her boss" and observed that "PTSD symptoms surfaced as problem with employer emerged" – Exhibit DC-27.
- On July 7, 2012, Ms. Binette stated that she was "upset because her boss is 'coming on to her'"; Dr. Kaufman observed that she was "tearful as she talks about her boss" and "quite anxious"; under his assessment, he stated that "[her] PTSD symptoms being exacerbated by unwanted sexual advances from her boss according to [patient]" – Exhibit DC-29.
- On July 31, 2012, Dr. Kaufman noted that Ms. Binette "was clearly upset and spoke very briefly about her job and more specifically her boss being the cause of her distress" and "that there is a situation causing much distress related to her job" – Exhibit DC-30.[5]

[5] Respondent objected to admission of these medical records on grounds that they were not produced prior to his deposition of Dr. Kaufman. But Respondent had ample time to request a further deposition of the witness and failed to make any request to do so. The records, which were in the custody of Northeast Kingdom Human Services, were produced on December 1, 2017, only days after the deposition and four weeks before the January 2018 resumption of the merits hearing. In addition, Respondent argued that the records were inadmissible hearsay. Ms. Binette's statements to Dr. Kaufman in April and July 2012 are

The August 7, 2012 Email Communication Between Ms. Binette and Respondent

On August 7, 2012, Ms. Binette sent the following email with a subject line of "I loved my job" to Respondent:

> I will not be in the office today. I will probably not be in tomorrow either. I am trying to communicate with you that the issues which lead to my absence are the direct result of the removal of my employee rights and protections granted under the Vermont statutes as amended and Fair Employee Acts. I do not feel respected as an employee, individual, or human being due to your recent behavior and comments. I have felt threatened and forced to cooperate and I am not going to let this happen any longer. I have not been treated as an employee, I have not been paid as an employee should, I have been misled by you in many aspects of my criminal case, my family has been misled by you and your words of such an employer should not. I hope there is a suggested agreement in which satisfies the loss of my integrity, finances, employment and reputation; that will let this become a respectful and responsible conclusion to these unfortunate happenings that have greatly damaged my future opportunities to trust any employment especially in this area. I look forward to your timely response.

Exhibit DC-3 (email, 8/7/12, 9:31 a.m.).[6]

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admissible for two reasons. First, they are admissible under V.R.E. 801(d)(1)(B), which applies to a prior consistent statement "when (1) the prior consistent statement corroborates the witness's in-court testimony; (2) the party offering the prior consistent statement establishes that the statement is being offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive; and (3) the statement is shown to have been made prior to the time that the supposed motive to falsify arose." *State v. Roy*, 140 Vt. 219, 226-27 (1981); *see also State v. Perrillo*, 162 Vt. 566, 571, 649 A.2d 1031, 1034 (1994). Respondent asserted through his presentation at the hearing that Ms. Binette had a motive to fabricate her allegations, but he presented no evidence to support any motive on her part to lie at the time these statements were made. In the alternative, the statements were admissible – in response to Respondent's presentation of evidence, discussed below, that Ms. Binette disavowed her allegations in August 2014 emails to Respondent – as prior consistent statements to rehabilitate Ms. Binette. *See State v. Church*, 167 Vt. 604, 605, 708 A.2d 1341, 1342 (1998) (where defendant presented evidence that the alleged victim had recanted her allegations of sexual abuse against defendant, victim's statement to another witness that she had been sexually molested admissible to rehabilitate the victim).

[6] Respondent testified that Ms. Binette told him at a subsequent meeting that she did not really mean what she had stated in the email. Ms. Binette testified to the contrary. The Panel finds Ms. Binette's testimony on this issue to be credible and Respondent's to be not credible. Also, the fact that the draft agreement had not yet been signed at this point in time buttresses Ms. Binette's credibility on this issue.

On August 8, 2012, Respondent replied and expressed a willingness to meet with Ms. Binette and discuss the matters. The response further stated as follows:

> This is the first time you have mentioned being uncomfortable. If you do not want to sign the papers we drafted with [my step-brother], that's fine. If you do not wish to follow-through on dating, that's fine, too. If you want a professional relationship, based only on your employment here, that's fine. I have told you that several times. The job is still yours to have, as long as you show up for work. Otherwise, you need an excused absence from work. I have been very good with being flexible with you. I have also helped you to the best of my abilities with your criminal case. I am not your attorney in that case. We have not talked about your case in quite some time. I am surprised that you suddenly have concerns, as things seemed to be going along just fine. Nobody here is interested in threatening you or forcing you to do anything. I would be happy to speak to you about your concerns, at your earliest convenience. Thank you for your message. I hope to hear back from you soon.

Id. at 2 (email, 8/8/12, 8:26 a.m.).

The Revised September 2012 Agreement

On or about September 28, 2012, after some discussions between Respondent and Ms. Binette, Respondent revised the draft agreement that had been previously prepared by his step-brother and they both signed the revised agreement ("the September 2012 Agreement"). Exhibit DC-5. While meeting with Ms. Binette, Respondent made some changes to the draft agreement that was previously prepared by his step-brother to arrive at the final version of the agreement. Ms. Binette signed the final agreement the next day. Ms. Binette understood from her discussion with Respondent that they needed to sign the agreement to satisfy Respondent's father and that it was required of her to continue working for Respondent.

Respondent did not advise Ms. Binette to obtain independent legal advice with respect to the agreement. To the extent that Respondent testified that he did advise her verbally to obtain

legal advice in connection with the agreement, the Panel finds that his testimony is not credible.[7]

The final agreement indicated in the "WHEREAS" section that the agreement was the product of both individuals (1) "wish[ing] to engage in a romantic relationship" and (2) "wish[ing] to continue their working relationship and set forth terms that protect both Employer and Employee." *Id.* at 1.

Under the terms of the agreement, Ms. Binette agreed " . . . that any romantic relationship with Employer is by mutual agreement. Employee agrees that her interest in pursuing a romantic relationship with Employer is done freely, voluntarily, and without any coercion or undue duress." *Id.*, ¶ 2.

The Agreement included a waiver provision under which Ms. Binette:

> . . . agree[d] to waive any and all claims or other actions against Employer for gender discrimination and/or sexual harassment pursuant to Title VII of the Civil Rights Act, and as amended, and Vermont's Fair Employment Practices Act, as amended, or any other legal or equitable claim arising against Employer by virtue of their [sic] romantic relationship with Employer and her employment by Employer.

Id., ¶ 3.

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[7] His testimony on this issue was not credible for several reasons. First, Respondent could have easily placed an acknowledgement in the agreement that Ms. Binette had been advised to obtain legal counsel and no such provision was in the agreement. Moreover, the Panel cannot believe that Respondent would not have put in writing any advice he gave Ms. Binette to seek legal counsel. Any lawyer in a situation where he or she felt the need to give such advice to an unrepresented person would do so in writing. In addition, the need to do so was even more apparent in this case in light of the August 7, 2012 email from Ms. Binette. Indeed, Respondent testified that he was concerned enough about her August 7, 2012 email that he subsequently met with Ms. Binette and recorded the conversation – although he was not able to produce any recording of that conversation at the merits hearing. Also, his description of his meeting with Ms. Binette after the August 7 email did not include any mention of advising Ms. Binette to get legal counsel. It is inconceivable, given the nature of the agreement and the surrounding circumstances, including Respondent's own testimony that the agreement "was complicated, it had laws in it" and his knowledge of Ms. Binette's unsophisticated background and the nature of the agreement, that Respondent would not have put such advice in writing. Finally, it was only near the end of the hearing and in response to a question from a Panel member (not his legal counsel), that Respondent indicated, and without any detail, that he had advised Ms. Binette to seek legal advice concerning the agreement. His testimony is not credible.

In preparing the final agreement, Respondent removed from the first sentence of this provision as it appeared in the draft agreement the word "demand" and inserted the word "against." *Compare* Exhibit DC-2 and Exhibit DC-5.

The agreement included a provision in which Respondent agreed:

> to base all decisions regarding the terms and conditions of Employee's employment on job performance and/or general economic conditions of the business. Employer shall not base any decision regarding the terms and conditions of Employee's employment based upon any romantic relationship, or lack thereof.

Id. ¶ 1. The following clause, which did not appear in the original draft, was also included in the final version of paragraph 1:

> The parties to this agreement understand that there must be a clear separation between their professional and personal lives, both between themselves and between them and the general public, including the firms' clients.

Id.

In addition, the agreement included a provision extending a work accommodation to Ms. Binette:

> Employer acknowledges that Employee suffers from a condition that sometimes makes it difficult for her to be on time for the start of her workdays. Employer has in the past given Employee a certain amount of latitude regarding her showing up for work on time. The parties to this agreement hereby acknowledge that Employee will continue to be afforded latitude regarding her showing up for work on time. Employee has and will continue to make reasonable efforts to see that she does come to work on time, in spite of her condition.

Id. ¶ 4.

Ms. Binette requested that a provision along these lines be included in the agreement. Respondent drafted the language. Utilizing Ms. Binette's paycheck for the pay period from July 19 through September 6, 2012 and her hourly rate of pay, it appears that Ms. Binette worked less

than 40% of available work hours (assuming 8-hour work days) during this period. Respondent had to be well aware at that time of the problems with coming to work that Ms. Binette was experiencing during this period of time.

Another work-related provision set forth the parties' "understand[ing] that their work will sometimes require them to work after regular business hours and/or on weekends." *Id.* ¶ 5.

The final paragraph stated as follows:

> The parties hereby recognize this document may need to have additional language added to it as a result of further contemplation. For now, this is what the parties have agreed to. There will be no changes to the substance of what has already been included in this document. The document will be signed today but not witnessed, because the parties contemplate a final version being signed within the next 15 days.

Id. ¶ 6.

In fact, the agreement was not witnessed by any third party. Respondent and Ms. Binette signed as well on the lines for the witness signatures. In addition, no subsequent version of the agreement was ever prepared.

Respondent's Meeting with a Psychiatrist and Commencement of Therapy

Sometime in the early fall of 2012 Respondent met with a psychiatrist at the urging of his parents, who had expressed some concerns about his well-being. The psychiatrist recommended that Respondent see a therapist and Respondent began therapy in November 2012. Respondent attributed his need for therapy to the effect on him of the death of numerous friends and describes his therapy as "grief counseling."

Ms. Binette also suggested to Respondent that he see a therapist and Respondent told Ms. Binette that he was seeing one. On December 18, 2012, while meeting with Dr. Kaufman, Ms. Binette stated that "she is enjoying work, relationship [with] her boss is better and she believes it is because he is in therapy." Exhibit DC-31.

The After-Hours Conference Room Incident Involving Respondent's Client

At some point towards the end of Ms. Binette's employment, she invited a female client of Respondent's, with whom Ms. Binette was acquainted, to drink beer with her at the law office late one evening. After drinking for a while, they removed some of their clothing and began kissing each other. Eventually, Ms. Binette placed a call to Respondent asking him to come to the office.

After arriving at the office, Respondent found Ms. Binette and his client in the conference room partially unclothed, he began engaging in sex with them, and he eventually directed his sexual attention towards the client. At some point, Ms. Binette stopped participating and left the office. In the process of collecting her clothing, she mistakenly took a tank top that belonged to Respondent's client. The client went to Respondent's home after this incident and spent the night there. Respondent testified credibly at the hearing that, at some point in time prior to this incident in the conference room, he had had sexual contact with the client and the Panel so finds.[8]

December 2012/January 2013 and Termination of Ms. Binette's Employment

At some point around December 2012 or January 2013, Respondent communicated concerns to Ms. Binette regarding her absences from work. Around the same time, he informed

[8] While Ms. Binette placed the call asking Respondent to come to the office, the Panel is unable to determine whose idea it was to call Respondent. Ms. Binette testified that the client asked her to place the call to Respondent. The client, who had been previously represented by Respondent in a divorce action and was at the time under a charge of furnishing alcohol to a minor, initially testified that she did not know the circumstances surrounding the placement of the call and then, in response to a leading question from Respondent's counsel, testified that she didn't believe that she had encouraged Ms. Binette to place the call. The client's testimony was ambiguous. In addition, the client had a reason to want to put responsibility on Ms. Binette for bringing Respondent to the office, given the nature of the conduct that took place. And, finally, the client had a reason to want Respondent to come to the office, given her prior sexual involvement with Respondent. For all these reasons, the client's testimony was unreliable. At the same time, both parties had been drinking and therefore neither party's memory may have been accurate.

Ms. Binette that he was planning to offer a job to one of his clients, Andrea Poutre, and suggested that Ms. Binette might then reduce her hours of work and share the position with Ms. Poutre. He also asked Ms. Binette to help train Ms. Poutre for the job. Ms. Binette had met Ms. Poutre previously in the office while Respondent was representing Ms. Poutre.

On New Year's Eve 2012, Ms. Binette and Respondent had sexual intercourse at his condominium.

In January 2013, Respondent offered Ms. Poutre a job and sometime in the latter part of that month informed Ms. Binette that he had hired Ms. Poutre. Ms. Poutre started working in the office the last week of January 2013.[9]

After receiving her paycheck on January 25, 2013, Ms. Binette did not return to work. Ms. Binette did not work with Ms. Poutre for any period of time. During the week or two preceding her final day, Ms. Binette was absent from work on some days without notifying Respondent. For at least some of that time, Ms. Binette was ill and, at Respondent's request, provided him with a doctor's note to that effect.

It is not clear whether Ms. Binette quit or whether she was fired by Respondent. There was no written documentation generated by Respondent regarding the change in Ms. Binette's employment status. At the end of Ms. Poutre's first week of work, Respondent informed Ms. Poutre that the job was hers alone.

Post-Employment Period

From the time she stopped working for Respondent in January 2013 to the present, Ms. Binette has been unemployed and has lived at home with her parents. Ms. Binette continues to suffer from agoraphobia and other symptoms related to her PTSD and ADHD conditions.

[9] Respondent's interactions with Ms. Poutre are described in additional findings related to the events involving Ms. Poutre.

In the months after she stopped working in Respondent's law office, Ms. Binette's "cutting" behavior worsened significantly. In addition, she suffered from enhanced anxiety.

On February 14, 2013, approximately three weeks after she stopped working, Ms. Binette sent an email to Elizabeth Wilkel, an investigator working with Daniel Maguire, the lawyer who represented Ms. Binette in connection with the grand larceny charge. The email asked for advice relating to her former employment in Respondent's office and included an account of her final week in the office. Ms. Binette stated, among other things, that during an interview with a new client Respondent "wouldn't stop throwing those stupid gold paper clips down my shirt;" that he was "picking on me for wanting to be a border patrol agent;" that she had been "avoiding him as much as possible" and was afraid of him; and that, after coming down with the flu, she did not return to the office. In response to the email, Ms. Wilkel recommended that Ms. Binette consult an attorney and provided her with an email address for Attorney Lauren Kolitch. Exhibit DC-24.

In March 4, 2013, Ms. Binette sent an email to Respondent. Exhibit R-1. The email expressed gratitude, admiration and affection for Respondent; a sense of loss with respect to her job with Respondent and their relationship; confusion; and a loss of personal confidence. She stated that it was "hurtful" for her to see the facebook posting of Respondent's new legal assistant – presumably Andrea Poutre at that time. It also stated that Ms. Binette would have liked to have gone back to work for Respondent at that time.

Sometime in March 2013, possibly in response to the March 4 email, Respondent had some discussions with Ms. Binette about the possibility of her returning to work as a Timeslips assistant in his office. Nothing came of those discussions.

On March 12, 2013, while meeting with Dr. Kaufman, Ms. Binette expressed her "unhapp[iness] about having lost a job that she actually enjoyed" and indicated that while

employed she had understood that Respondent was working with a therapist on issues relating to his masturbation in the office. Exhibit DC-33. Ms. Binette stated to Dr. Kaufman that she had returned to work following the masturbation incident "on condition that he see a therapist" and that "she had spoken to the therapist in Hanover, NH . . . .several times." Later that month, she told Dr. Kaufman that "she has been feeling very anxious as she deals with her job situation" and that "[t]he experience with her boss was very upsetting . . . ." Exhibit DC-34, 3/26/13.

In April 2013, Ms. Binette sent an email to Attorney Kolitch asking for help. She stated that: "My Boss is an Attorney and he has been sexually devastating me and my life to the point that I hardly feel alive anymore and I am VERY INCREDIBLY AFRAID of his statements and I guess they are threats. Maybe you can help. If so, I have a few pages I can email to you to give a clear but not detailed description of how ill I have fallen. I can't do this anymore." Attorney Kolitch responded that she was unsure if it was something she could handle and indicated that Ms. Binette could send her additional information and she would review it. Exhibit DC-25, at 1 (4/26/13, at 8:05 a.m.). Ms. Binette provided additional information and in a follow-up email stated that "there must be someone who can help me confront him. It needs to stop." *Id.* at 2 (4/26/13, at 9:03 a.m.).[10]

In May 2013, Ms. Binette was interviewed by a state police detective as a result of a complaint of sexual harassment that Andrea Poutre filed against Respondent in April 2013. Ms. Poutre gave Ms. Binette's and Cynthia Mead's names to the investigating officer as other

[10] The various statements made by Ms. Binette to Dr. Kaufman, Elizabeth Wilkel, and Attorney Kolitch *after her employment ceased* were not considered as substantive evidence. Because they were made after her employment by Respondent terminated – when she arguably had a motive to lie – they cannot satisfy the requirements of V.R.E. 801(d)(1)(B). They are admissible, however, as rehabilitation evidence in light of Respondent's assertion, discussed below, that Ms. Binette's August 2014 email recanted her allegations against Respondent. They are consistent with Ms. Binette's testimony that Respondent's conduct was unwelcome and that she confronted him. And, in addition, her statements are admissible to the extent that they reflect her state of mind during the time period in question.

persons having relevant knowledge. When interviewed, Ms. Binette made allegations of sexual harassment against Respondent.

