BOARD OF OVERSEERS OF THE BAR

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May 6, 2011

Ronald W. Lupton, AAG
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006

Re: GCF 11-105

Dear Assistant Attorney General Lupton:

I am writing to acknowledge receipt of your response dated May 5, 2011 with attachments concerning the above pending grievance complaint.

By copy herewith I now provide the complainant, Edward E. Bartlett PhD., an opportunity to review your correspondence. This letter will serve as my request to Dr. Bartlett to submit to this office by May 16, 2011 any additional information he wishes to have considered in response to the information you have supplied. I will send you copies of any additional materials received.

Thank you for your attention to this matter.

Sincerely,

J. Scott Davis
Bar Counsel

JSD/dms

c: Edward E. Bartlett, PhD.
(with enclosure)

IN RE: MARY N. KELLETT

GCF: 11-105/11-111

Response of Mary N. Kellett, ADA to Complaint of Edward E. Bartlett and The National Coalition for Men[1]

Overview.

The Maine Bar Rules on their face allow "*Any* person [to] submit to the Board a signed, written complaint alleging misconduct by an attorney" subject to the Rules. Rule 7.1(a) (emphasis added). Mr. Bartlett is a resident of Rockville, MD, and the National Coalition for Men is located in San Diego, CA. No connection to the State of Maine is provided for either Complainant, no indication is given that either has any first-hand knowledge of the matters set forth in the Complaints, beyond a few references to the trial transcript, one of which was edited such that it distorts the context. *See p. 6 infra.* The Complaints are largely a rehash of those allegations already before the Board in GCF-11-00 brought by Vladek Filler.

I. Bartlett Complaint

Edward E. Bartlett ("Bartlett"), claiming to act on behalf of an organization named Stop Abusive and Violent Environments (SAVE) has filed a Bar Complaint against ADA Mary Kellett. After reviewing it, Bar Counsel has indicated various of the Bar Rules which may be relevant to the matter: 3.1(a); 3.2(f)(4); and 3.7(a)(b)(e)(i)(ii)(2). This Response sets out Ms. Kellett's position

[1] Respondent will respond to the Complaint in the same order as the allegations were made, using the same numbering system. We understand that these Complaints are being presented collectively to a Grievance Commission Panel; where appropriate we will refer to our previously filed responses to Mr. Filler's Complaint, GCF #11-00.

on the allegations. She has served the people of the State of Maine as an Assistant District Attorney since 2001, primarily in Hancock County, handling for the most part sexual assault and juvenile cases. She is fully aware from her training and experience that the role of the prosecutor goes beyond securing a conviction, that her role is "not simply of an advocate, but rather of [an] official duty-bound to see that justice is done." *State v. Smith,* 456 A.2d 16, 18 (Me 1983). She denies the allegations set forth in these complaints.

A. Decision of the Law Court in State v. Filler

This section of the Complaint contains unsubstantiated allegations about Kellett's conduct during the criminal trial of Vladek Filler and a synopsis of the Law Court's decision upholding the grant of a new trial to the Defendant. The Law Court's decision speaks for itself, the allegations 1-4 were previously addressed in our original Response and Reply in GCF #11-00.

B. Conduct Rules Allegedly Violated

Maine Rule of Professional Conduct 3.4(a).[2]

d. This was dealt with in our Response to Filler's Complaint in GCF-11-00 ("Response") at page 2. Kellett attended a discovery motion hearing on October 25, 2007, but defense counsel informed the court at the start of the proceedings that there were only two matters to be discussed, his motion for a

[2] This Rule was not in effect at the time of the actions complained of, but we understand "Rule 3.4 corresponds to and is generally in accord with" portions of Maine Bar Rule 3.7. *see M. R. Prof. Conduct 3.4 Reporter's Note.* We will attempt to respond to those points which seem to be allegations against Kellett without responding line item by line item to the chronology set forth in this section.

bill of particulars, and a motion in limine relating to defense requests for various medical records.

e. This was dealt with in our Response at page 14. Following the October 31, 2007 discovery request, Kellett called defense counsel's office and spoke with his assistant on November 2, 2007 telling her that the materials sought could be obtained directly from the law enforcement agency that had the originals.

h. There was no May 30 order from Justice Anderson. The discovery order signed by him was dated June 3, 2008.

