STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In Re: PRB File No. 2017-029

Decision No. 218

Disciplinary Counsel and Respondent in the above matter have submitted various stipulations of fact for the Hearing Panel's consideration in the above matter, together with proposed conclusions of law and a joint recommendation that the Panel issue a private admonition as a sanction for violations of Rule 4.2 and 5.3 of the Rules of Professional Conduct. On or about July 19, 2018, the Hearing Panel issued a ruling with respect to the parties' amended stipulation of facts ("amended stipulation"). As set forth in its ruling, the Panel accepted the statements set forth in paragraphs 1 – 27, 29, and 31 of the amended stipulation; rejected paragraphs 28, 30, 32, 33, and 34; and afforded the parties the option of either submitting supplemental factual information (by supplemental stipulation or through an evidentiary hearing) or of closing the factual record. On August 17, 2018, Disciplinary Counsel notified the Panel that she wished to present evidence on the issue of sanctions, and a hearing was duly scheduled for October 15, 2018. On October 3, 2018, Respondent filed a motion to revise the amended stipulation and, in addition, waived his right to a hearing. The motion proposed to supplement the amended stipulation by substituting new provisions for the previously rejected paragraphs 30 and 33 of the amended stipulation. On October 3, 2018, Disciplinary Counsel filed a response indicating that she had no objection to the amendments proposed by Respondent and she withdrew her request for a hearing.

The Panel has reviewed the proposed amendments of paragraph 30 and 33 of the amended stipulation ("the supplemental stipulated facts"). The proposed amendments set forth reasonably specific factual statements that are relevant to the issues before the Panel in this

proceeding. In addition, they do not suggest any unaddressed factual questions that could impact the Panel's decision in this proceeding. Accordingly, the Panel will adopt those proposed amendments as its own findings of fact along with the statements of fact previously accepted by the Panel. In sum, the factual record before this Panel consists of paragraphs 1 – 27, 29, and 31 of the amended stipulation and the October 3, 2018 supplemental stipulated facts.

With the evidentiary record now complete, the above matter is ripe for a decision on the merits of the issues presented. The Panel hereby issues the following findings of fact, conclusions of law, and order.

STIPULATED FINDINGS OF FACT

Pursuant to A.O. 9, Rule 11(D)(5)(a), the Panel makes the following findings of facts to which the parties have stipulated:[1]

1. Respondent is an attorney licensed to practice law in Vermont. He was admitted practice in Vermont in 1998 and maintains a solo practice in St. Albans.

2. He works with one other individual, a nonlawyer assistant, VG. The firm has no other employees.

3. Respondent's practice consists of bankruptcy, family, criminal, and real estate law.

4. Respondent is married to VG. VG and Respondent first met in 2006 and began dating. After they started dating, VG began doing work for Respondent in his law practice. Respondent and VG married in 2007.

5. VG has a Ph.D. in marine biology. VG has no formal training in law or any aspects of legal practice.

[1] The paragraphs that follow paragraph 27 have been renumbered sequentially to avoid confusion.

6. Since 2006, VG has worked part-time for Respondent in his law practice.

7. VG sets her own hours and they vary depending on work load, but she regularly works approximately 20 hours per week.

8. VG has no employment contract, formal job title, or set hourly wage or salary.

9. VG's job responsibilities include primarily assisting with collecting information and filing of forms required for Respondent's bankruptcy practice. VG meets with clients when they come to sign paperwork, handles much of the office bill paying, and processes some incoming mail. VG trained herself on the job and is considered extremely proficient.

10. Before the conduct giving rise to the instant matter, VG never had any formal training regarding the Rules of Professional Conduct. Before her conduct giving rise to the instant stipulation, Respondent did not schedule training or regularly discuss with VG his ethical obligations.

11. Respondent has complete managerial authority for the work conducted by his firm.

12. Respondent is obligated under Rule 5.3(a) to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance" that VG's conduct is compatible with his own ethical obligations.

13. Respondent accepts full responsibility for the conduct which is the subject of this matter regarding VG.

14. Respondent represented client TK in related divorce and bankruptcy matters. In 2016, TK filed for Chapter 13 Bankruptcy, which included a repayment plan to his creditors through a Chapter 13 Trustee. SK was TK's ex-spouse and a creditor whom the parties generally

agreed was to receive payment through the repayment plan. At all time during the proceedings, SK was represented by counsel, LK.