In July 2013, Respondent was interviewed by the same state police detective and was confronted with the allegations that were made by Ms. Mead, Ms. Binette, and Ms. Poutre. In the course of the interview, Respondent stated to the detective that Ms. Binette had mental health concerns that sometimes affected her decision making while she was at work. He also made a point of telling the detective that he had put in place an agreement with Ms. Binette to protect himself from claims of sexual harassment.

On December 31, 2013, Ms. Binette sent a text message to Respondent wishing him a happy new year. Exhibit R-7.

On August 11, 2014, Ms. Binette stopped by Respondent's condominium. He asked a neighbor to keep watch while they spoke outside his condominium. They embraced when she left.

Beginning August 12, 2014 and continuing through December 10, 2014, Ms. Binette and Respondent engaged in an ongoing series of text messaging. Exhibit R-2. On her birthday, August 16, 2014, Ms. Binette contacted Respondent and made statements that expressed sorrow, regrets, and feelings that she was at fault concerning the loss of her job in Respondent's office. Respondent prompted her to make additional statements: "I tried to teach you and work w[ith] you and pay you the utmost respect, professionally and personally, no? I think I did"; "This is a good conversation we do need to have. Thank you."

Eventually, Respondent asked her if she wanted him back in her life and she said yes. He then said "I'm not opposed to that, under one condition . . . U owe me an apology and an explanation for the lies you told the state police about me." Ms. Binette responded: "Yes. I

certainly do. And I will. If U give me that opportunity." Respondent replied: "I appreciate the apology." Ms. Binette then continued to describe herself as "wrong," "selfish," "hurtful" and "false," as well as "the bad guy," and indicated that she wanted to tell the truth. "I was so very wrong. I have never done [something] so hurtful to someone. And I need [people] to know that I was not honest in those statements."

Throughout the back and forth, Respondent continued to encourage Ms. Binette to make these statements:

- "Ur making headway. Your visit and the apology about the lies says a lot."
- "And for the record, I have no intentions of causing you problems for those mistakes. I promise."
- "Ya know what? I think you're no longer a girl. UR a woman now. Nice! Now I'm really impressed."
- "I had some pretty fond memories of u ya know. Is it OK for me to think about those again? I've been blocking them out for like 18 months!"
- "I [n]ever stopped thinking about you, just so u know."
- "I can be with u. So u know. But you have to CALL or text me first! . . . Cuz u admitted what you did."

Respondent and Ms. Binette proceeded to engage in sex talk regarding their New Year's Eve 2012 date – with Respondent saying "Can I tell you something now . . . The first night we made love was the single best sexual experience of my entire life" and Ms. Binette reminiscing about "the fire and it was perfect." Respondent brought up his masturbation in front of Ms. Binette, stating "I so remember u making me watch u. Torturing me. And yet, I loved it all." Ms. Binette responded with the following statements: "I remember . . . yes . . . wow . . . we did.

The black lace n pink bra . . . Still have it. *** I bet I'd like u to do that to me too. Now [I'm] much more comfortable [with] myself. I wa[s] my problem. Never you. I'm much more certain and clear now, also very curious about new sexual experiences . . . but I have not been successful in having feelings for anyone else since the beginning of us."

Respondent eventually invited Ms. Binette to his condominium and she went there and engaged in sexual activity with him in the early morning hours of August 17, 2014.

After their get together at Respondent's condominium on August 17 and until approximately early December 2014, Ms. Binette and Respondent periodically exchanged friendly and affectionate text messages and they engaged in sexual conduct on two or more occasions in September and October 2014 at Respondent's condominium. The sexual relationship between them appears to have ended sometime around December 2014.

At various times subsequent to the termination of Ms. Binette's employment, Respondent expressed to her parents and others that she was afraid of Respondent and that Respondent had threatened her to keep her from testifying against him. Ms. Binette had an experience while swimming in Lake Memphremagog in July 2014 that caused her to believe that Respondent had arranged to have two African-American men from Connecticut come to Vermont and try to drown her or scare her by holding her under the water. In addition, she told her mother that Respondent had threatened to have her "turned into a New Jersey speed bump," which she understood to mean that she would be killed and thrown into a batch of asphalt if she complained about his conduct. Ms. Binette also reported to her parents a couple of events where she believed she was being held against her will – once when she reported waking up at a party at a neighbor's house with almost no clothes on and fleeing; another time when she allegedly ended up at party in Milton, Vermont, and felt that she had been drugged with a pill in her drink, woke

up, and subsequently fled. These allegations were reported to law enforcement authorities by either Ms. Binette or her parents. No charges were ever filed in connection with these allegations by Ms. Binette. These incidents were alleged to have occurred and were reported after Ms. Binette's employment ceased. The Lake Memphremagog incident was reported by Ms. Binette to her parents in approximately July 2014. There is insufficient evidence presented to determine the dates associated with the other incidents.

There was no evidence presented that Respondent threatened Ms. Binette at any time. Rather, these fears appear to have resulted from exacerbation of her PTSD and incidents of paranoia in the period subsequent to her employment. All of these reported incidents appear to be consistent with the behavioral profile associated with PTSD during periods of exacerbation, to which Dr. Kaufman testified. There were no incidents remotely akin to these that were reported prior to the termination of Ms. Binette's employment in Respondent's office.

Additional Findings Regarding Allegations of Sexual Harassment

The issue of whether or not the paper clip throwing by Respondent and his masturbation in front of Ms. Binette was unwelcome on her part was heavily contested at trial. After considering all of the evidence and judging the credibility of the witnesses, the Panel finds as follows:

Respondent's conduct in throwing paper clips at Ms. Binette's breasts and cleavage area was unwelcome on the part of Ms. Binette. Ms. Binette repeatedly asked Respondent not to do so. Respondent persisted in throwing paper clips at her after having been asked by Ms. Binette to stop. That conduct was unwanted and humiliating to Ms. Binette.

Ms. Binette credibly testified that in response to the paper clip incidents she engaged in "cutting" behavior at home and confronted Respondent with the scratches on her arms and asked

him to stop. She credibly testified that "I felt so disgraced that I just felt like I needed to dig it out of me" and that ". . . I just was so mad at myself for letting it happen, and I went to work the next day and I showed him, and I said, Look at my arms. I can't work for you when I am full of [...] and see just from my anxiety from last night to be here today, I'm all full of scratches." The Panel finds that Ms. Binette did not welcome Respondent's conduct.

Ms. Binette reported and complained about the paper clip incidents to her mother on several occasions. Although the first occasion when she reported it to her mother occurred sometime over the summer months, her report is still significant. She had no incentive to lie to her mother at that time. In addition, as addressed below, Ms. Binette reported to her psychiatrist, Dr. Kaufman, at an appointment in April 2012, that Respondent was making "unwanted unwelcome advances towards her." Although this report does not specifically refer to the throwing of paper clips, its timing is consistent with her testimony that the conduct occurred and that it was unwanted. Again, she had no motive to lie to Dr. Kaufman at that time.

In addition, after considering all of the evidence and judging the credibility of the witnesses, the Panel finds that Respondent's masturbation in July 2012 was not welcomed by Ms. Binette and that, in fact, she felt humiliated and disturbed by Respondent's masturbation. The fact that Ms. Binette told her mother immediately after the incident that "she was humiliated, embarrassed [and] felt terrible" is powerful evidence that corroborates Ms. Binette's testimony. Ms. Binette had no incentive to lie to her mother. She had previously told her parents that she loved her job.

Ms. Binette's report to Dr. Kaufman is also significant. In late July 2012 she told Dr. Kaufman that her boss was coming on to her and Dr. Kaufman observed her anxiety. This is the time period when the masturbation incident occurred. While Dr. Kaufman's notes do not

expressly refer to the specific incident, they nevertheless tie her state of mind directly to her boss's conduct and support her account.

In addition, Ms. Binette's August 7, 2012 email to Respondent complained to him about his "behavior and comments." Again, though the email did not specifically address the masturbation incident, Ms. Binette complained about Respondent's behavior not long after the masturbation incident reportedly occurred. Moreover, it is hardly surprising given her status as an employee and given the nature of the conduct in question that she would not put the graphic details of the incidents in her email to Respondent.

* * *

Respondent presented a variety of evidence designed to question Ms. Binette's testimony that Respondent's conduct was unwelcome and to otherwise undermine her credibility. The Panel is not persuaded.

Respondent's bookkeeper, Nekol Pyle, testified that while having lunch with Ms. Binette and Respondent in November 2012, Ms. Binette told her that she and Respondent were in a relationship and that she was happy about the September 2012 Agreement and the prospect of having an open relationship. But that testimony does not shed much light on the events that preceded the September 2012 Agreement. Moreover, the September 2012 Agreement did not guarantee that Respondent would stop throwing paper clips or masturbating in front of Ms. Binette at work.

The Panel finds that the March 2013 email and August 2014 text messages between Respondent and Ms. Binette deserve very little, if any, weight as evidence. The evidence from Dr. Kaufman demonstrated that Ms. Binette suffers from PTSD as well as attention deficit disorder. The behaviors that attend these mental disorders include impulsive actions, avoidance

behavior, chaotic functioning, and counter-phobic actions. Ms. Binette's post-employment communications with Respondent, during a time when she had lost her job and had no other prospects and was unquestionably under stress, are consistent with those behaviors.[11]

Moreover, the statements Ms. Binette made in August 2014 relating to the masturbation incident were actively incited by Respondent and part and parcel of a "sexting" communication that culminated with Respondent inviting Ms. Binette to have sex with him at his condominium – and extending that invitation in return for her withdrawing her allegations. The Panel cannot assign any significant weight to those statements. By contrast, the evidence that was generated while Ms. Binette was working for Respondent is entitled to great weight.

It is also important to recognize that the personal relationship that developed between Respondent and Ms. Binette was a complicated one from Ms. Binette's standpoint. She was grateful to Respondent for giving her a job and was in awe of him as a professional. In turn, he viewed himself as helping someone who no one else would help and he communicated that to Ms. Binette during her employment, in all likelihood encouraging feelings of owing him

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[11] Respondent objected the presentation of Dr. Kaufman's testimony on the grounds that he had not undertaken a "forensic" examination of Ms. Binette in relation to the specific time periods and events involved in this proceeding. But V.R.E. 702 allows any expert testimony that will "assist the trier of fact to understand the evidence or to determine a fact in issue" and allows for such testimony "in the form of an opinion or otherwise." That was the case here. The Panel notes that expert testimony from a qualified mental health professional that sheds light on behaviors associated with certain mental health conditions has been allowed in many instances when sexual conduct is at issue. In *State v. Lumumba*, 2014 VT 85, ¶ 5, 197 Vt. 315, 104 A.3d 627, the Court observed as follows: "In situations where a victim's behavior may seem superficially bizarre, for example, expert testimony can dispel misconceptions about the behavior of victims and show that the conduct of the complaining witness, however seemingly unusual, is consistent with the [victim] profile. [In a sexual assault case], [s]uch behavior might include a delay in reporting, *recantation or a continued relationship with an alleged abuser*." *Id.* (quotations omitted) (emphasis added); *see also State v. Hazelton*, 2009 VT 93, ¶ 13, 186 Vt. 342, 987 A.2d 915 (expert testimony that post-assault behaviors consistent with symptoms of PTSD); *State v. Gokey*, 154 Vt. 129, 133-34, 574 A.2d 766, 768 (1987) (expert testimony on "psychological dynamics" and "behavior patterns" may serve a "rehabilitative [function], where behaviors such as delay in reporting, recantation, or a continued relationship with the alleged abuser may be mistaken as impeaching the credibility of the child [victim].").

something and, alternately, guilt. Ms. Binette often enjoyed Respondent's company in the workplace and genuinely liked him and, in all likelihood, developed an interest in dating Respondent. At the same time, Ms. Binette was disturbed by his sexualized behavior.

The post-employment timing of the communications relied upon by Respondent is also noteworthy. Ms. Binette truly loved her job and was sad about losing it, as well as her friendship with Respondent, and had no job prospects at the time or any financial resources. She was thirty years old and living at home with her parents. She was emotionally vulnerable. In the August 2014 text messaging exchanges, Respondent played on those vulnerabilities (whether intentionally or unintentionally), encouraging her to withdraw her allegations.

At the time Respondent was aware that those allegations were under investigation by Disciplinary Counsel. In addition, he was aware of Ms. Binette's mental health issues. He had previously stated to the state police detective who interviewed him in July 2013 that Ms. Binette had mental health issues that affected her decision making. It is difficult to understand why Respondent proceeded to communicate with Ms. Binette under the circumstances, let alone why the Panel should place any weight on those communications. Ms. Binette's post-employment communications with Respondent cannot viewed as the product of someone who is freely recanting prior allegations.

Moreover, the fact that Ms. Binette may have wanted in August 2014 to have a sexual relationship with Respondent at his condominium, and proceeded to pursue such a relationship, has very little if any bearing on whether the Respondent's conduct that occurred previously in the workplace while she worked for Respondent was unwanted at that time. Ms. Binette could have been interested in having a relationship with Respondent outside the workplace and still not have welcomed the conduct that took place in the workplace. Likewise, the fact that Ms. Binette

had sexual intercourse with Respondent on New Year's 2012 at his condominium – not in the workplace – six months after the masturbation incident and after Respondent had recently started seeing a mental health therapist (which she reported to Dr. Kaufman in December 2012 as a positive development) – reveals very little.

In an attempt to undermine Ms. Binette's testimony regarding the paper clip incidents, Respondent presented two witnesses. In a 2017 deposition, Respondent elicited from Ms. Binette's mother a statement to the effect that her daughter had identified those two individuals as having been present during a paper clip incident. The witnesses testified at the hearing that they did not observe any throwing of paper clips at Ms. Binette. Their testimony does not convince the Panel to disbelieve Pamela Binette's testimony. First, Pamela Binette denied that she had identified those particular individuals in question to her mother. In addition, Diane Binette pointed out in her testimony at the hearing that the conversation with her daughter had occurred more than five years earlier, suggesting that the mother's memory could have been faulty in 2017.

Moreover, the scope of the testimony by the two individuals is narrow. Alan Franklin testified that he "may have been" in Respondent's office a total of one time and James Roy recalled seeing Ms. Binette on only one occasion. In contrast to that testimony, even Respondent has testified that he threw paper clips at Ms. Binette on multiple occasions – though not conceding that he targeted her breasts. The Panel also observes that any male employer who throws a "scoop" of paper clips on a female administrative assistant – or for that matter who randomly throws individual paper clips at a female assistant – should reasonably expect that such conduct might strike the assistant's chest area and be offensive to the assistant.

Respondent attempts to rely on a note he wrote to Ms. Binette in the office at some point in time after the September 2012 Agreement was signed. Respondent wrote: "At 5 a.m. when I waken you drive me crazy. U Drive my pants crazy! You make me wanna M.B." Respondent testified that "M.B." meant masturbate. Ms. Binette responded with "That's very nice!! [smiley face] Hope you enjoy the craziness in your pants." Exhibit R-6. It is noteworthy that this communication was initiated by Respondent, not by Ms. Binette. In addition, the response from Ms. Binette is hardly as graphic as Respondent's note and can be viewed as a response of an employee to a boss that does not say too little or too much. Also, there is no date in evidence for this communication so that it is unclear whether it was sent after Respondent started his mental health therapy or before. Given that Ms. Binette was encouraged by Respondent deciding to get therapy (as she stated to Dr. Kaufman), the timing of this note could have affected her response. Likewise, the note must be considered along with the fact that Ms. Binette depended on Respondent for continued employment and to obtain cash advances between paychecks. In light of all this evidence, the Panel cannot place any significant weight on the note.[12]

The testimony of Christian Cornelius was both vague and inconsistent. On one hand, he testified that Ms. Binette had recanted her allegations, without any specific details as to when that occurred or the circumstances. At the same time, he indicated that Ms. Binette had told him that "Glenn Robinson had made her pull his tie . . . it was kind of a feeling that what she was talking about was something like a leud [sic] act" while then expressing his own opinion that "what she was actually talking about, I think the more precisely-accurate that she should have

[12] The Panel also observes that Respondent's act of sending that note to Ms. Binette in the workplace was inconsistent with the provision he drafted in the September 2012 Agreement that "there must be a clear separation between [the parties] professional and personal lives, both between themselves and . . . the general public, including the firm's clients." ¶ 1 (emphasis added).

said was straighten his tie *** she kind of made me to believe she was talking about a leud [sic] act." His testimony is, at best, ambiguous.