i. This was dealt with in our Response pp. 2-3. It is perhaps somewhat ironic that Bartlett quotes from the defense's letter to Kellett accusing her of violations of the Bar Rules. Defense counsel knew Kellett objected to the production of certain materials and that there was a motion pending to decide whether the prosecution should produce them. Despite this, the defense subpoenaed the officer and then asked him to turn the documents over prior to the date set out in the subpoena and prior to the resolution of the discovery dispute by the court.

j. This order of June 3, 2008 was endorsed on the defense discovery motion dated October 12, 2007. No finding was made that any recordings existed, the order requires that any recordings "that may exist" be turned over.

k. This was dealt with in our Response at 6.

l. This was dealt with in our Response at 6-7 and in our Reply to Filler's Response in GCF -11-00 at 3. Officer Willey appeared and testified at trial,

part of the audio was played for the jury during his testimony and it was admitted in its entirety for the jury's consideration. No controversy over the video occurred at all. In fact, the testimony at trial, elicited by *defense counsel* from Deputy Willey, was that the cruiser recording system failed in both its audio and video modes, so that no video was available.

l-o. These were dealt with in our original Response and Reply to Filler's submissions. Defense counsel reviewed the audio and was told to contact the Sheriff's Office directly to view the video as Kellett believed that's where it was located. It was not until trial when defense counsel examined Dep. Willey that it appeared that no video was ever captured because the cruiser system failed and Willey recorded the audio on his digital voice recorder. *See our Reply to Filler's Response at 3.*

q-r. As noted above the defense ascertained that no video of the incident was taken.

Maine Rule of Professional Conduct 3.8(a).

A grand jury indicted Filler on a total of seven assault and sexual assault charges. There is no allegation or evidence that Kellett mislead that jury or failed in any constitutional or ethical fashion to present evidence to it when seeking an indictment against Filler.[3] If this is an allegation that Kellett possessed exculpatory evidence concerning the accusations against Filler and that she had an obligation to present it to the grand jury, we do not believe that

[3] The language of Rule 3.7(i)(1) states: "A lawyer shall not institute or cause to be instituted criminal charges when the lawyer *knows*, or it is *obvious*, that the charges are not supported by probable cause." (emphasis added). The term "knows" means actual knowledge of the facts in question. *ABA/BNA Lawyers Manual on Professional Conduct* at 61.608.

to have been required. No mention of any duty to disclose exculpatory information during a grand jury proceeding is contained in Bar Rule 3.7(i). The *ABA/BNA Lawyers Manual on Professional Conduct* states that prosecutors in a grand jury setting should comport with governing law including, statutes, procedural rules, decisional law, and constitutional guarantees. *ABA/BNA Lawyers Manual on Professional Conduct* at 61.612. In fact, it appears that as a matter of federal constitutional law no such obligation exists. *see U.S. v. Williams*, 504 US 36 (1992). "To the contrary, requiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body." *Id. at 51.*

Further, motions for judgment as a matter of law were made by the defense at the close of the state's case and at the close of all the evidence. The Court let the case go to the jury.

Maine Rule of Professional Conduct 3.3(a)(1).

This general repetitive allegation was dealt with above and in our prior submissions.

C. Prosecutorial Misconduct.[4]

In subparagraphs 1 and 2 Bartlett references the prior sections of his Complaint. These allegations have been dealt with above and in our submissions in GCF-11-00.

[4] Bartlett again references the Rules of Professional conduct, not the Bar Rules.

In subparagraph 3(a)-(d) Bartlett notes that Filler raised several instances of alleged prosecutorial misconduct before the Law Court and purports to supply evidence supporting four of those allegations.

3(a). Comments made on facts not in evidence.

Kellett asked Ligia: "Now, when you got up in the morning what did you do?" *HT at 125.* Responding, Ligia started to describe some actions taken by Filler against her that morning and the defense objected. The quotation cited by Bartlett is edited and does not accurately reflect what the Court was telling counsel. The statement "I'm troubled by you going beyond that," refers to the fact that the final assault charged against Filler took place on April 20, 2007 and that Ligia started to describe what Filler did on the next day, April 21st. The Court was troubled because the answer related to actions of Filler after the date of the last crime with which he was charged.

