STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In Re: Margaret Strouse, Esq.
PRB File No. 2008.207

Decision No: 128

Respondent is suspended for six months for failing to tell her employer that she was involved in a romantic relationship with the husband of one of her employer's divorce clients in violation of Rule 8.4(c) of the Vermont Rules of Professional Conduct. The matter was heard on September 28, 2009, before Hearing Panel No. 7 consisting of Harland L. Miller, Esq., Chair, Mark Hall, Esq. and Stephen V. Carbone.

Facts

Respondent was admitted to the Vermont Bar in 2001, and in January of 2006 was hired to work for the firm of Kirkpatrick & Goldsborough, PLLC. In November of 2007, while Respondent was employed with the firm, Dr. Erin Cody engaged Kirkpatrick & Goldsborough, PLLC attorney Mary Kirkpatrick to represent her in a divorce from her husband Peter Reisfeld. The couple had two sons, one age four and the other age 18 months.

In early February, Respondent and Peter Reisfeld met at a gym and shortly thereafter began dating. At the time Respondent did not know that Dr. Cody was a client of her firm. On or about February 19, 2008, Respondent was looking through a list of the firm's clients and realized that the man she was dating was in the process of a divorce involving a client of her firm. Respondent called an attorney friend for advice and within several hours informed Attorney Kirkpatrick that she had recently started to date Mr.

Reisfeld, and that she had just discovered that his wife was a client of the firm. Respondent requested that the firm erect a "conflict wall," which she understood to mean that she would have nothing to do with the file and would in no way participate in the representation of Dr. Cody. She apparently believed a "conflict wall" would allow her to continue in the relationship.

The following day, Attorney Kirkpatrick left Respondent a message in which she indicated that Respondent's employment would be terminated if she did not end her relationship with Peter Reisfeld. The next day, February 21, 2008, Respondent told Attorney Kirkpatrick that she had, in fact, terminated her relationship with Mr. Reisfeld. In reliance on Respondent's representation, Attorney Kirkpatrick disclosed the affair to Dr. Cody, indicating that Respondent had ceased seeing Mr. Reisfeld. Dr. Cody consulted with another attorney and, relying on Attorney Kirkpatrick's representation, decided to continue with Kirkpatrick & Goldsborough, PLLC as her attorneys in the divorce.

On February 26, 2008, Respondent received an email confirmation at work that a gift she had ordered from Lake Champlain Chocolates would be delivered to Mr. Reisfeld on February 27, 2008. At some point between February 21, 2008, and March 8, 2008, Respondent and her children spent time with Mr. Reisfeld and his children at the pool of a local health club. They were together on other occasions during this time period.

Respondent continued to work at Kirkpatrick & Goldsborough, PLLC, and did not inform Attorney Kirkpatrick or Dr. Cody that she had resumed her relationship with Mr. Reisfeld.

Because Dr. Cody was to leave the state for health reasons, she and Mr. Reisfeld

negotiated a temporary agreement that, as of March 7, 2008, provided that if Dr. Cody was not in the home with the children, Mr. Reisfeld could move in during her absence to care for the children. Dr. Cody left the home on March 8, 2008, a Saturday. Respondent and her children arrived later that same day and spent the night at the marital home with Mr. Reisfeld and his children. She and Mr. Reisfeld slept in the master bedroom. This event was subsequently discovered by Dr. Cody's family.

On Tuesday, March 11, 2008, Attorney Kirkpatrick heard from Dr. Cody's family that they believed that Respondent and her children were living in the marital home with Mr. Reisfeld and his children. Attorney Kirkpatrick confronted Respondent, at which time Respondent admitted that she had been staying with Mr. Reisfeld at the marital home, and that the relationship had resumed. Attorney Kirkpatrick immediately terminated Respondent's employment with the firm.

Respondent and her children continued to live with Mr. Reisfeld for several months after her employment terminated.

This Panel finds that the relationship between Mr. Reisfeld and Respondent was, at all times relevant hereto, romantic in character and not a mere friendship or casual acquaintance.

There are several aggravating factors. There was both actual harm and the potential for serious harm. The fact that Respondent and her children were living in the marital home with Mr. Reisfeld and his children was stressful and confusing to the Reisfeld children and difficult for Dr. Cody. All three were vulnerable due to the divorce and Dr. Cody's health problems

The Panel is also concerned that Respondent neither understands nor acknowledges the wrongful nature of her conduct. She was either evasive or nonresponsive to questions from Disciplinary Counsel and the Panel about the details of her relationship with Mr. Reisfeld, the events giving rise to the complaint, or even the date she was fired from her position at the firm. She had no answer when asked by Disciplinary Counsel if she knew what was at issue in the hearing.