Finally, Respondent has not demonstrated through any evidence that Ms. Binette lied based on jealousy. Even assuming that Ms. Binette was bothered by Respondent's engaging in sexual activity with his client during the after-hours incident in the conference room, that event occurred near the end of Ms. Binette's employment. The paper clip throwing began and the masturbation incident occurred much earlier and there is earlier-generated evidence that corroborates Ms. Binette's testimony. Likewise, the hiring of Ms. Poutre occurred at the very end of Ms. Binette's employment.

RESPONDENT'S CONDUCT RELATED TO ANDREA POUTRE

In approximately 2002, Ms. Poutre retained Respondent and his step-father to represent her in connection with civil claims that had been asserted against her. At the time, Ms. Poutre was either being sued or threatened with suit in connection with a car accident that resulted in a fatality. The decedent, who was Ms. Poutre's best friend, was in a car along with Ms. Poutre when the car crashed. Ms. Poutre was injured in the accident.

Approximately eighteen months later when Ms. Poutre was charged criminally with the offense of driving under the influence of alcohol with a death resulting ("the DUI charge") in connection with the same accident, Respondent volunteered to serve as local counsel in Orleans County for a Burlington attorney who handled the defense of the DUI charge. Respondent attended to minor matters such as status conferences, attended hearings along with lead counsel, and drove from time to time with Ms. Poutre to meetings with lead counsel in Burlington.

The civil claims against Ms. Poutre were not pursued further and Respondent's law firm refunded Ms. Poutre's retainer that had been paid in connection with that representation. In

2004, Ms. Poutre pled nolo contendere to the DUI charge. She was incarcerated for sixty days and placed on probation. Respondent's law firm did not charge Respondent for the legal services rendered in connection with the civil claims or in connection with the criminal charges.

At the time of the car accident in 2002, Ms. Poutre was twenty-one years old and had a child who was one and one-half years old. She was divorced from the father of her child. She had received a high school diploma and a degree in cosmetology from O'Brien's School of Cosmetology and was working as a hair stylist in a local hair salon.

At some point in time – either during his representation of Ms. Poutre in the criminal proceeding or following the sentencing of Ms. Poutre in 2004 – Respondent began to have his hair cut by Ms. Poutre approximately every three weeks at the local hair salon where she worked.[13] At some point in time, Ms. Poutre stopped charging Respondent for his haircuts and stated that she was doing so to give him something of value in return for his unpaid services. He accepted those gratuities. Respondent continued having his hair cut by Ms. Poutre until approximately 2007, when Ms. Poutre stopped working at the hair salon.

Respondent testified that he developed romantic feelings for Ms. Poutre when he first met her in 2002, that he was "awestruck by her, you know, who wouldn't be" and commented to his step-father at that time that Respondent was "a sharp woman." At some point between 2004 and 2007, Respondent invited Ms. Poutre to his house for a bonfire. Ms. Poutre came to that event with her sister.

[13] Respondent's testimony was inconsistent on the timing issue. He initially testified that he first met Ms. Poutre at the consultation regarding the civil claims filed against her. But he later testified that he first met Ms. Poutre through her giving him hair cuts. And later in the hearing, with prompting from his counsel, he testified that he did not start having his hair cut by Ms. Poutre until after she was sentenced on the DUI charge.

Ms. Poutre was charged with several violations of her probation ("VOP") over the years. The first VOP charge was filed in May 2007; the second in May 2011; the third in May 2012; and the fourth in October 2012. Respondent volunteered to represent Ms. Poutre in connection with each of the VOP proceedings and did not charge Ms. Poutre for any of his legal services in connection with those proceedings.

Ms. Poutre is addicted to opiates. She has been in treatment for opiate addiction since approximately 2011.

In 2007, Ms. Poutre gave birth to an opiate-addicted child due to her use of opiates during the pregnancy. The first VOP charge, filed in May 2007, was based on Ms. Poutre's use of opiates.

The first VOP charge resulted in a determination that Ms. Poutre had violated her probation, and she was incarcerated for some period of time. In addition, she was fired from her job at the hair salon around this time. Following her release from prison, she continued to be under probation. Respondent represented Ms. Poutre on the charge and did not bill her for his legal services.

Around this time, Ms. Poutre's ex-husband filed a motion seeking custody of Ms. Poutre's first child based on Ms. Poutre's opiate addiction. Respondent represented Ms. Poutre and did not charge for his legal services. The motion resulted in custody of Ms. Poutre's first child being awarded to her ex-husband. Following this determination, Respondent did not have any further interaction with Ms. Poutre until approximately May 2011, when the second VOP charge was filed against her.

The second VOP charge resulted in an amendment of the conditions of probation and continuation of probation. Respondent represented Ms. Poutre in connection with the second

VOP charge and did not charge for his legal services.

Respondent represented Ms. Poutre again in May 2012 in connection with the third VOP charge and, again, did not charge for his legal services. The charge resulted in another amendment of the conditions of probation and continuation of probation.

In July 2011, Ms. Poutre worked for approximately two weeks in Respondent's law office while his administrative assistant was on vacation. She worked for no pay, apparently in order to give something of value to Respondent in return for his legal services.

Respondent and Ms. Poutre had occasional interactions outside the law office setting between May 2011 and the fall of 2012. On one occasion, Ms. Poutre invited Respondent to her house for a barbecue and he attended.

In October 2012, Ms. Poutre was charged with a fourth violation of her probation. She admitted the violation. Respondent represented her in connection with the sentencing. Again, he did not charge her for his legal services.

The judge presiding over the sentencing hearing decided to modify Ms. Poutre's sentence so that, although she would have to serve some time in jail, her sentence would expire relatively soon and she would be released on furlough. Both Respondent and Ms. Poutre considered the outcome to be a good one.

Immediately following the sentencing hearing in early January 2013, Respondent and Ms. Poutre went back to Respondent's law office so that Ms. Poutre could get her purse and then go home. While Respondent and Ms. Poutre were in the office, Respondent masturbated to ejaculation in his pants in the presence of Ms. Poutre. Following the incident, Ms. Poutre left the office and met her boyfriend who was waiting in a car outside. Respondent became aware at some point during the interaction with Ms. Poutre that her boyfriend's car was outside the office.

A few days after the January 2013 masturbation incident, Respondent gave Ms. Poutre a ride to the Chittenden Correctional Facility to begin serving her sentence. She was incarcerated for approximately eleven days and was released on Thursday, January 24, 2013.

On the date of the sentencing hearing on the fourth VOP charge, Respondent offered Ms. Poutre a job as an administrative assistant in his office.[14] Ms. Poutre agreed to take the job. At the time, she was unemployed, her boyfriend had been without a job for two years, and she had two children. She testified credibly that "[i]t was just a way to make money at a really bad time."

Following her release, Ms. Poutre worked as an administrative assistant for Respondent for approximately five weeks. Respondent paid her at the rate of $9 per hour. During that time, she was paid on a weekly basis as a "cash" advance, with a check written by Respondent; however, she received only one "paycheck" over that period of time with a pay "stub" that reflected the withholding of income taxes and Social Security for the five-week period of time.

Towards the end of February 2012, Ms. Poutre's probation officer asked her for some form of proof of her employment. At the time, Ms. Poutre had not yet received a paycheck with a pay stub reflecting withholding of taxes and Social Security and therefore did not have a paycheck record to provide. Following a discussion between Ms. Poutre and Respondent and with Respondent's permission, Ms. Poutre generated a "fake" paycheck stub for herself using the office's QuickBooks system and delivered that document to her probation officer. Exhibit DC-7. The information in that document concerning withholding was consistent with the paycheck that

[14] Ms. Poutre testified that the offer was made "after court" the day of the sentencing hearing and again on the drive to the Correctional Facility. The Panel finds her testimony to be credible. Respondent testified that "before she went into the jail [they] had agreed" that she would start work when she was released from jail. Respondent's testimony was vague and unconvincing as to the timing of the job offer. The Panel finds Ms. Poutre's testimony credible on this point.

was eventually issued by Respondent's bookkeeper at the conclusion of Ms. Poutre's employment. However, the pay stub had not yet been generated by the bookkeeper and no withholding had occurred as of the point in time when Ms. Poutre generated the fake pay stub. Respondent was aware that the document had been generated by Ms. Poutre and that it was provided to Respondent's probation officer.

Based on the evidence presented, the Panel is unable to determine by clear and convincing evidence whether the probation officer was seeking a pay stub reflecting withholding of taxes and Social Security or simply some evidence from her employer that she was, in fact, employed at that time. The Panel notes that Disciplinary Counsel did not present any testimony at the hearing by Ms. Poutre's probation officer or by any other representative of the Probation and Parole Office who might have addressed the practice that was in effect at that time. In addition, even assuming the probation officer was seeking a pay stub demonstrating that withholding had occurred, the Panel is unable to determine by clear and convincing evidence that Respondent understood that to be the case.

During the time that Ms. Poutre worked in the office, she spent a substantial amount of time with little work to do. She did not assist Respondent with the production of any of his written work. Aside from opening the mail and attending to random small tasks assigned by Respondent, she spent all of her time either sitting with Respondent in his office or accompanying him in meetings or in court. They sometimes watched You Tube videos together in the office. Respondent and Ms. Poutre engaged in flirtatious conduct in the office and there was physical contact between them. The conduct included "slapping on the butt," the use of foul

language,[15] and sexualized banter. The Panel finds that both Respondent and Ms. Poutre initiated and participated in this conduct.

Respondent tried to suggest in his testimony that "the way [Ms. Poutre] dressed and the way that she talked" amounted to flirtatious conduct. But there was no evidence that Ms. Poutre dressed inappropriately or that Respondent ever took any steps to ask her to dress any differently or to talk or behave any differently in the office. Rather, the Panel finds that Respondent actively encouraged flirtatious conduct and also initiated it himself.

In addition, Respondent talked to Ms. Poutre about his sexual experiences with other women, including Ms. Binette. He told Ms. Poutre about having participated in sex in the conference room with Ms. Binette and his client and how, on another occasion, he had ejaculated in his pants in the office following a "striptease" by Ms. Binette.

Sometime after the January 2013 masturbation incident that preceded Ms. Poutre's incarceration and while she was working in Respondent's office, Respondent masturbated to ejaculation in his pants once again while in the office and in the presence of Ms. Poutre. There is insufficient evidence to determine the date of the incident.

On March 8, 2013, Ms. Poutre was arrested at Respondent's law office and shortly thereafter charged with embezzling funds from the law firm. Several months later, the embezzlement charge was dismissed.

While the embezzlement charge was pending against Ms. Poutre she was incarcerated for several months. In early April 2013, while she was incarcerated, she filed a sexual harassment

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[15] One note for Respondent that was handwritten by Ms. Poutre read "Hook the Shit up . . . Bitch!" Exhibit R-KKK. Ms. Poutre testified that the note was requesting that Respondent hook up a fax machine or telephone. Respondent testified that he thought communications like these were fun and amounted to joking. The evidence presented in the hearing showed that he tolerated and encouraged such communications in his office.

claim against Respondent. The charge was investigated by a state police detective. The detective interviewed Ms. Poutre and, at her suggestion, also interviewed Ms. Mead and Ms. Binette. After completing those interviews, he interviewed Respondent in July 2013. Following the completion of the investigation, no criminal charges were filed against Respondent related to Ms. Poutre's allegations. However, the matter was referred in 2013 to the Professional Responsibility Program.

Prior to asserting a sexual harassment complaint against Respondent while she was incarcerated on the charge of embezzlement, Ms. Poutre had not complained to Respondent about any of his conduct, nor had she told anyone about her allegations of sexual harassment against Respondent.

Additional Findings Regarding Allegations of Sexual Harassment

Based on all the evidence presented and after assessing the credibility of the witnesses, the Panel is unable to find by clear and convincing evidence that the masturbation to ejaculation by Respondent in the presence of Ms. Poutre occurred on more than two occasions. Likewise, the Panel is unable to find by clear and convincing evidence whether Respondent's masturbation and other referenced conduct by Respondent such as "slapping on the butt" and telling stories of his sexual involvement with other women was unwelcome from Ms. Poutre's perspective.[16]

[16] In reaching this conclusion, the Panel did not give any weight to evidence presented by Respondent as to Ms. Poutre's reputation for honesty (through the testimony of Ms. Poutre's ex-husband) and Respondent's reputation for honesty (through the testimony of his step-father). That testimony deserved very little, if any, weight given the general nature of the testimony and the obvious or potential bias of those witnesses by virtue of their relationship to Ms. Poutre or Respondent.

CONCLUSIONS OF LAW

I.

Respondent's Conduct Related to Ms. Mead

Disciplinary Counsel alleges that Respondent violated Rule 1.7 by engaging in a sexual relationship with Ms. Mead at the same time he was representing her in a divorce action. The evidence shows that Respondent undertook the representation of Ms. Mead shortly after she filed for divorce; that a sexual relationship between Respondent and Ms. Mead began within a few months thereafter; that the sexual relationship continued up to and including the date of the final divorce hearing, on which date Respondent negotiated a settlement agreement on behalf of Ms. Mead; that Respondent told Ms. Mead shortly after the settlement that he was ending the relationship; and that he had been privately planning to end the relationship for at least a month.

Rule 1.7 states as follows:

> (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 of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (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*.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

V.R.Pr.C. 1.7 (emphasis added).

Although Ms. Mead has attempted to call into question the adequacy of Respondent's representation of her in the divorce action, whether or not Respondent's representation was adequate is not the issue under Rule 1.7 and will not be addressed. Rather, the issue is whether Respondent's personal interest in having a sexual relationship with Ms. Mead resulted in a significant risk that his representation of her would be materially limited. Respondent argues that the absence of an express provision prohibiting sexual relations with a client led him to believe that a relationship was permissible; that he researched the issue prior to entering into the relationship; that he reasonably believed based on his research that he could represent Ms. Mead in the divorce action while in a sexual relationship with her; that he discussed the issue with Ms. Mead and that she consented to his representation; and that the impending breakup of the relationship did not impair his representation and, on the contrary, only caused him to work that much harder to provide diligent representation.

At the outset, the Panel rejects Respondent's suggestion that he was entitled to rely on the absence of an express prohibition and that he undertook a diligent inquiry before embarking on the sexual relationship. The Comments to Rule 1.7 in effect at the time in question included the following statement: "These rules do not expressly prohibit a lawyer from engaging in a sexual relationship with a client, *but such relationships could give rise to a variety of violations of specific provisions of the rules.* See Rule 1.8, Comment [17]." Rule 1.7, Comment 12 (emphasis added). In turn, Comment 17 of Rule 1.8 stated as follows:

> The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between

> lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic obligation not to use the trust of the client to the client's disadvantage. In addition, *such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of professional judgment*. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. For all of these reasons, *lawyers are cautioned that sexual relations with a current client could give rise to claims of* incompetence under Rule 1.1, of lack of diligence under Rule 1.3, of *a conflict with the lawyer's personal interests under Rule 1.7(a)(2)*, of using client information to the client's disadvantage under Rule 1.8(b), of conduct involving dishonesty or the like under Rule 8.4(c), of or conduct prejudicial to the administration of justice under Rule 8.4(d).

V.R.Pr.C. 1.8, Comment 17 (emphasis added).[17]

In sum, the comments in the Rules put Respondent on notice that sexual relations with a client could violate Rule 1.7, among other provisions.

Several courts in jurisdictions without an express provision prohibiting sexual relations between an attorney and his or her client have addressed a situation where an attorney had sexual relations with the attorney's divorce client, concluding that even a consensual sexual relationship violates Rule 1.7 because of the nature of a divorce proceeding. In *Attorney Grievance Commission of Maryland v. Culver*, 849 A.2d 423 (Md. Ct. App. 2004), the Maryland Court of

[17] Rule 1.8 was recently amended, effective March 12, 2018, to expressly prohibit a lawyer from having sexual relations with a client, subject to a limited exception: "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced." *See* Rule 1.8(j). The amendment also removed the last sentence of Comment 17; however, a comment adopted at the same time cautions that even when a consensual sexual relationship exists prior to commencement of an attorney-client relationship, "the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2)." Comment 18 (eff. 3/12/18). Of course, the charges in this proceeding must be decided on the basis of the prior provisions and comments that were in effect at the time of the events alleged.

Appeals held that an attorney who engaged in a sexual relationship with his divorce client had "an inherent conflict of interest." *Id.* at 442. It concluded as follows:

> In a domestic relations matter, when the grounds for divorce, child custody, alimony, or the distribution of marital assets are at issue, the attorney knows or should know that a sexual relationship with the client has the potential to jeopardize the client's case. In such circumstances, an attorney who engages in sexual relations with the client violates Rule 1.7(b).