15. In August 2016, the parties were in negotiations and attempting to reach agreement about how much TK would pay SK through the repayment plan. The parties vigorously disputed how much TK's earnings had been for 2016 and how much cash he had on hand. The parties frequently communicated matters of legal substance through email, including sources and numbers for income and cash.

16. On two occasions, email related to the bankruptcy proceeding and negotiations of cash and income amounts were sent directly to SK, without the consent of her lawyer, LK, and without authorization by law or court order.

17. The first email was sent on Sunday, August 7, 2016 at 2:14 p.m. The email is from VG to SK, with Attorney LK listed as cc. The subject line states: "Your analysis." "Your analysis" refers to financial analysis regarding TK's income and assets, which was the subject of dispute between the parties.

18. The message states as follows: "Hello S[K], Nice job on the analysis. May I communicate with you to compare our numbers?" VG sent the message related to bankruptcy issues in an attempt to clarify information about certain disputed assets.

19. Respondent admits that VG told him she had done this shortly after the message was sent and that the message pertains to the subject of LK's representation of SK.

20. Respondent admits that he failed to make reasonable efforts to ensure that his firm had measures in effect giving reasonable assurance that VG's conduct was compatible with his own ethical obligations to refrain from contacting a represented party about the subject of the representation. Respondent admits that he had no such measures in place and that prior to the

instant conduct he had never given VG any formal training regarding contact with a represented party or other Rules of Professional Conduct.

21. Before this instance, VG had never contacted a represented party about the subject of the representation.

22. Respondent has since discussed this matter with VG and she now understands why such contact is not permitted, and Respondent is confident she will never repeat this error again.

23. Respondent agrees [that] the following measures, had they been in place, would have given reasonable assurance that VG's conduct was compatible with his own ethical obligations:

(a) Regular training on the Rules of Professional Conduct and how they relate to nonlawyer assistants;

(b) Written policies for the firm regarding email communications, including the use of cc and bcc;

(c) Written policies or practice guidelines for the firm regarding all communications with opposing parties and represented parties.

Respondent has since implemented these measures to insure the violation does not occur again.

24. The second instance of direct communication with SK occurred on Friday, August 12, 2016 at 3:15 p.m. This communication was an email from Respondent to LK, but on the cc line it lists SK, Respondent himself, and the Chapter 13 Trustee. The message subject line states "T[ ] K[ ] correct 2016 income and cash."

25. The message states as follows:

> Dear L[K],
>
> You made the remarkable assertion at Wednesday's meeting that in 2016 T[K] received either $43,000 or $60,000 in income; and pulled a full $16,000 out of checking account in cash [sic]. This is considerably in excess that we are able to find. I was astonished at these much higher amounts and I hope that I will not be disappointed when I ask to see the documentation. I'm certain you have such, otherwise you would not be impairing the Bankruptcy Court process by making baseless claims before the trustee. I would therefore request your straightforward, one page list of income and cash-outs for the period of January 1 to July 11, 2016, with amounts and dates. [Trustee], for your records, the correct numbers are: Income = 28,952 Cash = 945
>
> Thank you,
> [Respondent]

26. On Monday, August 15, 2016, Attorney LK emailed Respondent asking him not to communicate with SK directly. The same day, Respondent replied and agreed he would not do so.

27. Regarding the August 12, 2016 communication from Respondent to SK, Respondent admits that he knew SK was represented by LK and knew he did not have LK's consent or other authorization to contact SK directly.

28. Respondent has one prior admonition from 2014 for unrelated conduct.[2]

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[2] Following submission of the parties' amended stipulation of facts, the Panel requested that the parties submit Respondent's prior admonition for the Panel's review so that the Panel could determine for itself whether the prior offense was, in fact, unrelated to the conduct alleged in the current proceeding. Administrative Order 9 provides that when a private admonition has been imposed, "the lawyer shall not be identified in the published decision," A.O. 9, Rule 8(A)(5)(b), but that a prior admonition nevertheless "may be used in subsequent proceedings in which the respondent has been found guilty of misconduct as evidence of prior misconduct bearing upon the issue of the sanction to be imposed in the subsequent proceeding." *Id.*; *see also id.*, Rule 8(B) ("Prior findings of misconduct, including admonitions, may be considered in imposing sanctions."). After reviewing the prior admonition, the Panel has determined that the conduct previously at issue is not related to the conduct alleged in the current proceeding. In light of this determination and the protection otherwise conferred under Rule 8(A)(5)(b) on a private admonition, the Panel will not identify the prior admonition.

