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STATE OF VERMONT
PUBLIC SERVICE BOARD

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Joint Petition of Central Vermont Public Service Corporation ("CVPS"), Danaus Vermont Corp., Northern New England Energy Corporation ("NNEEC") for itself and as agent for Gaz Metro Limited Partnership and its parents, Green Mountain Power Corporation ("GMP") and Vermont Low Income Trust for Electricity, Inc. ("VLITE"), for approval of: (1) the merger of Danaus into and with CVPS; (2) the acquisition by NNEEC of CVPS and certain other Vermont companies; (3) the amendment to CVPS's Articles of Association; (4) the merger of CVPS into and with GMP; and (5) the acquisition by VLITE of a controlling interest in Vermont Electric Power Company, Inc.	)	Docket No. 7770

REPLY TO DEPARTMENT OF PUBLIC SERVICE AND PETITIONERS' OPPOSITION TO RATEPAYERS INTERVENTION[1] AND PETITION FOR APPOINTMENT OF INDEPENDENT COUNSEL

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

BACKGROUND AND DUTIES OF LAWYERS AND PUBLIC OFFICIALS

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

[1] The Department does not oppose Ratepayers intervention on permissive grounds. DPS Response at p.11.

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

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

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

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

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

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

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

II. The State Administration has Prejudiced the Position of DPS

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

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

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

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

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

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

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

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

IV. The Role of the Commissioner as a Lawyer and "Personal Interest Conflicts"

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

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

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

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

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

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

[11] The "Public" cannot provide "informed consent" given the nature of the relationship. Accordingly, other mechanisms must be found to provide confidence in the process.
[12] See ftnt. 6.

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

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

VI. Ratepayers Participation as Interveners is Appropriate.

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

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

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

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

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Shumlin reiterates support for GMP, CVPS merger

Halifax, Nova Scotia - July 11, 2011

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

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

WCAX News

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

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

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

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

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

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

¶ 8. This Court reviews a disciplinary hearing panel's findings of fact under a clearly erroneous standard. A.O. 9, Rule 11(E); *In re Farrar*, 2008 VT 31, ¶ 5, 183 Vt. 592, 949 A.2d 438 (mem.). A panel's findings are upheld if "clearly and reasonably supported by the evidence," whether the findings are purely factual or mixed law and fact. *In re Blais*, 174 Vt. 628, 629, 817 A.2d 1266, 1269 (2002) (mem.) (quotations omitted). We give deference to the recommendations of a disciplinary panel but use our own discretion and make our own determination as to which sanctions are appropriate for violations of the Rules of Professional Conduct. *Id.* at 630, 817 A.2d at 1269; *Farrar*, 2008 VT 31, ¶ 5.

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

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

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

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

Id., cmt. [3].

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

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

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

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

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

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

¶ 25. In deciding between 5.11(b) and 5.13, we agree with respondent that 5.13 is the more fitting. While we conclude her actions reflected adversely on her fitness to practice law, we do not agree that the reflection was so serious as to merit disbarment. This opinion is supported by a review of the Commentary to ABA Standard 5.11, which discusses a number of cases where disbarment was proper, all of which involved significantly more serious conduct. See ABA Standards § 5.11, at 38, Commentary (citing cases where lawyers were convicted of serious felonies and disbarment was imposed, including *In re Grimes*, 326 N.W.2d 380 (Mich. 1982) (disbarring lawyer convicted of two counts of federal income tax evasion and one count of subordination of perjury) and *Sixth Dist. Comm. of the Va. State Bar v. Hodgson*, No. 80-18 (Va. Disciplinary Bd., 1981) (disbarring lawyer who advised client that he could make arrangements to have her husband killed in lieu of bringing child custody suit)).

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

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

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

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

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

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

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

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

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

¶ 41. As the majority recognizes, we give deference to the Panel's decision. In giving deference, I concur with the Panel's decision that a reprimand is too lenient a sanction, given the level of deceit and the severity of the potential ethics violation here. Although I agree with the majority that the ABA Standards are broad and subjective and do not lead conclusively to any one sanction in this case, I believe they support a suspension. See ABA Center for Professional Responsibility, Standards for Imposing Lawyer Sanctions (1986) (amended 1992). ABA Standard 5.1 is the most applicable standard as it deals with conduct "involving dishonesty, fraud, deceit, or misrepresentation." As the majority notes, the parties point to different subsections of Standard 5.1. Disciplinary counsel advocates for ABA Standard 5.11(b), which states disbarment is generally appropriate for "intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice." ABA Standard 5.13, for which respondent advocates, states that a reprimand is "generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law." The majority correctly acknowledges that whether or not the seriousness of an attorney's actions rises to the level covered by Standard 5.11(b) is an extremely subjective determination. Because this ABA Standard does not provide for suspension, the severity of the sanction varies tremendously based on the difference in the degree of conduct.

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

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

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