Id. at 443.[18]

In adopting a bright-line rule, the *Culver* Court made clear that an inherent conflict of interest is present even when sexual relations are consensual. *See id.* ("We agree with those courts that have held that an attorney who engages in sexual relations with a client, *whether consensual or not*, while representing that client in a matrimonial matter, jeopardizes the client's rights and engages in an inherent conflict of interest in violation of Rule 1.7(b).") (emphasis added).[19]

In another case where the pertinent rule did not contain an express prohibition, the Supreme Court of Rhode Island reached the same conclusion, reasoning as follows:

> Any competent attorney practicing in the area of domestic-relations law must be aware that the sexual conduct of a divorce client may have a significant bearing on that client's ability to secure child custody and in the determination of the distribution of marital assets. The attorney who engages in sexual relations with his or her divorce client jeopardizes the client's rights. The lawyer's own interest in maintaining the sexual

[18] The language of Maryland's Rule 1.7 at issue in *Culver* differed somewhat from Vermont's Rule 1.7, but the differences are not material with respect to the issue presented in this case. The rule at issue in *Culver* provided as follows: "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation." 849 A.2d at 435. If anything, Vermont's rule is more rigorous by requiring, among other things, that any consent be in writing.

[19] In a subsequent attorney disciplinary proceeding, the Maryland Court of Appeals affirmed in the strongest terms its continuing adherence to that application. *See Attorney Grievance Commission of Maryland v. Hall*, 969 A.2d 953, 964 (Md. Ct. App. 2009) (observing that "an attorney's mere engagement in sexual relations with a client in a domestic relations matter is a *per se* violation of Rule 1.7(b)").

> relationship creates an inherent conflict with the proper representation of the client.

Matter of DiPippo, 678 A.2d 454, 456 (R.I. 1996).

Other courts have reached similar conclusions. *See, e.g., In re Halverson*, 998 P.2d 833, 840 (Wa. 2000) (concluding that respondent's belief that he could engage in sexual relations with his divorce client was not objectively reasonable and observing that the respondent should have known that discovery of his affair with his client could worsen the relationship between his client and her husband and thereby "complicate the dissolution proceeding" and, in addition, could impact the child custody determination); *State ex rel. Oklahoma Bar Assoc. v. Downes*, 121 P.3d 1058, 1066 (Ok. 2005) (upholding a determination that respondent's consensual sexual relationship with his client was adverse to her interests in a divorce proceeding, in violation of Rule 1.7, and observing that "[t]he dangers [associated with such relationships] include: (1) destroying the chances of reconciliation, (2) impairing the attorney's independent judgment, and (3) if the property division or the minor children's custody is contested, making the attorney a focal point of the proceedings and a potential witness."). The Panel agrees with the conclusions and reasoning of these courts.

Respondent argues that this particular divorce proceeding did not present any issues that would trigger concerns about the sexual relationship. According to Respondent, Ms. Mead did not want to contest the issue of physical custody over her children and Ms. Mead's husband had embarked on his own relationship and would not have been bothered by his soon-to-be ex-wife having a relationship with her attorney. But given the nature of a divorce proceeding, any such belief was not objectively reasonable. Whatever position Ms. Mead may have taken at one point in time would not have precluded a later change in position. Moreover, Respondent's assertion that Ms. Mead's husband would not have cared amounts to unbridled speculation.

The Panel rejects Respondent's assertion that he reasonably believed that he could represent Ms. Mead while having a sexual relationship with her and that he obtained her consent. Under Rule 1.7, if a concurrent conflict of interest exists, the lawyer nevertheless may proceed with the representation if he or she meets all the requirements of subsection (b). That provision requires, among other things: (1) a reasonable belief that the lawyer will be able to provide competent and diligent representation under the circumstances; and (2) the client's informed consent, in writing. *See* V.R.Pr.C. 1.7(b)(1) & (4).

Assuming Respondent could rely on his subjective belief that his relationship with Ms. Mead did not pose a risk of undermining his representation of her, the fact that Respondent avoided going out with Ms. Mead in the Newport area suggests that he did actually harbor concerns or uncertainty about whether the relationship was ethically acceptable. But, in any event, the "reasonable belief" requirement sets forth an **objective** standard – it does not contemplate a subjective belief. When an inherent conflict is present – as this Panel has concluded is present here – a lawyer cannot rely on his or her subjective belief. Finally, even if Respondent could establish a reasonable belief, there was no evidence presented by Respondent that Ms. Mead ever gave informed consent in writing.

Respondent's arguments also overlook the fact that the basic purpose of a divorce proceeding is to dissolve a marriage – a marriage in which the two parties presumably engaged in a sexual relationship – and that the issues presented in such a proceeding are often emotionally charged. There is an inherent risk in this type of case that the relationship between the parties for purposes of pursuing either a potential settlement or a contested resolution of the litigation can be worsened by the discovery that one of the parties is having sex with his or her attorney. An attorney's perceptions of whether a sexual relationship with a divorce client are likely to result in

potential harm to the client are simply unreliable in an emotionally charged environment such as a divorce proceeding.

There were additional factual circumstances that should have caused Respondent to question the wisdom of being in a sexual relationship with Ms. Mead while he was representing her. Because Ms. Mead was not paying him for his legal services and, in addition, because he was employing her in his tanning salon business, there was a risk that the combination of Respondent foregoing payment for his legal services and providing income to Ms. Mead, in combination with the sexual relationship, would cause her to not question Respondent sufficiently on his representation of her or to accept less information than she would otherwise have accepted from a lawyer representing her. And, though it may have been well-intentioned, Respondent's statements that Ms. Mead could stay at his condo to alleviate her financial circumstances following the divorce and that he would continue to help her in the future (presumably without charging her) ended up inserting the relationship into the divorce calculus.

Finally, the fact that Respondent intended, at least one month prior to the scheduled final divorce hearing, to end his relationship with Ms. Mead and to commence a sexual relationship with Ms. Binette and that he then proceeded to end the relationship with Ms. Mead right after the settlement in June 2012 could not help but raise questions in Ms. Mead's mind as to his representation of her and engender a feeling of abandonment.

When Respondent ended the relationship within days after the final divorce hearing, there was every reason for Ms. Mead to wonder whether Respondent had diligently represented her – whether he did or not. It is hardly surprising that Ms. Mead believes – whether that belief is valid or not – that Respondent did not zealously represent her interests in connection with the divorce settlement agreement.

In sum, by engaging in a sexual relationship with Ms. Mead while at the same time representing her in a divorce action up to and including the final divorce settlement, Respondent violated Rule 1.7.

II.

Respondent's Conduct Related to Ms. Binette

A. Rule 4.3

Disciplinary Counsel alleges that Respondent gave legal advice to Ms. Binette in connection with the September 2012 Agreement, in violation of Rule 4.3.

Rule 4.3 states as follows:

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

V.R.Pr.C. 4.3.

Rule 4.3 creates three obligations: (1) an obligation to refrain from "stat[ing] or imply[ing] that the lawyer is disinterested"; (2) an obligation to "make reasonable efforts to correct [a] misunderstanding [when the lawyer knows or should reasonably know that the unrepresented person misunderstands the lawyer's role in the matter]"; and (3) an obligation to refrain from "giv[ing] legal advice to an unrepresented person, other than advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."

Comment 1 to Rule 4.3 states that:

> [a]n unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client, and where necessary, explain that the client has interests opposed to those of the unrepresented person.

Id., Comment 1.

Comment 2 states that:

> In [situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client], the possibility that the lawyer will compromise the unrepresented person's interests is so great that the rule prohibits the giving of any advice, apart from the advice to obtain counsel. *Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur.*

Id., Comment 2 (emphasis added).

Comment 2 goes on to state:

> This rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

Id.

Respondent had "dealings" with Ms. Binette related to the September 2012 Agreement. In late May or early June 2012 he participated in a conference call with his step-brother and Ms. Binette to discuss the drafting of an agreement. He subsequently presented to Ms. Binette a draft agreement that was produced by Respondent's step-brother. The evidence also showed that Ms. Binette was unrepresented in those dealings with Respondent.

Moreover, the Panel concludes that Respondent should be considered both a lawyer and client within the meaning of those terms in Rule 4.3 under the factual circumstances presented. In *Barrett v. Virginia State Bar ex rel. Second Dist. Comm.*, 634 S.E.2d 341, 345 (Va. 2006), the Virginia Supreme Court held that an attorney could be disciplined, under several model rules that reference conduct involving representation of a client, when the attorney was acting on his own behalf. It reasoned that interpreting the rules in a way that would prevent lawyers from being held accountable when acting on their own behalf would conflict with the purposes of the state's professional responsibility program. *Id.* at 345. The *Barrett* court opined as follows:

> It would be a manifest absurdity and a distortion of these Rules if a lawyer representing himself commits an act that violates the Rules but is able to escape accountability for such violation solely because the lawyer is representing himself. *Attorney Grievance Commission v. Alison,* 317 Md. 523, 565 A.2d 660, 668 (1989) (intent and purpose of Maryland's version of Rule 4.4 served only by applying construction that lawyer is representing client when he represents self); *Montgomery County Bar Ass'n v. Hecht,* 456 Pa. 13, 317 A.2d 597, 601-02 (1974) (anomalous to condemn lawyer's knowing participation in introduction of perjured testimony by client and condone giving such testimony by lawyer himself).

Id. at 345.

The underlying purposes of the Rules of Professional Conduct are "to protect the public from harm and to maintain confidence in our legal institutions by deterring future misconduct." *See, e.g., In re Obregon*, 2016 VT 32, ¶ 19, 145 A.3d 226, 231 (2016). Likewise, "[a] presumption obtains against a construction that would lead to absurd results." *State v. Longley*, 2007 VT 101, ¶ 10, 182 Vt. 452, 459, 939 A.2d 1028, 1033 (2007). Rule 4.3 is designed to protect unrepresented persons from being taken advantage of. The observation in Comment 1 – that "even when the lawyer represents a client" there is a risk that an unrepresented person will assume that a lawyer is looking out for the unrepresented person's interests – suggests that such a risk is even greater when dealing with a lawyer one-on-one. The Panel

concludes that Respondent should be considered, in connection with the September 2012 agreement, to have been dealing on behalf of a client (himself) within the meaning of that phrase in Rule 4.3.[20]

Respondent makes the ambivalent assertion that he "may have been represented" by his step-brother in connection with the agreement because his step-brother prepared the initial draft of the agreement. But even assuming that his step-brother represented him when he prepared the draft, the step-brother had no dealings with Ms. Binette other than the conference call. The step-brother transmitted a draft agreement to Respondent, who then presented it to Ms. Binette. In addition, the step-brother had no involvement in the process of revising the draft agreement that occurred four months later. Respondent drafted those changes to the agreement and presented the revised agreement to Ms. Binette. Respondent represented himself in his dealings with Ms. Binette.

The next question is whether Respondent gave legal advice to Ms. Binette under circumstances where he knew or reasonably should have known that her interests were or had a

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[20] Respondent attempts to disregard *Barrett* because the court there observed that attorneys who represent themselves in litigation routinely act as both lawyer – by appearing in a case – and client – by "providing testimonial or documentary evidence," 634 S.E.2d at 345. That case happened to involve an application of Rule 4.4; however, the public-protection rationale for the decision was primary to the decision and is equally applicable under Rule 4.3. Respondent's reliance on two cases is also misplaced. In *Sack v. Sullivan*, 1999 WL33437564 (Mich. Ct. App), an unpublished intermediate appellate court opinion, the court concluded that a lawyer who was an unrepresented party to a real estate agreement could not be considered to be "dealing on behalf of a client" under Michigan's Rule 4.3. *Id.* *2. But the text of the rule at issue in *Sack* did not include the "shall not give legal advice to an unrepresented person" language in the third sentence of Vermont's rule and the court's statement consisted of one sentence without any analysis of the rule's underlying purpose – protection of the public. In *Pinsky v. Statewide Grievance Committee*, 578 A.2d 1075 (Ct. 1990), the court held that an attorney who was being represented by another attorney in pending litigation did not violate Rule 4.2 when he communicated with the opposing party who was represented by counsel. But the court relied upon language in the Comments to Rule 4.2 it interpreted as suggesting the appropriateness of such communications in addition to the reference to the "representing a client" language in the rule. Moreover, the majority of courts have rejected the holding in *Pinsky*. *See In re Disciplinary Action Against Lucas*, 789 N.W.2d 73, 76 (N.D. 2010) (stating that "[m]ost courts have held that Rule 4.2 applies to attorneys representing themselves because it is consistent with the purpose of the rule" and citing cases from other jurisdictions).

reasonable possibility of being in conflict with his interests. The "giving of legal advice" is a fact-specific concept that takes into account both the conduct of the attorney and the reasonable perceptions of the unrepresented person. *See, e.g., Attorney Q v. Miss. State Bar*, 587 So. 2d 228, 234 (Miss. 1991) (concluding that a "don't worry about it" statement where consequences flowed from a document presented in litigation constituted the giving of legal advice and that the appropriate focus is not on what the lawyer intended but on what the unrepresented person "may reasonably have heard and understood," taking into consideration the person's background).

Respondent argues that there was no evidence that he gave legal advice to Ms. Binette and that his dealings with Ms. Binette were in the nature of negotiating the terms of a transaction – as opposed to a communication in connection with litigation – and, as such, his dealings with her were permitted under the language in Comment 2 indicating that "[t]his Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person."

That sentence in Comment 2 must be read together with the next sentence in the comment. The Comment does not allow a lawyer to give legal advice to an unrepresented person in connection with a transaction. Rather, it allows a lawyer to undertake some limited interactions with an unrepresented person in connection with a transaction, provided that the lawyer has taken some prophylactic steps. In the event that a lawyer "has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations." V.R.Pr.C.

4.3, Comment 2. The lawyer is still prohibited by the Rule from giving legal advice "other than advice to seek counsel" when a conflict of interest is present.

Taking into account all the factual circumstances, the Panel concludes that Respondent gave what amounted to legal advice to Ms. Binette to enter into the agreement, knowing that his interests with respect to the waiver clause were in conflict with those of Ms. Binette. The draft agreement Respondent presented to Ms. Binette included language purporting to "set forth terms that protect both Employer and Employee." Respondent's conduct in presenting the draft that included this language was tantamount to giving her legal advice that the agreement was sufficiently protective of her interests. Likewise, the revised final version of the agreement that Respondent presented to Ms. Binette in September 2012 included the same language.

In reaching this conclusion, the Panel has taken into account Ms. Binette's relative lack of experience and sophistication, as well as the setting. Ms. Binette's educational background and work experience were extremely limited. She was unsophisticated and unprepared to handle a matter that involved a waiver of her rights. This was not a commonplace transaction. On the contrary, it was highly unusual. In addition, the setting is relevant. The agreement was presented to her in the workplace by her boss – on whom she was dependent for employment and who was expressing a desire to enter into a romantic relationship with her. She was presented with an agreement indicating that her boss, who was a lawyer, intended for the agreement to protect her interests as well as his. Under these circumstances, the presentation of the agreement to Ms. Binette amounted to giving legal advice to her.

Moreover, some jurisdictions have concluded that presenting a legal document, which includes a waiver of claims, to an unrepresented person in certain situations can be tantamount to providing legal advice and should be avoided unless the opposing party obtains representation.

In North Carolina Ethics Opinion #2015-1, it was opined in connection with Rule 4.3 "that a lawyer may not prepare pleadings and other filings for an unrepresented opposing party in a civil proceeding currently pending before a tribunal if doing so is tantamount to giving legal advice to that person." The opinion sets forth the following guidance:

> A lawyer must avoid the overreaching which is *tantamount to providing legal advice to an unrepresented opposing party*. The lawyer should consider whether: (1) *the rights, if any, of the unrepresented opposing party will be waived, lost, or otherwise adversely impacted by the pleading or filing, and the significance of those rights*; (2) the pleading or filing solely represents the position of the unrepresented opposing party (e.g., an answer to a complaint); (3) the pleading or filing gives the unrepresented opposing party some benefit (e.g., acceptance of service to avoid personal service by the sheriff at the person's home or work place); (4) the legal consequences of signing the document are not clear from the document itself (e.g., the hidden consequences of signing a waiver of right to file an answer in a divorce proceeding has hidden consequences); (5) the pleading or filing goes beyond what is necessary to achieve the client's primary objectives; or (6) the pleading or filing will require the signature of a judge or other neutral who can independently evaluate the pleading or filing. *If a disinterested lawyer would conclude that the unrepresented opposing party should not agree to sign the pleading or filing under any circumstances without advice of counsel, or the lawyer is not able to articulate why it is in the interest of the unrepresented opposing party to rely upon the lawyer's draft of the document, the lawyer cannot properly ask the unrepresented opposing party to sign the document.*

2015 N.C. Ethics Opinions 1 (emphasis added).

Although this opinion is in the context of litigation, it acknowledges that the presentation of legal documents that impair legal rights can amount to legal advice. In this case, Ms. Binette was being asked to waive the assertion of any of the remedies available to her through Title VII of the federal Civil Rights Act or the Fair Employment Practices Act, 21 V.S.A. § 495 et seq. ("FEPA"), or any common law cause of action for any as-yet-unknown future claim of gender discrimination or sexual harassment. She was being asked to waive claims for conduct that had not even occurred yet – as opposed to a release of a claim that had previously accrued to her.

The Panel also concludes that Respondent violated a second obligation under Rule 4.3 – to make reasonable efforts to "correct [a] misunderstanding [when the lawyer knows or should reasonably know that the unrepresented person misunderstands the lawyer's role in the matter]." V.R. Pr.C. 4.3.[21] That obligation applies even when an agreement pertains to a transaction.