29. Respondent lacked any dishonest or selfish motive.

30. Respondent has had twelve years of practice as a solo practitioner in the State of Vermont and ten years of prior practice in the states of Pennsylvania and West Virginia.

31. Respondent has verbally, and in writing, consistently accepted responsibility for the subject communication and regretted [the] same since he became aware of the subject communication until the present. There have been no similar communications since the subject communication occurred in August of 2016.

CONCLUSIONS OF LAW

Rule 4.2

Rule 4.2 of the Vermont Rules of Professional Conduct provides as follows:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

V.R.Pr.C. 4.2.

The Comments to Rule 4.2 explain the rule's underlying purpose:

> This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation.

Id., Comment [1].

Moreover, the Comments point out that the rule is strictly applied and that a represented party's consent does not obviate the prohibition in the rule: "This rule applies to communication with any person who is represented by counsel concerning the matter to which the communication applies." *Id.*, Comment [2]. "The rule applies even though the represented

person initiates or consents to the communication." *Id.*, Comment [3]; *see also United States v. Lopez*, 4 F.3d 1455, 1462 (9th Cir. 1993) (observing that the rule "is fundamentally concerned with the duties of attorneys, not with the rights of parties").

Respondent's August 12, 2016 email communication violated Rule 4.2. Respondent intentionally sent the email communication to opposing counsel, LK, *and* to LK's client, SK. Respondent has admitted that he knew SK was represented by LK at the time and that he did not have LK's consent or other authorization to contact SK directly. Moreover, it is undisputed that the communication concerned a matter in connection with which SK was receiving representation from LK.

The fact that the email communication was also sent to opposing counsel does not change this conclusion. Respondent sent a communication to a person represented by another lawyer without the consent of opposing counsel. It should also be noted that, in contrast to a verbal communication made to a represented person in the presence of that person's lawyer, a written communication sent to an opposing counsel's client poses an enhanced risk that the represented person might respond to the communication before his or her counsel is able to advise the client not to do so. Lawyers typically have multiple clients and busy schedules and are not always able to review written communications immediately upon receipt. The fact that the August 12 email was transmitted on a Friday afternoon – the end of the work week – highlights the risk associated with a written communication to a person represented by another lawyer, even when opposing counsel receives the same written communication. In sum, the August 12 email communication violated Rule 4.2.

Rule 5.3

Rule 5.3 of the Vermont Rules of Professional Conduct provides, in pertinent part, as follows:

> With respect to a nonlawyer employed or retained by or associated with a lawyer:
>
> (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer; [and]
>
> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; ****

V.R.Pr.C. 5.3(a) & (b).

The Comments to the rule recognize that "[nonlawyer assistants] act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment . . . . The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline." *Id.*, Comment [1].

Respondent violated Rule 5.3(a) because he failed to make any effort to undertake measures that would provide reasonable assurance that the conduct of his nonlawyer assistant, VG, would be compatible with his own professional obligations under the Code of Professional Responsibility. *See In re PRB Docket No. 2016-042*, 2016 VT 94, ¶¶ 7-8, 203 Vt. 635, 154 A.3d 939 (concluding that solo practitioner violated Rule 5.3(a) by failing to implement internal financial policies and procedures for nonlawyer assistant).

Respondent, as a solo practitioner, "ha[d] a duty to assure that [his] law practice ha[d] policies and procedures in place to assure nonlawyer employees adhere to the standards

established in the Rules of Professional Conduct." *Id.* ¶ 7. When he arranged for VG to assist him in his law practice it was incumbent on him to put adequate measures in place that would establish appropriate guidelines for VG's work at the firm. Respondent has admitted that he did not provide any training or guidance to VG regarding Respondent's ethical obligations and that he otherwise failed to undertake any other measures along those lines. VG was never informed that, as a rule, she should not communicate with a person who was being represented by another lawyer – because it would be unethical for Respondent to do so. Having failed to put in place any polices or procedures or undertake any training of VG with respect to avoiding any contact with a represented party, Respondent violated Rule 5.3(a).