In mitigation, Respondent has no prior discipline.

Conclusions of Law

Rule 8.4(c) of the Vermont Rules of Professional Conduct states that "[i]t is professional misconduct for an attorney to engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[1] The Amended Petition of Misconduct alleges that Respondent violated this rule by engaging in conduct involving *deceit*.

Respondent argues essentially that she never literally lied to Attorney Kirkpatrick, therefore she did not engage in deceit. Along this line of argument, she claims she was truthful in admitting to the relationship once she discovered the attorney-client relationship and in later admitting that the affair had been resumed. The facts are not contested, however, that Respondent resumed the relationship covertly and remained silent about its resumption until she was confronted by Attorney Kirkpatrick. Indeed, there is substantial question whether the relationship *ever* ceased during this time period. The question is whether such conduct constitutes deceit under Rule 8.4(c). The Panel concludes that it does.

[1] Respondent is charged under the Rules of Professional Conduct in effect at the time of the misconduct. The new Vermont Rules of Professional Conduct became effective on September 1, 2009.

Rule 8.4 provides in relevant part: "It is professional misconduct for a lawyer to . . . (c) engage in *conduct* involving dishonesty, fraud, deceit or misrepresentation." A violation of Rule 8.4(c) requires a showing that a respondent was dishonest, deceitful, fraudulent, or misrepresented the truth. The provision deals broadly with conduct, and is not limited to spoken or written misrepresentation, so deceit may take place without an actual stated lie.[2] Instead, deceit has been defined in connection with the prior disciplinary rules as the "active suppression of facts by one bound to disclose them." *See In re Shorter*, 570 A.2d 760, 777 n. 12 (D.C. 1990). Silence or other covert conduct is implied in the definition of the term, "deceit."

The Vermont Supreme Court has decided affirmatively many times in the civil common law context that silence can be "deceit" where there is a legal or equitable obligation of disclosure. *See, e.g.,Sutvin v. Southworth*, 149 Vt. 67, 69-70 (1987). In *Sutvin v. Southworth* the Court held:

> Fraud "must consist of some affirmative act, or of concealment of facts by one with knowledge and a duty to disclose." *Standard Packaging Corp. v. Julian Goodrich Architects, Inc.*, 136 Vt. 376, 381, 392 A.2d 402, 405 (1978) (citing *Town of Troy v. Am. Fid. Co.*, 120 Vt. 410, 423-24, 143 A.2d 469, 477-78 (1958)). "Silence alone is insufficient to constitute fraud unless there is a duty to speak." *Cheever v. Albro*, 138 Vt. 566, 571, 421 A.2d 1287, 1290 (1980). Where there is a duty to speak, however, Vermont has long recognized the doctrine of negative deceit. *See Crompton v.*

[2] Were we to follow Respondent's argument that deceit and lying are the same thing, it would of necessity shift the burden of policing this relationship to Attorney Kirkpatrick. It would result in the conclusion that as long as Respondent was not asked about the relationship, and as long as she did not lie about it if asked, there would be no violation.

Not only is this an absurd conclusion, it ignores the underlying reason for Attorney Kirkpatrick's ultimatum. Both Attorney Kirkpatrick and Respondent had an obligation of loyalty to Dr. Cody as a client. That obligation was compromised.

Beedle, 83 Vt. 287, 75 A. 331 (1910) (a thorough discussion of the history of the doctrine by Justice Haselton) (citing *Paddock v. Strobridge*, 29 Vt. 470 (1856)). That doctrine has been well defined:

> The test of liability for failure to disclose facts material to the transaction is some duty, legal or equitable, arising from the relations of the parties, such as that of trust or confidence, or superior knowledge or means of knowledge. When in the circumstances of the particular case such duty is present, failure to disclose a material fact with intention to mislead or defraud is equivalent to a fraudulent concealment of the fact and stands no better than the affirmation of a material misrepresentation. *Cheever v. Albro*, 138 Vt. at 571, 421 A.2d at 1290 (quoting *Newell Brothers v. Hanson*, 97 Vt. 297, 303-04, 123 A. 208, 210 (1924)).