Respondent should have reasonably known that Ms. Binette misunderstood his role in connection with the September 2012 Agreement. At the outset, Ms. Binette was confused by the conference call with Respondent's step-brother and initially questioned why there was a need for an agreement. Moreover, Ms. Binette credibly testified that she understood from Respondent that she and Respondent needed to sign the agreement to satisfy Respondent's step-father and that she understood it was required of her to continue working for Respondent. Whether her impression was right or wrong, she was confused about Respondent's role.

The Panel observes that the risk of a lawyer's communication being misunderstood would be even greater when the lawyer is your boss and is discussing with you an agreement that contemplates a sexual relationship between the two of you. From Ms. Binette's perspective, Respondent's role was at least to some degree that of a co-worker and a prospective lover – as opposed to that of an adversary without any emotional attachment who is trying to get a good deal for himself in a conventional transaction.

Respondent failed to take reasonable steps to correct Ms. Binette's misunderstanding, and therefore violated Rule 4.3. Under the circumstances, Respondent should have presented a full written disclosure/warning to Ms. Binette in writing explaining that he was looking out for his

[21] Although Count II of the Petition of Misconduct focuses on the issue of whether legal advice was given to Ms. Binette in violation of Rule 4.3, the Panel concludes that it is appropriate to address the issue of whether Respondent's conduct in connection with the presentation of the waiver agreement violated any other provision of Rule 4.3. Respondent was placed on notice that Rule 4.3 and the circumstances surrounding the September 2012 Agreement to Ms. Binette were at issue.

own interests and not hers and recommending that she hire an attorney to examine the agreement.[22] Respondent failed to do so. He produced no documentary evidence of any such action – even though he testified that he was concerned enough by the August 7, 2012 email he received from Ms. Binette that he tape-recorded a subsequent meeting. And his August 8, 2012 response to her email, while indicating she did not have to sign the agreement, downplayed the conflict of interest between them by referring to "the papers *we drafted* with [my step-brother]." Exhibit DC-3 (emphasis added). In addition, Respondent did not advise Ms. Binette to hire an attorney.

Respondent's step-brother's testimony that he verbally advised Ms. Binette to obtain an attorney during the conference call in May 2012 does not suffice. First, four months elapsed between the conference call and Respondent's presentation of the revised agreement to Ms. Binette. A reasonable step would have required, at a minimum, a reminder to Ms. Binette. And, second, under the circumstances, any advice to consult an attorney should have been made in writing – to impress upon Ms. Binette the seriousness of the matter – and should have been accompanied by a written disclosure/warning that Respondent was not looking out for her interests and was not giving her any legal advice. Respondent's failure to so advise Ms. Binette

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[22] The dangers inherent in presenting legal documents to unrepresented persons and the need to provide clear communication in writing to avoid a misunderstanding has been recognized in the context of family law proceedings. Goal 3.2 of the American Academy of Matrimonial Lawyers' Goals for Family Lawyers provides that "[a]n attorney should not advise an unrepresented person" and includes the following comment: "Once it becomes apparent that another party intends to proceed without a lawyer, the attorney should, at the earliest opportunity, inform the other party *in writing* as follows:

1. I am your spouse's lawyer.
2. I do not and will not represent you.
3. I will at all times look out for your spouse's interests, not yours.
4. Any statements I make to you about this case should be taken by you as negotiation or argument on behalf of your spouse and not as advice to you as to your best interest.
5. I urge you to obtain your own lawyer.

See AAML, *The Bounds of Advocacy: Goals for Family Lawyers* (2000).

constituted a separate and distinct violation of Rule 4.3.

B. Rule 8.4(d)

On January 16, 2018, following the completion of the merits hearing, the Panel issued an order directing the parties to brief two questions: first, whether the requirements of procedural due process or any other provision of law would bar the Panel from considering and determining, on its own initiative, whether or not Respondent engaged in conduct that is prejudicial to the administration of justice, in violation of Rule 8.4(d) of the Rules of Professional Conduct, by presenting and entering into the September 2012 Agreement insofar as Paragraph 3 of the agreement purported to waive potential prospective claims of gender discrimination and/or sexual harassment against him; and secondly, assuming there is no bar to the Panel's consideration of the issue, whether that conduct on the part of Respondent violated Rule 8.4(d).

The Panel concludes that it is not barred from considering this potential violation because Respondent received notice in the Petition that the conduct in question was the subject of this proceeding, and because Respondent has not identified any potential evidence not already presented to the Panel that could make a difference in the resolution of the issue. *See, e.g., Lawyer Disciplinary Bd. v. Stanton*, 760 S.E.2d 453, 465 (W.Va. 2014) ("a lawyer may be disciplined for an uncharged rule violation if the uncharged violation is within the scope of the misconduct alleged in the formal charge, and if the lawyer is given: (1) clear and specific notice of the alleged misconduct supporting the uncharged rule violation; and (2) an opportunity to respond."); *see also Statewide Grievance Committee v. Botwick*, 627 A.2d 901, 906-08 (Ct. 1993);

The conduct in question – Respondent's presentation and execution of the September 2012 Agreement – was alleged in the petition and, therefore, Respondent had fair notice. *Cf. In*

re Berk, 157 Vt. 524, 528, 602 A.2d 946, 948 (1991) ("findings concerning *uncharged behavior* cannot be used to support a conclusion of misconduct") (emphasis added). Moreover, as explained below, Respondent has failed to identify any additional material evidence that might have been presented at the hearing if the violation had been charged in the petition.

Rule 8.4(d) provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice." V.R.Pr.C. 8(d). Some courts have held that in order to violate Rule 8.4(d) conduct must bear directly on a judicial proceeding or process. *See, e.g., In re Carter*, 11 A.3d 1219, 1224 (D.C. 2011) ("for conduct to violate Rule 8.4(d) it must be improper, bear directly upon the judicial process, and taint the judicial process in more than a *de minimis* way") (quotations omitted).

However, other courts have interpreted the rule more broadly, concluding that under some circumstances agreements negotiated by attorneys on their own behalf with third parties violated Rule 8.4(d). For example, in *Florida Bar v. Frederick*, 756 So.2d 79 (Fla. 2000), the Florida Supreme Court concluded that an attorney's conduct in negotiating a release agreement with former clients that required them to forego filing a complaint against him with the Florida Bar in return for his refunding some payments they had previously made to him violated Rule 8.4(d). It interpreted the phrase "prejudicial to the administration of justice" as extending to "conduct that prejudices our system of justice as a whole." *Id.* at 87. And it cited other examples of attorney conduct that violated Rule 8.4(d) that did not directly impact a judicial process – including an attorney's "self-serving loan transaction with a client." *Id.*

In another case, *Lawyer Disciplinary Bd. v. Artimez*, 540 S.E.2d 156, (W.Va. 2000), an attorney who had surreptitiously engaged in sexual relations with his client's wife negotiated a settlement agreement in which he agreed to pay his client's husband a sum of money in return

for a release of any professional or civil liability claim against the attorney, including the filing of any licensing complaint. *Id.* at 160. The West Virginia Supreme Court concluded that the attorney had prejudiced the administration of justice by drafting and entering into an agreement that released the husband's civil and licensing claims in return for a payment of money. *See id.* at 164. The Court concluded that the agreement was inconsistent with the obligation to promote the quality of justice and the accountability of members of the bar. *See id.* (observing that the attorney "acted improperly by trying to absolve himself of the consequences of a potential violation of ethical rules resulting from his affair with his then-client's wife.") *Id.* at 164; *see also* V.R.Pr.C., Preamble and Scope, Comment [1] ("A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.").

The Panel is mindful that the Rules are to be construed to promote their underlying purpose of protecting the public. With these principles in mind, the Panel concludes that the September 2012 Agreement violated Rule 8.4(d).

Respondent's presentation of the proposed agreement and subsequent execution of the agreement was intended to secure a prospective release of legal claims that might otherwise be asserted against Respondent for gender discrimination and/or sexual harassment. It purported to waive any future claims by Ms. Binette of sexual harassment under Title VII or FEPA, or other legal or equitable claims, and the remedies that are available thereunder, that might arise "by virtue of their romantic relationship and her employment." Agreement, ¶ 3. An attorney asking for a release for *past* conduct in connection with some sort of settlement agreement is one thing (assuming the agreement does not attempt to preclude the filing of a disciplinary complaint against the attorney). But, here, Respondent sought to absolve himself of future liability under

Title VII and FEPA, or under any other legal or equitable claim, for what might otherwise be considered discrimination or sexual harassment.

Moreover, the subject of the waiver clause, discrimination and sexual harassment, was conduct for which an attorney could be disciplined under the Vermont Rules of Professional Conduct. *See* Rule 8.4(g). Preventing or inhibiting a claim of sexual harassment from being filed would also make it less likely that any future conduct amounting to sexual harassment would come to light and be reported to the Vermont Professional Responsibility Board. In sum, Respondent's presentation and entry into the September 2012 Agreement, by itself, violated Rule 8.4(d).

Respondent argues that he did not draft the language of the document and did not request that a waiver clause be included. But his step-brother testified credibly – and the Panel has found – that Respondent did request that a waiver of claims be included to protect his interests and, in any event, Respondent is responsible for presenting the document to Ms. Binette. He presented the draft of the agreement and then later revised the document – including making revisions to the waiver clause – and presented the revised version to Ms. Binette. And, finally, he signed the September 2012 agreement. He cannot avoid responsibility.

In support of his assertion that due process should bar the Panel's determination, Respondent argues that if a violation of Rule 8.4(d) had been alleged in the petition he might have "pursue[d] a line of questioning about that issue." Reply Mem. Re Hearing Panel Order For Supplemental Briefing, 3/12/18, at 2. But he fails to identify any specific line of questioning, let alone one that could have altered the Panel's conclusion. *See In re Fink*, 2011 VT 42, ¶ 32, 189 Vt. 470, 22 A.3d 461 (rejecting due process challenge and declining to remand for a separate sanctions hearing where respondent "failed to proffer what additional

noncumulative evidence he would present at a second hearing"). Respondent argues that he might have presented testimony from an employment and labor relations expert about the use of "romantic relationship" agreements in the workplace. But, even assuming such testimony were presented, that testimony would not be responsive to the issue presented in this case – whether a lawyer who attempts to obtain a release of future claims for gender discrimination or sexual harassment violates the Rules of Professional Responsibility.

Finally, Respondent's attempted reliance on a recently passed House Bill, H.707, is misplaced. That bill would, among other things, amend FEPA to expressly prohibit an employer from requiring an employee to enter into an agreement that waives a substantive or procedural remedy with respect to a claim of sexual harassment. Respondent argues, based on the bill, that there is not presently a prohibition against such agreements and that the September 2012 Agreement did not violate public policy. But whether such agreements are or are not, as a general matter, void and unenforceable is not determinative of the question presented. Even assuming that such agreements would not be held by a court to be void as against public policy – and Respondent has not demonstrated that the Legislature's recent move to add explicit language to FEPA would dictate that conclusion – the Rules of Professional Conduct impose separate obligations on lawyers. Whether the 2012 Agreement was void or not, Respondent violated Rule 8.4(d) by seeking to absolve himself of future liability for gender discrimination or sexual harassment. His conduct was fundamentally inconsistent with his duty as a lawyer. In conclusion, the agreement presented and signed by Respondent violated Rule 8.4(d).

C. Rule 8.4(g)

Disciplinary Counsel has alleged that Respondent violated the prohibition against discrimination in Rule 8.4(g). The version of Rule 8.4(g) in effect at the time alleged in the

Petition provided, in pertinent part, as follows:

> It is professional misconduct for a lawyer to discriminate against any individual because of his or her race, color, religion, ancestry, national origin, sex, sexual orientation, place of birth or age, or against a qualified handicapped individual, in hiring, promoting or otherwise determining the conditions of employment of that individual.

V.R.Pr.C. 8.4(g).[23]

This provision was intended to address both discrimination against clients[24] and discrimination in the employment context. *See* Reporter's Notes – 2009 Amendment, at 900 ("Comment [3] [describes the application of Rule 8.4(g)] in the context of client representation . . . . *Discrimination against an associate or employee in the employment context, however is a violation of Rule 8.4(g) regardless of the purpose.*") (emphasis added).

The language of Rule 8.4(g) appears to have been drawn from a combination of Title VII and FEPA. Title VII prohibits "discriminat[ion] against any individual *with respect to his compensation, terms, conditions, or privileges of employment*, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2002e-2(a)(1) (emphasis added). FEPA provides, in pertinent part, that:

> [i]t shall be unlawful employment practice, except where a bona fide occupational qualification requires persons of a particular race, color, religion, national origin, sex, sexual orientation, gender identity, ancestry, place of birth, age, or physical or mental condition [f]or any employer . . . to

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[23] The rule was amended effective September of 2017, but that amendment only applies prospectively. References in this memorandum to Rule 8.4(g) and its comments are to the version of the rule and accompanying comments in effect prior to the 2017 amendment.

[24] Comment 3 of Rule 8.4 provides that:

> A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (g) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (g).

> discriminate against any individual because of . . . sex . . . or against a qualified individual with a disability.

21 V.S.A. § 495(a).

The Vermont Supreme Court has held that federal case law interpreting Title VII constitutes persuasive authority on the appropriate application of FEPA, along with case law interpreting similar statutes in other states. *See Lavalley v. E.B. & A.C. Whiting Co.*, 166 Vt. 205, 210, 692 A.2d 367, 369 (1997).

While Rule 8.4(g) does not expressly address sexual harassment, FEPA includes a definition of the term:

> "Sexual harassment" is a form of sex discrimination and means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:
>
> (A) submission to that conduct is made either explicitly or implicitly a term or condition of employment;
>
> (B) submission to or rejection of such conduct by an individual is used as a component of the basis for employment decisions affecting that individual; or
>
> (C) the conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

21 V.S.A. § 495d(13).

That definition, in turn, appears to be based on the Equal Employment Opportunity Commission's interpretive regulation which declares sexual harassment to be a form of sex discrimination under Title VII. *See* 29 C.F.R. 1604.11; *see also Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

The two types of sexual harassment referred to in subsections (A) and (B) of 21 V.S.A. § 495d(13) are referred to collectively as *quid pro quo* harassment – whereas the type referred to in

subsection (C) is referred to as "hostile work environment." "*Quid pro quo* sexual harassment occurs when submission to or rejection of improper or unwelcome sexual conduct by an individual is used as a basis for employment decisions affecting such individual." *Bouveng v. NYG Capital LLC*, 175 F.Supp.3d 280, 311 (S.D.N.Y. 2016).

1. Did Respondent Engage in *Quid Pro Quo* Sexual Harassment?

The Panel concludes that the waiver clause in the September 2012 Agreement made the submission to unwanted sexual advances a term or condition of employment and therefore Respondent engaged in *quid pro quo* sexual harassment by presenting and entering into the agreement. Although the waiver provision did not *explicitly* make the submission to unwanted sexual advances a term of employment, it *implicitly* did so by placing Ms. Binette in a position where she could not as a practical matter assert a claim of discrimination or harassment against her employer going forward.

At first glance, paragraph 1 of the agreement seems to undermine this conclusion because it affirmatively stated that decisions as to Ms. Binette's terms and conditions of employment would be made based on job performance and economic status of the business and not on the basis of "the romantic relationship" and, therefore, purported to preserve employment rights in favor of Ms. Binette under paragraph 1. In addition, the Panel has noted that the waiver clause was worded to bar claims arising from both "the romantic relationship and her employment by Employer," thereby suggesting that claims arising *solely* from the employment relationship would not be barred. But there are serious problems with placing any reliance on these aspects of the agreement.

First, trying to distinguish claims arising solely from the employment relationship from those also involving the romantic relationship would not be easy. Respondent could argue that

workplace conduct Ms. Binette found offensive resulted from a misunderstanding in an ongoing romantic relationship and, therefore, was waived. It is also noteworthy that paragraph 1 made no reference to FEPA or Title VII or enforcement of the kinds of claims available under those statutes and, therefore, did not restore what paragraph 3 took away.

Respondent put himself in a position to argue in the future, regardless of paragraph 1, that a claim could not be brought under FEPA or Title VII (or on any other basis) because the parties had a romantic relationship during the period of time in question. That argument could effectively negate any ability to enforce a claim of sex discrimination pursuant to paragraph 1.

Second, there were no enforcement provisions in the agreement governing Respondent's obligation under paragraph 1, leaving Ms. Binette without a clue as to how to enforce any rights under paragraph 1 and as to what remedies might be available to her, even assuming she could present a claim not barred by the waiver. This uncertainty would at the very least have inhibited – if not completely discouraged – Ms. Binette from ever asserting a claim against Respondent.

The Panel's conclusion that a *quid pro quo* was effected through the agreement is further supported by the fact that the agreement *expressly* linked a term of her employment – the provision in paragraph 4 that promised her "latitude regarding her showing up for work on time" based on her agoraphobia, the "condition [from which Employee suffers] that sometimes makes it difficult for her to be on time" – to the waiver of any prospective claims against Respondent for gender discrimination and/or sexual harassment. The agreement stated that the parties' respective agreements were given "in consideration of the mutual promises set forth below." Exhibit DC-5. In other words, the work accommodation was provided to Ms. Binette in return for the waiver.