In addition, Respondent violated Rule 5.3(b) by failing to make reasonable efforts to ensure that VG's conduct was compatible with Respondent's obligation under Rule 4.2 to avoid communicating with a person who Respondent knew was represented by another lawyer.[3] At the outset, the Panel observes that the obligations set forth in Rule 5.3(a) and (b) are not alternative obligations. They are designed to impose comprehensive responsibilities on lawyers. *See In re PRB Docket No. 2016-042*, ¶ 9 ("*[I]n addition to putting policies in place*, lawyers are required to supervise their nonlawyer employees so that the nonlawyer employees comply with the Rules of Professional Conduct.") (emphasis added). Subsection (a) imposes responsibility on those in

[3] At the outset of this proceeding, Disciplinary Counsel and Respondent filed a proposed stipulation that included an admission, utilizing the language of Rule 5.3(b), that Respondent had "failed to make reasonable efforts to ensure the paralegal's conduct was compatible with his own professional obligation to refrain from contacting a represented party about the subject of the representation." *See* Stipulation of Facts and Proposed Conclusions of Law, 1/31/18, ¶ 23. However, the parties did not propose a corresponding conclusion of law to the effect that Respondent violated Rule 5.3(b). As a result of this ambiguity, the Panel requested that the parties address the factual issues and the law pertaining to the interpretation and application of Rule 5.3(b). *See* Decision on Proposed Stipulation of Facts, 3/14/18, at 2-4. Thus, the Panel placed the parties on notice that it was considering whether a violation of Rule 5.3(b) occurred, and the Panel afforded the parties an opportunity to submit additional facts and legal briefing. *See id.* at 5. Disciplinary Counsel subsequently submitted briefing on these issues in connection with the filing of the proposed amended stipulation of facts. Respondent did not file a brief on the issues.

positions of authority within a law firm to put adequate policies and procedures in place to guide nonlawyer assistants. Such policies and procedures ensure that when nonlawyer assistants begin working at a firm, and as they continue working, they will be provided with general guidance that will enable them to avoid conduct that would otherwise violate the Rules of Professional Conduct. Subsection (b) imposes a responsibility on a lawyer who is working with a nonlawyer assistant to supervise adequately the nonlawyer assistant.

> Paragraph (b) requires a lawyer with direct supervisory authority over a nonlawyer assistant to make reasonable efforts to ensure the assistant's conduct is compatible with the lawyer's ethical obligations. Compliance with paragraph (a), in other words, does not suffice if the lawyer also has direct supervisory authority over the nonlawyer whose conduct is in question.

ABA Center for Professional Responsibility, *Annotated Model Rules of Professional Conduct* (8th ed. 2015), 497; *see also, e.g.*, *Att'y Grievance Comm'n v. Glenn*, 671 A.2d 463, 479 (Md. 1996) (finding violation of Model Rule 5.3(b) where respondent failed to ensure that office procedures regarding escrow accounts were actually followed by nonlawyer assistants); *In re Comish*, 889 So.2d 236, 245 (La. 2004) ("proper supervision by the lawyer . . . includes adequate instruction when assigning projects").

Here, Respondent was working with VG on a particular matter. He was her supervisor in connection with that matter. He took no steps to advise her that she should not contact SK, even though he knew that SK was being represented by another lawyer. The August 7, 2016 email from VG pertained to the subject of Attorney LK's representation of SK. If Respondent had sent that email, he would have violated Rule 4.2.[4]

[4] The fact that VG's email purported to ask permission from SK to confer – "May I communicate with you to compare our numbers?" – does not change the conclusion that the communication violated Rule 4.2. As explained previously, a represented party's consent will not negate a Rule 4.2 violation. Any communication whatsoever is prohibited, unless authorized by law or a court order. *See* V.R.Pr.C. 4.2. There was no such authorization in this case.