As previously discussed in our Response there was no order to avoid discussion of "the child custody dispute." *Response at 29-35.* The portion of the transcript cited as evidence of this misconduct concerns a line of questioning by the prosecutor that was designed to show the jury why Ligia finally left Filler on April 21, 2007. At *HT* 127-28 Kellett made an offer of proof contending that the evidence of why and how Ligia left was relevant to rebut the defense position that Ligia falsified allegations of sexual assault to gain an advantage in a custody dispute. A lengthy discussion at side bar resulted in the court curtailing somewhat the scope of the testimony Kellett was allowed to elicit.

3(b). Shifting the burden of proof.

As noted in our Response at 33, Kellett made absolutely sure that the jury understood which party had the burden of proof by stating: ". . . I would emphasize that to you: that the defendant has absolutely no duty to testify and the defendant has no duty to call any evidence -- or present any evidence or present witnesses."

As for the use of the term "victim," the word was used by both the parties and the Court. Defense counsel used it twice, both times to refer to his client, the accused. *Id. at 23.* The presiding justice used it in side bar conferences. *See e.g. HT at 34, 101-03, 111.* The defense made no objection to its use by the prosecution. Use of the term violates no ethical rule.

3(c). Personalized the case.

This was dealt with in our Response at 33.

3(d). Evoking the jury's passions.

Here Bartlett points to the same sidebar conference that he cited in § 3(a) *supra.* Kellett sought to admit testimony of why and how Ligia left Filler on April 21, 2007 to counter the defense's argument that Ligia made false accusations to get custody of her children. The Court made a ruling, telling Kellett: "You could inquire: Did you leave him and why did you leave him?" *HT at 128.* When examination resumed following the sidebar conference Kellett asked if Ligia left the residence after April 20, 2007 "And why did you finally leave at this time?" Simply put, the Court made a ruling and she followed it.

D. Disbarment.

Complainant cites "media accounts" as support for a claim that Kellett has for years intentionally acted in a fashion that is harmful to the administration of justice. There is no evidence presented of any ethical lapses. Clearly, it is a difficult task to convince a jury beyond a reasonable doubt that a person has committed a crime. If the prosecutor was subject to an ethics complaint every time she lost a case and a defense attorney gave an interview to a newspaper complaining about the State's treatment of the accused, there would be few lawyers willing to take the job and Bar Counsel would be very busy indeed with totally frivolous claims.

II. Complaint of the National Coalition for Men ("NCFM").

This Complaint consists for the most part of unsubstantiated accusations and generalities. With regard to the Filler matter, NCFM states that Kellett prosecuted him for sexual assault "with no reasonable basis" and in the face of "overwhelming" evidence of his innocence. It also "understands" that there was no credible evidence "to prove that the sexual act did occur" and that Kellett "may have" withheld or destroyed evidence. Kellett it is said knew or should have known that Ligia had a history of mental instability and of making false accusations, lacked credibility, and had ulterior motives for making the allegations she did.

These allegations have been addressed in our responses to Filler's complaint in GCF-11-00. Regarding the evidentiary matters, the Law Court stated: "The trial court did not err in denying Filler's motion for judgment of

acquittal because there was 'sufficient evidence in the record to support a finding, beyond a reasonable doubt, that [Filler] committed each element of the crimes' alleged." *State v. Filler,* 2010 ME 90 ¶ 27, 3 A3d 365, 373, quoting *State v. Drewry,* 2008 ME 76, ¶ 33, 946 A.2d 981, 991.

No evidence is supplied to support any history of Kellett prosecuting "numerous similar cases" where defendants were found not guilty or that she has "ulterior personal motives" that drive her to prosecute men regardless of evidence. This unsubstantiated allegation is scurrilous and should be dismissed out of hand.

NCFM then speculates that Kellett is a key player in some effort to ensure that Ligia regains custody of her children, and is obsessed with "the Filler case." As previously noted in our Response in GCF-11-00, Kellett was not involved in the DHHS proceedings addressing the custody of the children. No evidence is presented by NCFM that she has any involvement or interest in whether Ligia regains custody of her boys. Finally, the amateur psychological comment about an obsession with the Filler matter is not worth considering. Kellett, the prosecutor, was assigned the case by her office and prosecuted Mr. Filler in accordance with Maine law and the ethical tenets of the Bar Rules.

Conclusion

A review of the actions taken, and the decisions made by ADA Kellett in the circumstances as they existed at the time, shows that at all times complained of she complied with the provisions of the Bar Rules.

Dated: May 5, 2011

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