Respondent asserts that Ms. Binette voluntarily signed the agreement because she wanted to have a consensual relationship with Respondent. But even if that were the case,[25] that would not confer a right on Respondent to proceed with an agreement that amounted to *quid pro quo* sex discrimination. In sum, by presenting and entering into the agreement, Respondent engaged in *quid pro quo* sexual harassment.

2. Did Respondent's Conduct Result in a Hostile Work Environment?

Although Disciplinary Counsel did not expressly allege that Respondent's conduct resulted in a hostile work environment, the Panel will address that issue in light of the factual allegations that were made in the petition and the evidence that was presented at the hearing. *See In re Illuzzi*, 160 Vt. 474, 481, 632 A.2d 346, 349 (1993) (no due process violation where panel found violations based on the conduct and disciplinary rule cited in the petition). The petition alleged that "Respondent repeatedly subjected [Ms. Binette] to unwelcome, demeaning, and offensive conduct of a sexual nature." Petition, Counts II & III, at 4, ¶ 15.

Title VII was "intend[ed] to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment." *Harris v. Forklift Systems, Inc.* 510 U.S. 17, 21 (1983) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)). "To establish a hostile work environment claim, a claimant must demonstrate that the alleged conduct: 1) was unwelcome; 2) resulted because of her gender, disability, or prior protected activity; 3) was sufficiently severe or

[25] Any such conclusion is at the very least questionable in light of the evidence that Ms. Binette felt she needed an accommodation based on her agoraphobia; that she was dependent on Respondent for continued employment; that she perceived that she needed a full year of employment with Respondent to gain admission to a border patrol training program; that she had a grand larceny charge pending against her; that she had limited education and experience on which to draw; and that she had not received any independent legal advice.

pervasive to alter the conditions of her employment; and 4) was imputable to her employer." *Pueschel v. Peters*, 577 F.3d 558, 564–65 (4th Cir. 2009) (quotations omitted).

"Whether conduct was unwelcome must be determined by the plaintiff's subjective point of view." *Mercado v. Lynnhaven Lincoln-Mercury, Inc.*, 2011 WL 5027486, at *3 (E.D. Va. 2011); *see also Harris*, 510 U.S. at 21. "[I]f the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." *Id.* "Whether an environment is hostile or abusive can be determined only by looking at all the circumstances." *Id.* at 23. The circumstances to be considered:

> may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Id.

Grappling with the question of what constitutes "unwelcome" sexual advances, the federal courts have held that:

> the fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome." 29 CFR § 1604.11(a) (1985).

Meritor, 477 U.S. at 68 (1986) (also observing that "the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact").

The Equal Employment Opportunity Commission ("EEOC") has issued guidance that addresses various issues, including the issue of whether sexual conduct is unwelcome. Among the various points in the guidance are the following:

- When there is some indication of welcomeness or when the credibility of the parties is at issue, the charging party's claim will be considerably strengthened if she made a contemporaneous complaint or protest. *** [But w]hile a complaint or protest is helpful to a charging party's case, it is not a necessary element of the claim. Indeed, the Commission recognizes that victims may fear repercussions from complaining about the harassment and that such fear may explain a delay in opposing the conduct. If the victim failed to complain or delayed in complaining, the investigation must ascertain why. The relevance of whether the victim has complained varies depending upon the nature of the sexual advances and the context in which the alleged incidents occurred.

- When welcomeness is at issue, the investigation should determine whether the victim's conduct is consistent or inconsistent, with her assertion that the sexual conduct is unwelcome. * * *

- [O]ccasional use of sexually explicit language does not necessarily negate a claim that sexual conduct was unwelcome. Although a charging party's use of sexual terms or off-color jokes may suggest that the sexual comment by others in that situation were not unwelcome, more extreme and abusive or persistent comments or a physical assault will not be excused . . . .***

- [E]vidence concerning a charging party's general character and past behavior towards others has limited, if any, probative value and does not substitute for a careful examination of her behavior toward her alleged harasser. ***

- [T]he resolution of a sexual harassment claim often depends on the credibility of the parties. The investigator should question the charging party and the allege harasser in detail. [It] should also search thoroughly for corroborative evidence of any nature. *** [A] charging party may not be able to identify witnesses to the alleged conduct itself. But testimony may be obtained from persons who observed the charging party's demeanor immediately after an alleged incident of harassment. Persons with whom she discussed the incident – such as co-workers, a doctor or a counselor – should be interviewed. Other employees should be asked if they noticed changes in charging party's behavior at work or in the alleged harasser's treatment of charging party.***

- Unless the conduct is quite severe, a single incident or isolated incidents of offensive sexual conduct or remarks generally do not create an abusive environment. *** [T]he more severe the harassment, the less need to show a repetitive series of incidents.*** The Commission will presume that the unwelcome, intentional touching of a charging party's intimate body areas is sufficiently offensive to alter the condition of her working

> environment and constitute a violation of Title VII. . . . [A] single unwelcome physical advance can seriously poison the victim's working environment.

EEOC Policy Guidance on Current Issues of Sexual Harassment, 3/19/90 (available at https://www.eeoc.gov/policy/docs/currentissues.html).

The Panel concludes that Respondent's conduct towards Ms. Binette, consisting of the paper clip throwing and the July 2012 masturbation incident, constituted physical conduct of a sexual nature; that it was sufficiently severe to alter the conditions of her employment; that it was unwelcome from Ms. Binette's perspective; and that it had the effect of creating "an intimidating, hostile, or offensive work environment." 21 V.S.A. § 495d(13). Respondent disputes that the conduct was unwelcome and presents various arguments. The Panel rejects those arguments.

As the case law and EEOC guidelines point out, the fact that Ms. Binette exposed herself to Respondent when he masturbated in front of her does not preclude the conduct being unwelcome. Ms. Binette exposed herself at Respondent's request. In addition, while Ms. Binette may have thrown paper clips at Respondent on occasion, there is no evidence that she threw them at him in a sexually suggestive manner. Nor did she ask Respondent to throw paper clips at her cleavage. Moreover, Respondent's attempt to shift responsibility onto Ms. Binette for his masturbation is unavailing. It was obviously his decision to masturbate in front of her. The masturbation and targeting of her breasts and cleavage by Respondent was unwelcome.

The fact that Ms. Binette did not complain to Respondent about the masturbation incident is hardly surprising. Respondent was her boss and she had no one else at work to whom she could complain. In addition, she was in a vulnerable position. She perceived that she needed to continue in her job in order meet the border patrol training requirement. There was a starkly different power relationship at play, even more so because of Respondent's status as a lawyer.

She was not being paid on a weekly basis and relied on Respondent to get paid in between regular pay checks. She had virtually no education or experience to enable her to get another job. Indeed, she had previously been unable to find work. And, finally, she had ongoing mental health issues and needed accommodation from Respondent to deal with her agoraphobia.

The fact that Ms. Binette went home immediately after the masturbation incident and told her mother about it while visibly upset, expressing feelings of humiliation, is powerful corroborating evidence that the masturbation was unwelcome. Likewise, the statements that Ms. Binette made in July 2012 to her psychiatrist, Dr. Kaufman, and his observations of her, while not expressly referring to the masturbation incident, are consistent with her testimony that she was being subjected to unwelcome conduct of a sexual nature. She told him that her boss was "coming on to her," and he observed that "she was tearful as she talks about her boss." Under the "Assessment" section, he wrote that "PTSD symptoms [are] being exacerbated by unwanted sexual advances from her boss according to [patient]."

Respondent testified that Ms. Binette flirted with him in the workplace with various conduct; that she expressed interested in having a dating relationship with him before the masturbation incident; and that she invited him to social events outside of work. But, even assuming that was the case, such evidence carries very little weight because it does not directly address the incidents themselves. In addition, evidence not connected closely in time to the incidents in question has questionable value. Thus, for example, testimony by Respondent's former assistant, Kelsi Dauphin, that she had lunch with Ms. Binette and Respondent in November 2012, and that Ms. Binette stated at that time that she was happy to have entered into the September 2012 agreement with Respondent, does not help determine whether Respondent's masturbation in July 2012 was welcomed or whether the paper clip incidents that started much

earlier were unwelcome. Likewise, Respondent's testimony that he had sex with Ms. Binette on New Year's Eve 2012 is remote in time from the paper clip incidents that began in the spring of 2012 and the July 2012 masturbation incident.

Respondent offered other evidence in an attempt to show that Ms. Binette had a motive to lie. But the Panel has found that evidence to be of questionable value. As to Ms. Binette's participation in the after-hours sexual interaction with Respondent and his client in the office conference room, it not only occurred late in her employment but, in addition, as Dr. Kaufman pointed out, persons with ADHD use alcohol as a coping mechanism and are prone to acting impulsively. She, along with the client, were drinking alcohol that night. Moreover, Ms. Binette obviously had no motive to lie to her mother or her psychiatrist when she made statements to them in July 2012.

Finally, as explained in the findings, the Panel assigns little weight to the post-employment communications between Ms. Binette and Respondent. Those communications were remote in time and they are consistent with the behaviors associated with Ms. Binette's PTSD and ADHD, as explained by Dr. Kaufman. In addition, as explained in the Panel's findings, the August 2014 statements were made with Respondent's prompting and encouragement, despite his prior acknowledgement that Ms. Binette had mental health issues "affecting her decisionmaking," and with his offer of incentives for such statements – possible future employment and sex. Under all the circumstances, those statements do not deserve any weight.

Finally, the Panel concludes that Respondent's conduct did result in a hostile work environment. The masturbation incident was extremely serious conduct of a sexual nature, sufficient by itself to create a hostile environment. The paper clip throwing was less serious, but

it happened on multiple occasions and, despite Ms. Binette's requests that it stop, was recurring conduct that caused her anxiety and humiliation.

In sum, the Panel concludes there is clear and convincing evidence that Respondent's masturbation and throwing of paper clips resulted in a hostile work environment, in violation of Rule 8.4(g).

III.

Respondent's Conduct Related to Ms. Poutre

A. Rule 8.4(g)

The evidence showed that both verbal and physical conduct of a sexual nature was directed at Ms. Poutre while she worked in Respondent's office. *See* 21 V.S.A. § 495d(13) ("Sexual harassment . . . means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when . . . .") The verbal statements Respondent made to Ms. Poutre about his sexual experiences with Ms. Binette and other women, including his account of masturbating in front of Ms. Binette and the after-hours sexual encounter in the conference room with Ms. Binette and his client, satisfy that element of a sexual harassment claim. Likewise, the two incidents of Respondent masturbating in his pants in Ms. Poutre's presence, and the "slapping on the butt" conduct satisfy that element.

However, Disciplinary Counsel failed to present clear and convincing evidence on the second element – that the conduct in question was unwelcome. There was conflicting evidence presented and virtually no corroborating evidence presented to the Panel with respect to the issue of whether the conduct was unwelcome. The fact that Ms. Poutre did not complain to Respondent is not dispositive. But Ms. Poutre conceded that she never complained to any family member or friend concerning the conduct in question. And when she finally did lodge a

complaint it was only after she had been arrested and charged with embezzling funds from Respondent's law office, at which point in time she had a motive to fabricate her complaint. The Panel is not concluding that Ms. Poutre fabricated her complaint. Rather, the Panel is concluding that it cannot place significant weight on the complaint she asserted in April 2013, while she was incarcerated on the embezzlement charge.

Because the Panel cannot conclude that the conduct in question was unwelcome, the charge will be dismissed.

B. Rule 5.3(c)(2) & Rule 8.4(c) & (d)

Disciplinary Counsel alleges that Respondent violated Rule 5.3(c)(2) by failing to prevent Ms. Poutre from presenting a "fake" paystub to her probation officer. He asserts that the paystub contained false information – because the withholding of taxes and Social Security had not yet occurred – and that if Respondent had presented the fake paystub, he would have been engaging in misrepresentation, in violation of Rule 8.4(c), and in conduct prejudicial to the administration of justice, in violation of Rule 8.4(d).

Rule 5.3 provides, in pertinent part, as follows:

> With respect to a nonlawyer employed or retained by or associated with a lawyer:
> ***
> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
> ***
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

V.R.Pr.C. 5.3(c)(2).

Ms. Poutre was a nonlawyer employed by Respondent and Respondent had managerial authority over Ms. Poutre. Thus, the issue under Rule 5.3(c)(2) is whether Respondent knew of conduct on the part of Ms. Poutre that would have violated a provision of the Rules if he had engaged in the conduct and, if so, whether he could have taken action to remedy that conduct.

To find a violation, the Panel must first consider whether the presentation of the paystub would have violated Rule 8.4(c) or (d) if Respondent had presented it. Rule 8.4 provides, in pertinent part, that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation," V.R.Pr.C. 8.4(c), "[or] engage in conduct that is prejudicial to the administration of justice." V.R.Pr.C. 8.4(d). The basic question is whether the paystub amounted to a misrepresentation within the meaning of those provisions.

As a threshold issue under Rule 8.4(c), the Panel must determine whether the type of conduct alleged, if true, would fall within the scope of that rule. Our case law imposes some limitations on the broad language of the rule. *See In re PRB Docket No. 2007-046*, 2009 VT 115, ¶ 12, 187 Vt. 35, 989 A.2d 523 (2009) ("[W]hile Rule 8.4(c) is broad and . . . encompasses conduct both within and outside the realm of the practice of law," . . . .[it] applies only to conduct so egregious that it indicates that the lawyer charged lacks the moral character to practice law."); *see also id.* ¶ 14 ("not all misrepresentations made by an attorney . . . call[ ] into question her fitness to practice law.").

The Panel concludes that this type of conduct, if otherwise established by clear and convincing evidence, would violate both Rule 8.4(c) and Rule 8.4(d). Generating false documents or altering documents has been held to be a violation of Rule 8.4(c). *See, e.g., In re Disciplinary Proceeding Against Poole*, 125 P.3d 954, 961 (Wa. 2006) (finding violation where respondent created and backdated an invoice to make it appear to be an invoice created months

earlier and provided it to opposing counsel); *In re Disciplinary Action Against Brost*, 763 N.W.2d 637, 637 (Minn. 2009) (attorney disciplined for using the expired notary stamp of a deceased notary, altering the stamp's expiration date, and forging his signature to fraudulently notarize her own signature on a certificate of trust prepared for a client and then submitting the document to a bank).

Here, the alleged conduct involved the presentation of an allegedly false document to a probation officer – an official who was undertaking governmental functions and serving the criminal justice system. That type of conduct, if proven, would reflect adversely on an attorney's fitness to practice law. *See, e.g., In re Disciplinary Action Against Houge*, 764 N.W.2d 328, 336 (Minn. 2009) (holding that attorney violated Rule 5.3(c) by entering into a sham agreement with an associate that was intended to cover up a probation violation by that individual). Likewise, the Panel concludes that such conduct would be subject to Rule 8.4(d). Because probation is part of our system of criminal justice and implicates a judicial determination by the court system, the presentation of inaccurate information to a probation officer concerning someone subject to the officer's supervision could be prejudicial to the administration of justice.

The next question for the Panel is whether the presentation of the paystub constituted a misrepresentation under the factual circumstances presented. The Panel is unable to conclude by clear and convincing evidence that it amounted to a misrepresentation. One could argue that the pay stub contained false information because no withholding had occurred as of the pay date that was indicated on the paystub – February 20, 2013. Exhibit DC-7. On the other hand, the undisputed evidence was that Ms. Poutre had in fact been paid the sums of money shown on the check as of that point in time and that withholding in the amounts indicated did eventually occur. The Panel concludes that the paystub, considered by itself, is somewhat ambiguous.

In addition, consideration of the evidence related to Respondent's state of mind leads the Panel to conclude that a violation should not be found. Courts from other jurisdictions addressing the requisite state of mind for a violation under Rule 8.4(c) generally do not require a specific intent to deceive; however, the majority of courts "seem to look for some culpable state of mind." ABA Ctr. For Prof'l Responsibility, Annotated Model Rules of Prof'l Conduct 679 (8th ed. 2015); *see, e.g.*, *Iowa Supreme Court Disciplinary Board v. Netti*, 797 N.W.2d 591, 605 (Iowa 2011) ("[T]he better view is to require some level of scienter that is greater than negligence to find a violation of [Rule 8.4(c)]"; unable to determine if respondent made a "knowing" misrepresentation); *In re Cutright*, 910 N.E.2d 581, 589-90 (Ill. 2009) (requiring "some act or circumstances that showed the respondent's conduct was purposeful"); *Attorney Grievance Comm'n of Maryland v. Siskind*, 930 A.2d 328, 344 (Md. Ct. App. 2007) ("[I]n order to establish its case against [an attorney], Bar Counsel is required to prove with clear and convincing evidence that [the attorney's] supposed false statements were made with the *knowledge that such statements were false when he made them*. In other words, the misrepresentation must be made by an attorney who *knows* the statement is false, *rather than the product of mistake, misunderstanding, or inadvertence.*") (quotations omitted) (emphasis added).