This a proceeding under the Vermont Rules of Professional Conduct, but it is clear that under Vermont common law silence can constitute deceit where there is an obligation to speak. It appears that the elements for actionable deceit in the professional conduct setting are not dissimilar. *See generally In re PRB Decision No. 109, aff'd by Supreme Court Entry Order Nov. 25, 2009,* 2009 VT 115, discussing the potential scope of behaviors to which the rule could apply). If anything it would seem that the standard of conduct under the Rules of Professional Conduct would be more demanding because deceitful conduct affects trust in the profession as whole. *See In re Hunter,* 167 Vt. 219, 226 (1997) (purpose of the Rules is "to protect the public from harm and to maintain confidence in our legal institutions by deterring future misconduct."). Black's Law Dictionary defines deceit to include, "A fraudulent or deceptive misrepresentation, artifice, or device used by one or more persons to deceive and trick another, who is ignorant of the true facts, to the prejudice and damage of the party imposed upon."

Black's Law Dictionary 365 (5th ed. 1979). As previously stated, deceit has held to be the suppression of facts where there is an obligation to disclose. *Cf. In re Shorter*, 570 A.2d at 777 n. 12. Under any definition, covert or deceptive conduct, where there is an obligation to disclose, falls well with the rubric of deceitful behavior.

In February, Attorney Kirkpatrick expressly told Respondent that she had the option of terminating the relationship with Mr. Reisfeld or leaving her employment with the firm. Respondent informed Attorney Kirkpatrick that the relationship was terminated. Both Attorney Kirkpatrick's ultimatum and Respondent's reaction thereto were clear and unequivocal. Respondent also knew that the Reisfeld divorce was ongoing at the time, that Dr. Cody remained a client of the firm, and that she certainly had not waived the conflict. Respondent had every reason to believe that her employment would be terminated were she to resume the relationship with Mr. Reisfeld. When she did so without informing Attorney Kirkpatrick or Dr. Cody, her *conduct* was designed to lead them to believe that the relationship was over.

There appears to be no question here that Respondent's conduct was, in fact, deceitful. The issue is therefore whether this particular deceitful conduct is subject to sanction under the Rules of Professional Conduct. The breath of Rule 8.4(c) has been the topic of much discussion locally and nationally. *See PRB Decision No. 109, supra* (discussing the potential scope of behaviors to which the rule could apply). Recently, the Vermont Supreme Court ruled in a highly fractured decision that the scope of the rule is not so broad as to implicate all forms of misrepresentation or deceit in the attorney's personal or professional life, even if the conduct involves an actual stated lie. *Id.* ¶¶ 11-17 (an affirmative misrepresentation by an attorney to a witness that he was not being

taped found not subject to sanction under Rule 8.4(c)*; see* D.C. Bar Legal Ethics Comm. Op. 323 ("Clearly [Rule 8.4.(c)] does not encompass all acts of deceit – for example, a lawyer is not to be disciplined professionally for committing adultery, or lying about the lawyer's availability for a social engagement."). Rule 8.4(c) instead only applies to " '*conduct* which indicates that an attorney lacks the character required for bar membership.' " *PRB Decision 109*, ¶ 15 (emphasis added). In so ruling, the Court affirmed "the hearing panel's conclusion that subsection (c) applies only 'to conduct so egregious that it indicates that the lawyer charged lacks the moral character to practice law.' " *Id.*

The Court has not yet had the opportunity to expand upon what specific behaviors might violate the rule. However, it has determined that answers depicting a lack of candor on a bar application "may be grounds for finding of lack of requisite character and fitness" to warrant admission. *In re Bitter*, 185 Vt. 151 ¶ 26-28 (2008). Inherent in the *Bitter* decision is that the failure to speak, when an obligation exists to do so, demonstrates a lack of character sufficient to deny admission to the bar. *Id.* It is consistent with *Bitter* to conclude that the rules of conduct with respect to maintaining a license to practice law in Vermont are no less exacting than those required for admission. The similar modes of analysis in *PRB Decicion No 109* and in *Bitter* suggest that the Vermont Supreme Court would reach the same conclusion.

Without doubt, however, the Vermont Supreme Court has determined that not all deceitful or dishonest conduct is punishable by Rule 8.4(c). Minor lies and broken promises are not necessarily violations. This Panel believes the matter before us is not a close case. Without question, a conflict of interest results when an attorney enters into a

romantic relationship with one spouse in a divorce proceeding in which the attorney's firm represents the other.[3] PRB Rule 1.7(b) ("A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to . . . a third person, or by the lawyer's own interest."); *see also In re Pattison*, 121 P.3d 423, 426-28 (Kan. 2005) (attorney violates Rules 1.7(b) and 8.4(d) by continuing as guardian ad litem of minor children after becoming romantically involved with the children's mother); *In re DiPippo,* 678 A.2d 454 (R.I. 1996) (attorney violates Rule 1.7(b) by beginning a relationship with a divorce client, as "any competent attorney" would know that the relationship could jeopardize the client's interest in the divorce); *People v. Singer*, 275 Cal. Rptr. 911, 921 (Cal. App. 3d 1990) (the conclusion is "inescapable" that a conflict of interest results when a criminal defense attorney is romantically involved with the wife of the defendant). "Loyalty is an essential element in the lawyer's representation of a client," and, foremost, "the lawyer's own interest should not be permitted to have an adverse effect on the representation of the client." PRB Rule 1.7, comment. Such a conflict of interest, when it arises, is imputed to the other attorneys of Kirkpatrick & Goldsborough, PLLC, a small law firm, thus giving rise, at a minimum, to a duty of disclose the fact that the relationship had resumed so that the matter could be brought to the client's attention. *See* Rule 1.10 (a firm is prohibited from representing any person when any one of them practicing alone would be prohibited from doing so by

[3] There has been much discussion of how and if sexual contacts *with clients* should be dealt with under the Rules of Professional Conduct. Vermont chose to not to adopt a specific rule, but rather to deal with the issue as a recommendation in the comments to Rule 8.4, which states: "A lawyer who engages in intimate sexual relations with a client while providing representation in a personal legal matter is one example of abuse of position which adversely reflects on the lawyer's fitness to practice." The rule does not speak expressly to the present situation.

Rule 1.7). While Respondent is not charged under Rule 1.7(b) for failing to disclose the conflict of interest, her act of covertly resuming and continuing on in the relationship after expressly stating it had been terminated resulted in a potentially catastrophic breach of trust with the client. *See* Comment, Rule 8.4 (rule applies to offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice.) It was clearly an active suppression of facts by one bound to disclose them. *In re Shorter,* 570 A.2d at 777 n. 12. Given the nature of Respondent's behavior—conducting a secret affair with a spouse of a divorce client, after representing to the client that the affair had been terminated—this Panel has little difficulty concluding that the conduct calls into question Respondent's character and fitness to practice law.

By virtue of her obligations to a client of her firm and her corresponding obligations under the Vermont Rules of Professional Conduct, Respondent had the duty at a minimum to reveal that she had resumed her romantic relationship with Mr. Reisfeld. Instead, she elected to covertly re-establish (or continue) a relationship which she had previously represented had been terminated. This Panel therefore finds that Respondent engaged in deceit in violation under Rule 8.4(c) of the Vermont Rules of Professional Conduct .

Sanction

Sanctions are not intended to punish lawyers but rather "to protect the public from harm and to maintain confidence in our legal institutions by deterring future misconduct." *In re Hunter*, 167 Vt. at 226. In determining the appropriate sanction in this matter, we are guided by the ABA Standards for Imposing Lawyer Discipline and by Vermont case law. Under the ABA Standards we first consider the duty violated, the lawyer's mental

state, and any actual or potential injury in order to arrive at a presumptive sanction. We then consider whether this sanction should be modified by aggravating or mitigating factors. *ABA Standards, § 3.0*.

Respondent owed a duty to her employer, Kirkpatrick & Goldsborough, PLLC; to Dr. Cody, the firm's client; to the public; and to the legal profession. One of the core aspects of the attorney-client relationship is the client's trust in the privacy and confidentiality of their communications. Consistent with that trust is the obligation to avoid conflicts of interest which call directly into question the loyalty of the attorney to the client. *See* Rule 1.7. To breach the obligation deceitfully, as happened in this case, is a serious matter, as it evinces exceptional indifference to Respondent's obligations to the client. *See* Rule 8.4(c), comment.

Attorney Kirkpatrick owed this important duty to her client, Dr. Cody, as did Respondent. Dr. Cody was the firm's client in a contested divorce proceeding. For her to discover during the proceeding that Attorney Kirkpatrick's associate was involved in a romantic relationship with her then-spouse was likely shocking enough, although the events appear to have been innocent up to that point. But, to later find out that Respondent was spending the night in the marital home and that the relationship had been resumed after being told it had been terminated was understandably devastating. The fact that Respondent elected to spend the night in the marital home on the very day Dr. Cody left to receive long-term medical care is inexcusable.

It is of no small consequence that Respondent's mental state was one of knowing. She knew that Attorney Kirkpatrick's view was that she had to choose between the relationship and her employment with the firm, and she intentionally concealed her

decision not to make that choice. She also knew that Dr. Cody was a client of the firm. She was aware of the conflict. Without doubt Respondent was aware of the affirmative representation she had made to Attorney Kirkpatrick.