Because Rule 4.1 prohibits a lawyer from "*knowingly* mak[ing] a false statement of material fact or law to a third person," V.R.Pr.C. 4.1, and because the decision in *In re PRB Docket No. 2007-046* rejected a broad interpretation of Rule 8.4(c) that would have allowed for a violation to occur when conduct is *less egregious* than that contemplated under Rule 4.1, *see* 2009 VT 115, ¶ 14, the Panel concludes that a violation under Rule 8.4(c) requires some degree of purposefulness to make a misrepresentation – albeit not necessarily a specific intent to deceive. Moreover, in the specific context of the charge presented in this case, that conclusion

seems consistent with the requirement of Rule 5.3(c)(2) that an attorney must "*know*[ ] of the conduct at a time when its consequences can be avoided or mitigated . . ." and fails to take action. *Id.* (emphasis added).

On the evidence presented, the Panel is unable to conclude that Respondent had the requisite state of mind. Respondent did allow Ms. Poutre to provide a statement that indicated withholding had occurred, even though it had not; however, he did have a payroll system in place and he expected that taxes and Social Security would be withheld from Ms. Poutre's earnings when the firm's bookkeeper eventually did the books at her next scheduled visit to the firm. Moreover, Respondent testified credibly that he understood from Ms. Poutre that the probation officer only wanted confirmation that Ms. Poutre was working for Respondent. And, while Ms. Poutre testified that she told him the probation wanted proof that withholding had actually been taken, there could have been a misunderstanding in the communications between them.

It would have been prudent for Respondent to take additional steps to obtain clarification from the probation office and to have submitted something other than the paystub in question. But under these circumstances, there is insufficient evidence to find a violation of Rule 8.4(c). Based on the same reasoning, the Panel concludes that there was no violation of Rule 8.4(d).

SANCTIONS DETERMINATION

The Vermont Rules of Professional Conduct "are 'intended to protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar.'" *In re PRB Docket No. 2006-167*, 2007 VT 50, ¶ 9, 181 Vt. 625, 925 A.2d 1026 (quoting *In re Berk*, 157 Vt. 524, 532, 602 A.2d 946, 950 (1991)). The purpose of sanctions is not "to punish attorneys, but rather to protect the public from harm and to maintain confidence in our legal institutions by

deterring future misconduct." *In re Obregon*, 2016 VT 32, ¶ 19, 201 Vt. 463, 145 A.3d 226 (quoting *In re Hunter*, 167 Vt. 219, 226, 704 A.2d 1154, 1158 (1997)).

Applicability of the ABA Standards for Imposing Lawyer Sanctions

Hearing panels are guided by the ABA Standards when determining appropriate sanctions for violation of the Vermont Rules of Professional Conduct:

> When sanctioning attorney misconduct, we have adopted the *ABA Standards for Imposing Lawyer Discipline* which requires us to weigh the duty violated, the attorney's mental state, the actual or potential injury caused by the misconduct, and the existence of aggravating or mitigating factors.

In re Andres, 2004 VT 71, ¶ 14, 177 Vt. 511, 857 A.2d 803 (mem.).

"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. *** This presumptive sanction can then be altered depending on the existence of aggravating or mitigating factors." *In re Fink*, 2011 VT 42, ¶ 35, 189 Vt. 470, 22 A.3d 461.

The Duty Violated

The ABA Standards recognize a number of duties that are owed by a lawyer to his or her client. *See Standards for Imposing Lawyer Sanctions* (ABA 1986, amended 1992) (*"ABA Standards"*), Theoretical Framework, at 5. Other duties are owed to the general public, the legal system, and the legal profession. *Id.*

By engaging in a sexual relationship with Ms. Mead while at the same time representing her in a divorce, contrary to Rule 1.7, Respondent violated a duty to his client to avoid conflicts of interest. By giving legal advice to Ms. Binette, an unrepresented person, and by failing to make reasonable efforts to clarify his role in connection with the September 2012 Agreement, contrary to Rule 4.3, when he knew or should reasonably have known that Ms. Binette

misunderstood his role, Respondent violated a duty to the legal system and to the profession. Moreover, by presenting to Ms. Binette and entering into the September 2012 Agreement, contrary to Rule 8.4(d), Respondent violated a duty to the legal system and to the profession. Likewise, by engaging in *quid pro quo* sexual harassment of Ms. Binette and by creating a hostile work environment through his unwelcome sexual conduct, contrary to Rule 8.4(g), Respondent violated a duty to the legal system and to the profession.

Mental State

"The lawyer's mental state may be one of intent, knowledge, or negligence." *ABA Standards*, § 3.0, Commentary, at 27. For purposes of the sanctions inquiry, "[a lawyer's] mental state is [one] of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result." *Id.*, Theoretical Framework, at 6. The mental state of "knowledge" is present "when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct [but] without the conscious objective or purpose to accomplish a particular result." *Id.* The mental state of "negligence" is present "when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." *Id.*; *see also id.*, at 19 (definitions of "intent," "knowledge," and "negligence").

The distinction between "knowing" and "negligent" misconduct has been explained as follows: "[W]as the lawyer aware of the circumstances that formed the basis for the violation? If so, the conduct was done knowingly. If the lawyer instead acted without awareness, but below the accepted standard of care, then he acted negligently. Application of these definitions is fact-dependent." *In re Fink*, 2011 VT 42, ¶ 38.

The Panel concludes that Respondent knowingly entered into a sexual relationship with Ms. Mead while he was representing her in the divorce action. His state of mind was not that of intent – because he was not seeking to accomplish a particular result by means of the relationship. At the same time, he acted with knowledge that he was in a relationship with a client. And his avoidance of appearing with Ms. Mead in the Newport area indicated an understanding of the potential risk associated with the relationship. Respondent's assertion that he believed he was not violating Rule 1.7 and therefore had a negligent state of mind is not persuasive. His failure to conduct adequate legal research should not diminish his state of mind. A basic review of the comments to Rule 4.3 and available case law would have revealed the inherent conflict that applies when a lawyer enters into a sexual relationship with a divorce client. Many courts have declared sexual relationships in the divorce context to be *per se* violations of Rule 1.7(a).

With respect to Respondent's violation of Rules 4.3 and 8.4(d) and his *quid pro quo* sexual harassment in violation of Rule 8.4(g), Respondent acted knowingly. After receiving a draft agreement from his step-brother, he provided a copy to Ms. Binette. He later revised the agreement and made changes to various provisions, including the waiver clause, before presenting the agreement to her once again. He knowingly signed the agreement.

One might argue that Respondent acted negligently when he failed to make reasonable efforts to clarify his role in connection with the September 2012 Agreement. However, Respondent *knowingly* presented a document to Ms. Binette that included the clause waiving her right to assert future claims of gender discrimination and sexual harassment and language representing that the terms of the agreement protected both of their interests. He read the agreement and is charged with understanding its terms. Likewise, his mental state was not that

of negligence when he presented the draft and final revised versions of the agreement to Ms. Binette. After receiving an email from her in August 2012 in which she expressed concerns about her employment situation, he *knowingly* wrote back suggesting that they had both mutually drafted the agreement with his step-brother's assistance. He knowingly prepared the final version of the agreement and made revisions to it, including changes to the waiver clause. In addition, he *knew* that Ms. Binette was an unsophisticated and highly vulnerable individual and he was well aware of the conflicting interests at stake. The evidence therefore supports the conclusion that his state of mind was that of knowledge.

Respondent's conduct consisting of throwing paper clips at Ms. Binette's breasts and masturbating in front of her was undertaken with an intentional state of mind. He was fully aware of his conduct and he was engaging in that conduct to achieve a particular result – his own gratification. Courts have concluded that the mental state associated with sexual harassment is that of intent. *See, e.g., In re Tenenbaum*, 880 A.2d 1025, 1034 (Del. 2005) (finding respondent's mental state to be one of intent). The fact that Respondent may not have *intended* to harm Ms. Binette by his conduct is not the issue.

Injury and Potential Injury

The ABA Standards consider "the actual or potential injury caused by the lawyer's misconduct." *ABA Standards*, § 3.0(c), at 26. The term "injury" is defined as "harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. The level of injury can range from 'serious' injury to 'little or no' injury." *Id.*, Definitions, at 9. The term "potential injury" refers to harm that is "reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted

from the lawyer's misconduct." *Id.* Under the ABA Standards, "[t]he extent of the injury is defined by the type of duty violated and the extent of actual or potential harm." *Id.*, at 6.

With respect to Respondent's conflict of interest involving Ms. Mead, there was no evidence that actual injury resulted to Ms. Mead as a result of the sexual relationship. The sexual relationship between Respondent and Ms. Mead never became an issue in the divorce action. Also, whether or not Respondent's representation was adequate – an issue not decided by the Panel – there was not clear and convincing evidence that the sexual relationship had any effect on the outcome of the divorce proceeding. Nevertheless, there was a significant risk to Ms. Mead's interests in the divorce action during the pendency of the action and, therefore, serious potential injury to Ms. Mead. And Ms. Mead continues to believe, rightly or wrongly, that Respondent relied upon the sexual relationship to provide less than zealous representation to her. Nothing will change her mind. In that sense, there is serious actual injury to the public perception of the legal profession. A conflict-of-interest violation of this type can only "feed public distrust of lawyers and decrease public confidence in the profession." *In re Fink*, 2011 VT 42, ¶ 36.

With respect to Respondent's conduct associated with the September 2012 Agreement, there was no evidence that Ms. Binette experienced any direct harm as a result of the agreement. On the other hand, there was potential injury to Ms. Binette associated with the agreement because, once it was signed by the parties, the waiver clause could have discouraged the filing by Ms. Binette of a gender discrimination or sexual harassment claim against Respondent in connection with subsequent conduct by him. And, if such a claim had been filed against Respondent, the waiver might have barred the claim – assuming of course that a court were to find the agreement to be valid.

Moreover, there was substantial injury to the legal system and the profession resulting from the agreement alone. Respondent's effort, through the waiver clause, to shield himself from liability for discrimination in connection with conduct that had not yet occurred – conduct that could also have resulted in a charge of professional misconduct against him under Rule 8.4(g) – was fundamentally inconsistent with the expectation that lawyers should seek justice at all times. Moreover, the *quid pro quo* effected by the agreement -- Ms. Binette giving up her rights to assert claims under FEPA and Title VII in return for a reasonable accommodation for her agoraphobia was highly problematic. Such an agreement could only decrease confidence in the legal profession.

With respect to Respondent's unwelcome sexual conduct involving Ms. Binette, there was serious emotional harm to her. She made clear to her mother and her psychiatrist that she was greatly upset by Respondent's behavior and she complained to Respondent in her August 2012 email to him about his behavior. Respondent likely did not intend to harm Ms. Binette through his conduct; however, Ms. Binette continues to struggle emotionally with those events.

Presumptive Standard under the ABA Standards

In relation to Respondent's conduct involving Ms. Mead, the Panel concludes that Standard 4.32 should apply. It provides for suspension "when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury to or potential injury to a client." The Panel concludes, for three reasons, that Standard 4.33 providing for reprimand "when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests . . . and cause injury or potential injury to a client," should not apply. First, the fact that Respondent avoided going out with Ms. Mead in the Newport area and did not want anyone to know about the

relationship shows that he was aware that there was risk associated with the relationship.

Second, the comments accompanying Rule 1.7 presented the issue of risks associated with having a sexual relationship with a client and, had Respondent looked, he would have found extensive case law addressing the issue in the context of representing a divorce client. Courts have declared sexual relationships in the divorce context to be *per se* violations of Rule 1.7. Respondent should not be rewarded for failing to conduct adequate legal research. The situation here did not present a fact-intensive conflict of interest without any legal guidance.

Third, a presumptive standard of suspension is necessary to recognize the potential for Ms. Mead to have suffered serious injury in this case. She was a litigant in divorce proceeding with grave concerns about her financial well-being who could ill afford to have her representation compromised or the relationship with her ex-husband further damaged.

In relation to Respondent's giving of legal advice to Ms. Binette and failure to clarify his role in connection with the September 2012 Agreement, Standard 7.2 appears to be most applicable. It provides that "[s]uspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public or the legal system." *ABA Standards*, § 7.2.

Standard 7.2 also applies to the violation of Rule 8.4(d) that Respondent committed by entering into an agreement that purported to waive any future gender discrimination or sexual harassment claims against him for conduct that had not yet occurred, as well as to the *quid pro quo* sexual harassment violation of Rule 8.4(g) based on the agreement. Respondent knowingly engaged in this conduct. Suspension is the presumptive standard.

Finally, with respect to Respondent's masturbation and targeting of Ms. Binette's cleavage with paper clips, suspension is appropriate under either Standard 7.2 or Standard 5.12.

Respondent had a duty not to engage in sexual harassment and harmed Ms. Binette and the profession by his deliberate conduct. *See, e.g., In re Depew*, 237 P.3d 24, 28 (Kan. 2010) (applying Standard 7.2 to sexual harassment conduct). Alternatively, Standard 5.12 providing for suspension "when a lawyer knowingly engages in criminal conduct [not involving the elements in Standard 5.11] that seriously adversely reflects on the lawyer's fitness to practice" is applicable. The Commentary to Rule 5.12 observes that "a suspension can be imposed even where no criminal charges have been filed against the lawyer."

Respondent's masturbation in front of Ms. Binette can be viewed as lewd and lascivious conduct. *See* 13 V.S.A. § 2601 (criminal offense of "open and gross lewdness and lascivious behavior"); *State v. Wiley*, 2007 VT 13, ¶ 11, 181 Vt. 300, 917 A.2d 501 (2007) (lewd and lascivious conduct "includes the element of appealing to or gratifying one's sexual desires"); *State v. Benoit*, 158 Vt. 359, 361, 609 A.2d 230, 231 (1992) (conviction "requires no more than one witness"); *State v. Ovitt*, 148 Vt. 398, 404–05, 535 A.2d 1272, 1275 (1986) (observing that the "State did not need to . . . prove that defendant *actually* exposed his genitals, or present evidence that the complaining witness *actually* saw defendant's genitals). Ms. Binette's observation of Respondent's masturbation – conduct that by its nature was intended to gratify Respondent's sexual desires – would be sufficient to establish a *prima facie* case.

For all the foregoing reasons, the Panel concludes that suspension is the presumptive sanction for each of the violations committed by Respondent.

Aggravating and Mitigating Factors Analysis

Next, the Panel considers any aggravating and mitigating factors and whether they call for a lesser or greater sanction than is presumed under the applicable standards. Following this analysis, the Panel must decide on the ultimate sanction that will be imposed in this proceeding.

(a) Aggravating Factors

The following aggravating factors under the ABA Standards are present:

§ 9.22(b) (dishonest or selfish motive) – Respondent's conduct involved selfish motives. He was pursuing his personal interest in having a sexual relationship with Ms. Mead while he was representing her. In addition, he masturbated in Ms. Binette's presence for his own sexual gratification, *see, e.g., In re Wolf*, 826 P.2d 628, 631 (Or. 1991) (recognizing sexual gratification as a selfish motive under ABA Standards), and he threw paper clips at Ms. Binette's cleavage for his own entertainment. Finally, he had a selfish motive for encouraging Ms. Binette to sign the September 2012 Agreement. He was trying to prevent claims of gender discrimination or sexual harassment from being filed against him.

§ 9.22(c) (pattern of misconduct) – The evidence showed a pattern of misconduct in this case. The pattern consisted of Respondent pursuing sexual relationships without regard for his ethical obligations. He pursued a relationship with Ms. Mead which presented a conflict with his representation of her in the divorce action. He presented a written agreement to Ms. Binette to facilitate a sexual relationship with her and, in so doing, violated several rules of conduct.

§ 9.22(d) (multiple offenses) – Respondent committed multiple violations of the Rules of Professional Conduct.

§ 9.22(g) (refusal to acknowledge wrongful nature of conduct) – Of course, Respondent had a right to dispute the allegations of misconduct against him and his defense of the charges cannot be held against him. But the fact remains that he did not acknowledge that his conduct was wrongful.

Moreover, the Panel observes that Respondent made several assertions at the hearing suggesting that he was not acknowledging his conduct and was blaming others. For example, he

attempted to justify his ongoing relationship with Ms. Mead by testifying that she had verbally consented to his representation of her. But even assuming Respondent had a subjective belief that he could represent her while having a relationship – and, as explained, any such belief was not *objectively* reasonable – Rule 1.7(b)(4) required "informed consent, confirmed in writing" to proceed notwithstanding a concurrent conflict. Respondent presented no evidence of any written consent but, nevertheless, tried to shift responsibility onto Ms. Mead.

In addition, he testified that it was not his idea, but rather his step-brother's, to put a waiver clause in the agreement with Ms. Binette and that the draft agreement was not what he wanted. But, aside from the fact that his step-brother contradicted Respondent's testimony, Respondent failed to acknowledge that he himself was the one who presented the document to Ms. Binette; that he reviewed the document again four months after his step-brother's involvement had ended and even made changes to the waiver clause at that time before presenting it once more to Ms. Binette. He could not blame his step-brother.