In assessing harm in this situation, there was actual harm to Dr. Cody and her children in terms of the emotional stress created by the relationship. There was also the potential for serious harm, as Dr. Cody's confidence and trust with respect to her counsel, occurring at a critical point in her life and the lives of her children, was obviously jarred by the events. Attorney Kirkpatrick's firm is small and client confidences could easily have been revealed either intentionally or inadvertently. Even without such an event actually occurred, the obligation of loyalty reasonably expected in the attorney client relationship was obviously violated. There was also the potential for harm to Attorney Kirkpatrick, had Dr. Cody filed a professional conduct complaint against her.

We now look at the aggravating and mitigating factors. In mitigation, Respondent has no prior disciplinary offenses. *ABA Standards § 9.3(a).* In aggravation, she appeared to have little remorse for the situation and did not acknowledge or even appear to understand the wrongful nature of her conduct. *ABA Standards § 9.22(g)*. She also acted selfishly in that she wanted to both retain her job and continue the relationship with Mr. Reisfeld, a situation she knew violated her obligations to the client in a manner which her employer would not tolerate, *ABA Standards § 9.22(b).* Dr. Cody and her young children were especially vulnerable to harm from Respondent's conduct. *ABA Standards § 9.22(b).* We also consider her vague and non-responsive answers to questions central to the charge of misconduct to be an aggravating factor.

Based upon these factors Disciplinary Counsel argues, with some justification,

that disbarment is the appropriate sanction in this case.

Section 7.0 of the ABA Standards covers "Violations of Duties Owed as a Professional," and the introduction to the section points out that the Rules "include many ethical standards that are not fundamental to the professional relationship but which define certain standards of conduct."

Section 7.1 provides that "[d]isbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent 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." Respondent knowingly deceived her employer and, more importantly, the firm's client in order to obtain a benefit for herself with the potential for causing serious injury. She wanted both her job and a relationship with Mr. Reisfeld and she appeared unconcerned about the potential for the harm this relationship could cause Dr. Cody and her children.

Disciplinary Counsel also points to Section 4.6 of the ABA Standards, "Lack of Candor" which states that "[d]isbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer, and causes serious injury or potentially serious injury to a client." *Id*. § 4.61. The client here is Dr. Cody, a client of the firm employing respondent, and again the facts fit the quoted section.

While the ABA Standards may point to disbarment in this case, Vermont case law does not. In general, disbarment has been reserved for serious criminal activity. See, e.g., *In re Ruggerio,* Supreme Court Entry Order 2006-154, (PRB Decision No. 88) (criminal conviction for embezzlement from trust account); *In re McGinn,* Supreme Court Entry Order 2005-237 (PRB Decision No 77) ($650,000 shortfall in client's trust,

plea in federal court to mail fraud, misappropriation of client funds); *In re Harwood*, 2006 VT 15 (PRB Decision No. 83) (misuse of client's trust funds); *In re Lane*, Supreme Court Entry Order 2002-431, (PRB Decision No. 42) (attorney was Treasurer of Chittenden County Democrats, temporarily used their funds for his own purposes).

We also note two recent cases in which the attorney was convicted of a crime and in each case the sanction was a one year suspension, *In re van Aelstyn*, PRB Decision No. 112 (2008) (conviction for extortion and stalking); *In re Neisner*, PRB Decision No. 119 (2009) (conviction of four offenses including the felony of impeding a police officer).[4]

While Respondent's conduct was undoubtedly serious and had the potential for injury, it was a first-time single violation of the rules instead of a pattern of misconduct; it did not involve betrayal of a client confidence or the commission of a crime or misdemeanor; and it did not appear to result in permanent harm to Dr. Cody or her children. We therefore believe that a suspension is more appropriate than disbarment. In imposing a six month suspension, we have several important objectives. We do wish to impress upon Respondent the seriousness of the offense, which we do not believe Respondent completely grasps, and we wish to protect the public. We believe that this will be satisfied by a six month suspension. Respondent will have to apply to be readmitted to practice and at that time will have to demonstrate to another Hearing Panel "by clear and convincing evidence that . . . she has the moral qualifications, competency, and learning required for admission to practice in the state, and the resumption of the practice of law will be neither detrimental to the integrity and standing of the bar or the

[4] This decision is currently on appeal to the Vermont Supreme Court.

administration of justice nor subversive of the public interest and that the respondent-attorney has been rehabilitated."

Order

Respondent, Margaret Strouse, is hereby suspended from the practice of law for a period of six months commencing on the date this order becomes final.

Dated: February 4, 2010

Hearing Panel No. 7

/s/

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Harland L. Miller III, Esq., Chair

/s/

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Mark Hall, Esq.

/s/

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Stephen V. Carbone