Respondent also tried to blame Ms. Binette for the agreement, testifying that her desire to have sex with him precipitated the signing of the agreement in September 2012. But, even assuming she wanted to have sex with him, that would not negate his desire to have sex with her and his desire and initiative to put the agreement in place. He was responsible for the agreement. In sum, he failed to acknowledge the wrongfulness of his conduct.

§ 9.22(h) (vulnerability of the victims) – Ms. Mead and Ms. Binette were highly vulnerable persons. Ms. Mead was financially and emotionally vulnerable. She had just left a marriage and was having serious financial problems and was depending on Respondent not only to forego charging her for his services but also to give her paying work at Respondent's tanning salon. Ms. Binette had a very limited educational background and work experience. She had

never worked in a law office or as an administrative assistant. At the time she was hired by Respondent, she had been unable to get a job and, while she worked for Respondent, she was trying to complete one year of employment in order to qualify for a training program to be a border patrol agent. She also had a grand larceny charge hanging over her (later dismissed) while she worked for Respondent. Moreover, she depended on Respondent to receive advances on her pay because paychecks were delivered no more frequently than monthly. Finally, Ms. Binette had ongoing struggles with mental health issues based on her PTSD and attention deficit disorder.

§ 9.22(i) (substantial experience in the practice of law) – At the time of the conduct in question, Respondent had practiced law for approximately twelve years. The courts tend to recognize experience exceeding ten years to be substantial. *See, e.g., In re Disciplinary Proceeding Against Ferguson*, 246 P.3d 1236, 1250 (2011) (respondent's 11 years of practice was sufficient basis for "substantial experience" aggravating factor). Of course, in relative terms his experience was not as great as a lawyer practicing for twenty or thirty years. Therefore, this factor is not entitled to as great weight as other aggravating factors.

§ 9.22(k) (illegal conduct) – Vermont law prohibits discrimination in the form of sexual harassment. Respondent's sexual harassment of Ms. Binette constituted illegal conduct. *See, e.g., In re Tenenbaum*, 880 A.2d 1025, 1035 (Del. 2005) (sexual harassment constituted illegal conduct under § 9.22(k)).

(b) Mitigating Factors

The following mitigating factors under the ABA Standards are present:

§ 9.32(a) (absence of a prior disciplinary record) – Respondent has no prior disciplinary action against him.

§ 9.32(c) (personal or emotional problems) – Respondent established that he had emotional problems during the time period in question. He began psychotherapy in November 2012 and was diagnosed by a therapist as having Adjustment Reaction with Anxiety based on the effect on him of a number of deaths over a 23-year period of persons close to him. A psychiatrist who previously examined him was "worried" that Respondent had developed PTSD as a result. According to his therapist, Respondent has struggled with grief, insecurity, and chronic low self-esteem. The Panel concludes that it is likely that Respondent's emotional problems played some role in his conduct.

At the same time, to the extent that Respondent cites to his therapist's letter as somehow explaining Respondent's "involvement" with the three complainants in this case and asks the Panel as well to consider an opinion by the therapist to the effect that Respondent has been rehabilitated and is not likely to engage in similar misconduct in the future, the Panel rejects any such reliance for two fundamental reasons. First, Respondent has **not** asserted the mitigating factor of "mental disability" under § 9.32(i). Under that factor, he would have been required to show the following:

> (1) That there is medical evidence that the respondent is affected by a . . . mental disability;
>
> (2) The . . . mental disability caused the misconduct;
>
> (3) The respondent's recovery from the . . . mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
>
> (4) The recovery arrested the misconduct and recurrence of that misconduct is unlikely.

ABA Standards, § 9.32(i).

Respondent did not assert that mitigating factor, presumably because he concluded that he could not meet the requirements. And, of course, it should be noted that there was no

statement by any psychiatrist presented in the proceeding. Put simply, Respondent cannot accomplish through the "emotional problems" factor what he did not assert or prove through the "mental disability" factor.

In addition, Respondent did not make his therapist available for cross-examination by Disciplinary Counsel or questioning by the Panel members – even after he was advised by entry order issued November 21, 2017 that the last two scheduled days of hearings in January 2018 would encompass sanctions issues. Although Disciplinary Counsel stipulated to allow the filing by Respondent of sanctions-related statements after the hearing had concluded, the Panel is not bound to accept or give any significant weight to the therapist's letter in the absence of an opportunity for cross-examination and questioning by the Panel. If Respondent wanted to present what amounted to expert testimony, he should have arranged for his therapist to testify.[26]

§ 9.32(e) (full and free disclosure to disciplinary board or cooperative attitude toward proceedings) – It appears that Respondent cooperated with requests for information in course of the investigation. In addition, he participated in the proceedings. However, the Panel cannot assign much weight to this factor because Respondent has a duty under V.R.Pr.C. 8.1(b) to cooperate in connection with any disciplinary investigation. *See, e.g., In re Richmond's Case*, 872 A.2d 1023, 1030 (N.H. 2005) ("[W]e do not ascribe significant weight to this factor because a lawyer has a professional duty to cooperate with the committee's investigation").

§ 9.32(g) (character and reputation) – There was evidence presented that Respondent has provided *pro bono* legal services on many occasions and there were several clients who

[26] To give just one example of why the therapist should have been made available for questioning, the Panel is left to wonder whether the therapist was aware that Respondent encouraged Ms. Binette to have sex with him in August 2014 – approximately a year **after** he had described Ms. Binette to a state police detective as having mental health issues that impaired her decisionmaking and more than one year **after** he had begun working with the therapist.

expressed their gratitude and appreciation for his services. In addition, Respondent has served the community through his membership in the American Legion. Although some evidence was presented with respect to Respondent's reputation in the legal community, the Panel is unable to assign much weight to it. It consisted of testimony by his step-father, who is an attorney, and the current associate in his law practice. *See Toledo Bar Assn. v. Ritson*, 936 N.E.2d 931, 937 (Ohio 2010) (observing that respondent's character evidence was mostly from persons who were close friends); *Cf. In re Wyatt's Case*, 982 A.2d 396, 414 (N.H. 2009) (citing respondent's "excellent reputation among judges and practicing attorneys" as mitigating factor). Likewise, testimony by Respondent's step-father and mother as to Respondent's character must necessarily be taken with a grain of salt.

§ 9.32(j) (delay in disciplinary proceedings) – There was some delay in bringing this matter to a conclusion. However, the delay is not fairly quantified, as Respondent argues, by reference to the number of years that have elapsed from the opening of the investigation. Delay resulted at least in part from Respondent's decision to expend time in an ultimately unsuccessful effort to secure a ruling on the basis of a stipulation of facts. The stipulation was rejected by a hearing panel in March 2017, at which point Disciplinary Counsel proceeded diligently to bring charges and a new hearing panel (the current one) was appointed to preside over the proceeding. The case then proceeded to an evidentiary hearing. Respondent must bear responsibility for his own strategic decisions in connection with the earlier proposed stipulation of facts. In his submission, Respondent has not provided a sufficient basis on which to quantify the delay. In addition, the Panel observes that Respondent was able to continue practicing law during the pendency of this proceeding.

* * *

For the following reasons, the Panel rejects Respondents' assertion that the following mitigating factors should apply:

§ 9.32(b) (absence of dishonest or selfish motive) – As explained in the discussion of aggravating factors, Respondent had selfish motives in connection with his misconduct.

§ 9.32(f) (inexperience in the practice of law) –Respondent asks to be considered an attorney "still gaining experience" despite his twelve years of practice. Of course, that could be said of all practicing attorneys. Respondent's argument is more pertinent to the weight that should given to the aggravating factor of "substantial experience" that is addressed above.

§ 9.32(h) (physical disability) – Respondent has not established that any physical disability had a causal relationship to his misconduct. He has not provided evidence that his specific misconduct can be attributed to a diagnosis that he suffers from fibromyalgia or a learning disability. To the extent that he tries to rely on the statement in a letter from his therapist to the effect that Respondent also has ADHD and that the combination of ADHD and learning disabilities "often affects [a person's] ability to process psychological information in real time," that statement is too general. The Panel further observes that Respondent managed to function as an attorney throughout the period of time in question and necessarily interacted with many people during that time. The Panel is not persuaded that any physical disability played a causal role. In addition, as explained previously, Respondent's therapist should have been made available for questioning at the hearing.

§ 9.32(k) (imposition of other penalties or sanctions) – Courts generally have applied the other-penalties-or-sanctions factor "only where the sanctions were disciplinary or punishment in nature." *Attorney Grievance Comm'n of Maryland v. Spery*, 810 A.2d 487, 494 (Md. 2002). Respondent has presented no such evidence.

§ 9.32(l) (remorse) – The Panel cannot find that Respondent has shown remorse for his conduct. As was his right, he denied any wrongdoing throughout the proceeding. At times during the hearing, he suggested that he might have made a different choice. But such statements are not expressions of remorse. Respondent tries to rely on post-hearing statements by his therapist in her letter to the effect that he has expressed remorse for "how he now understands he hurt these three women" and has accepted responsibility for his conduct. But he cannot speak through a third person.

(c) Weighing the Aggravating Mitigating Factors

The aggravating factors significantly outweigh the mitigating factors. Nevertheless, the Panel concludes that it should not increase the presumptive sanction to disbarment. The fact that Respondent has no prior disciplinary record weighs heavily in support of this conclusion. Suspension is the appropriate sanction.

* * *

The ABA Standards state that "[g]enerally, suspension should be for a period of time equal to or greater than six months, but in no event should the time period prior to application for reinstatement be more than three years." *ABA Standards*, at 20.[27] The ABA Standards also observe that in cases involving multiple charges of misconduct "[t]he ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations." *ABA Standards*, at 7.

Having in mind that "[i]n general, meaningful comparisons of attorney sanction cases are difficult as the behavior that leads to sanction varies so widely between cases," *In re Strouse*,

[27] However, the recommendation of a minimum length of suspension is not binding on the Panel. *See, e.g., In re McCarty*, 164 Vt. 604, 605, 665 A.2d 885, 887 (1995).

2011 VT 77, ¶ 43, 190 Vt. 170, 34 A.3d 329 (Dooley, J., dissenting), the Panel has considered past disciplinary determinations to inform its ultimate determination. There is presently no Vermont precedent addressing violations of this nature. Disciplinary decisions from other jurisdictions involving sexual harassment have generally imposed suspensions ranging from one to three years in duration. *See, e.g*, *In re Tenenbaum*, 880 A.2d 1025, 1026 (Del. 2005 (imposing three-year suspension based on sexual harassment of clients and employees); *Disciplinary Counsel v. Detweiler*, 989 N.E.2d 41, 45 (Ohio 2013) (imposing one-year suspension based on "sexting" with client); *In re Depew*, 237 P.3d 24 (Kan. 2010) (imposing one-year suspension based on sexual harassment of court administrative assistants); *Disciplinary Bd. v. Moothart*, 860 N.W.2d 598, 617 (Iowa 2015) (imposing 30-month suspension for multiple instances of sexual harassment). The facts of these cases vary, and the cases have necessarily been decided by comparison to other attorney discipline meted out in the various states. Therefore, it is difficult to draw firm conclusions from these cases.

The Panel believes that the length of suspension issued in this case should be calibrated in relation to other sanctions imposed in Vermont. The Panel views the decisions in *In re Neisner*, 2010 VT 102, 189 Vt. 145, 16 A.3d 587, and *In re Pope*, 2014 VT 94, 197 Vt. 638, 101 A.3d 1284, as providing the best guidance. In *Neisner*, the respondent was convicted of the offenses of impeding a police officer and providing false reports to law enforcement authorities. The charges resulted when the respondent left the scene of an accident and falsely reported that his wife had caused the accident. Based on a violation of Rule 8.4(b) for conduct that involved dishonesty and misrepresentation, the Court imposed a two-year suspension. In arriving at a sanction, the Court observed that the conduct was intentional. It noted the aggravating factors of selfish motive, substantial experience in the practice of law ("nearly twenty years"), and the fact

that respondent had engaged in illegal conduct. 2010 VT 102, ¶19. It recognized as mitigating factors that respondent had no prior disciplinary record; that other penalties and sanctions were imposed through his criminal conviction; that there was considerable evidence of good character; that he had publicly expressed some level of remorse; and that he suffered from alcoholism at the time. *Id.* ¶¶ 20-22. The Court concluded that because the mitigating factors outweighed the aggravating factors, the presumptive sanction of disbarment under ABA Standard 5.11 should be reduced to a suspension. It then proceeded to impose a two-year suspension. *Id.* ¶ 24.

In *Pope*, the respondent was convicted by a New York court of misdemeanor identity theft, and disciplinary counsel filed a petition for reciprocal discipline. Based on the conviction, the Court found a violation of Rule 8.4(b) and applied a presumptive sanction of suspension under ABA Standard 5.12. 2014 VT 94, ¶¶ 10-11. In imposing a two-year suspension, it drew a comparison to the sanction imposed in *Neisner*. After observing that both cases involved a violation of Rule 8.4(b), the Court placed great weight on the following considerations:

> There, as here, the respondent's criminal conduct reflected adversely on his honesty and trustworthiness, and violated his fundamental obligation to the public to uphold the law. There, as here, the respondent acted knowingly and intentionally, and, most important, there – as here – the respondent's misconduct undermined public confidence in the integrity of the bar and the administration of justice. Moreover, although the attorney in *Neisner*, like respondent here, had no prior disciplinary record, was generally cooperative, and had a record of community service, we concluded that a two-year suspension was necessary and sufficient to protect the public, maintain public confidence in the profession, and deter other attorneys from engaging in misconduct. We reach the same conclusion here.

Id. ¶ 14 (citations omitted).

The Panel concludes that the violations found in this proceeding should be considered no less serious and no less deserving of a substantial suspension than the conduct at issue in *Pope* and *Neisner*. Respondent's violations of Rule 8.4(d) and Rule 8.4(g) – presenting and entering

into an agreement to shield himself from liability for sexual harassment and engaging in sexual harassment – are serious violations that necessarily undermine public confidence in the integrity of the bar and the administration of justice. These violations reflected adversely on Respondent's personal integrity and trustworthiness. Sexual harassment is prohibited under FEPA. It may not be criminal conduct, but it is illegal conduct nonetheless. Moreover, Respondent might have been charged with the criminal offense of lewd and lascivious conduct based on his masturbation in front of Ms. Binette.

Respondent's conduct was every bit as serious as the conduct in *Neisner* and *Pope* and it should be recognized as such. The vulnerability of Ms. Mead and Ms. Binette should be considered. Ms. Mead will never believe that her lawyer represented her zealously. There is no telling whether Ms. Binette will ever recover from the trauma caused by Respondent. A substantial suspension is needed to restore confidence in the profession and the legal system.

Respondent has asked the Panel to weigh heavily the fact that he experienced some emotional problems during the time period in question. But Respondent failed to demonstrate that they were the primary cause of the conduct in question. Just as the respondent's conduct in *Neisner* was not excused by his alcoholism, 2010 VT 102, ¶ 22, neither is Respondent's conduct excused by his experiencing anxiety for which he eventually sought counseling. Likewise, the fact that Respondent has no prior disciplinary record and that he was generally cooperative in the disciplinary process and has provided some community service does not call for a reduction. As noted in *Pope* and *Neisner*, those factors carry little weight in the face of serious violations that undermine public confidence and they are outweighed in this case by other aggravating factors, including Respondent's efforts to blame others for his wrongful conduct.

Based on all of the foregoing considerations, the Panel will impose a two-year suspension as a sanction. In addition, in light of the evidence presented and because Respondent will be required to apply for reinstatement if he wants to resume the practice of law, *see* A.O. 9, Rule 22(B) ("A lawyer who has been suspended for six months or longer shall comply with paragraph D of this rule."); *id.*, Rule 22(D) (requiring motions for reinstatement to be filed and specifying related procedures and standards for reinstatement); *id.*, the Panel will require in addition to the other requirements of that rule, that any motion for reinstatement shall require submission of a certification of completion of a rigorous sexual harassment education program and submission of an independent qualified health-care professional's evaluation of Respondent's mental health, to be paid for by Respondent and undertaken no earlier than 90 days prior to the filing of any such motion. *See, e.g, Moothart*, 860 N.W.2d at 617 (requiring sexual harassment counseling and evaluation prior to any license reinstatement).

ORDER

It is hereby ORDERED, ADJUDGED and DECREED as follows:

1. Respondent, Glenn R. Robinson, Esq., has violated A.O. 9, Rules 1.7, 4.3, 8.4(d), and 8.4(g), as set forth above;

2. Respondent is suspended from the office of attorney and counselor at law for a period of two years (24 months) effective from the date of this decision; and

3. In the event that Respondent files a motion seeking permission to resume the practice of law, in compliance with A.O. 9, Rule 22(D), he shall be required to submit as part of his application (1) an independent qualified health-care professional's evaluation of his mental health, to be paid for by Respondent, to be performed no earlier than 90 days prior to the filing of

any motion; and (2) a certificate of his participation in and completion of a sexual harassment education program that meets with the prior approval of Bar Counsel.

Dated this 30th day of March of 2018.

Hearing Panel No. 3

By: _____
Sheila Ware, Esq., Chair

By: _____
Jeffrey S. Marlin, Esq.

By: _____
Patrick Burke, Public Member