The amended stipulation of facts submitted by the parties include various statements that pertain to the relationship between Respondent and VG. The fact that Respondent and VG were married to each other at the time in question does not obviate Respondent's responsibility to supervise VG's work at the law firm. *See, e.g., In re Anonymous*, 876 N.E.2d 333, 333-34 (Ind. 2007) (finding violation of Rule 5.3(b) where lawyer failed to supervise wife's management of the firm's trust account). Likewise, the fact that VG is apparently not working for Respondent as an employee or contractor and that she "has no employment contract, formal job title, or set hourly wage or salary," Amended Stipulation, ¶ 8, is irrelevant. What is relevant is that VG provided nonlawyer assistance to Respondent with his knowledge and permission. He was necessarily her direct supervisor as a result and, therefore, was obligated to provide adequate supervision.

It is apparent that Respondent failed to adequately supervise VG in connection with the particular matter at issue. He had assigned tasks to her; but he only discussed with VG the issue of contacts with SK *after* VG informed him that she had sent a communication to SK. Thus, Respondent's ethical shortcoming extended to his supervision of VG in the particular matter at issue. In sum, Respondent's conduct violated both Rule 5.3(a) and Rule 5.3(b).[5]

[5] The Panel suspects that it is not uncommon for solo practitioners to work with nonlawyer assistants who are relatives. It is important for solo practitioners to understand that the existence of a familial relationship does not obviate or justify a relaxation of the obligation to supervise nonlawyer assistants. Moreover, it is important to address Rule 5.3(b) in this case because adequate supervision might have obviated VG's email contact with a represented party. And, finally, the Panel observes as a general principle that the full extent of Respondent's Rule 5.3 violation should be recognized to ensure that the discipline imposed on Respondent accurately reflects the conduct that occurred and is a fair result in relation to both past and future disciplinary actions taken against other members of the bar for comparable conduct.

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.

"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.* In this case, Respondent owed a duty to the legal system and to the legal profession to refrain from communicating with a represented party and to take appropriate steps to provide guidance to his nonlawyer assistant with respect to communications with represented parties. *See* V.R.Pr.C. 4.2, Comment [1] ("This rule contributes to the proper functioning of the legal system . . . [and protects against] interference . . . with the client-lawyer relationship . . . .").

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 Supreme Court has observed that "[t]he line between negligent acts and acts with knowledge can be fine and difficult to discern . . . ." *In re Fink*, 2011 VT 42, ¶ 38. In addition, the Court has concluded that while a lawyer's constructive knowledge, in contrast to a lawyer's subjective belief, may support a determination that an ethics violation has occurred, "[i]n the context of sanctions . . . knowing conduct does not encompass both knew or should have known." *Id.* ¶ 38. In reaching this conclusion, the Court has reasoned that [i]f the definition [of

the term "knowledge"] extended to constructive knowledge, then no misconduct would be negligent because rather than failing to heed a substantial risk we would always assume the lawyer should have known the substantial risk." *Id.* ¶ 41. Thus, "while a lawyer's good faith, but unreasonable, belief that his actions are not misconduct is not a defense to a violation, such an error can be a factor in imposing discipline." *Id.*

Based on the record presented, the Panel concludes that Respondent's state of mind is best described as negligence. It appears that Respondent's email communication to SK was an isolated incident, more akin to inadvertence, and there is no evidence that Respondent was seeking to obtain an advantage. In addition, when SK's attorney notified him that he should refrain from communicating with SK, Respondent promptly acknowledged his obligation, which suggests that the communication was likely an oversight. Likewise, Respondent's failure to put internal policies and procedures in place for nonlawyer assistants and his failure to supervise his nonlawyer assistant was negligent conduct. There is no evidence that Respondent was consciously aware of his obligations under Rule 5.3 and knowingly disregarded them.

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.

There was no evidence presented of any actual injury to SK in this case. There was a potential that SK would respond to the two email communications without prior consultation with her attorney and to her detriment. On the record presented, however, it is not possible to say that such a result was probable, and the degree of harm that might have resulted cannot be quantified.

Presumptive Standard under the ABA Standards

ABA Standard 6.34 provides as follows:

> Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in improperly communicating with an individual in the legal system, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with the outcome of the legal proceeding.

ABA Standards, § 6.34, at 45.

This standard is generally applied in cases where isolated instances of improper communication have occurred, along with little or no actual or potential injury or interference with the outcome of a legal proceeding. *See Annotated Model Rules of Professional Conduct*, at 337.[6] That is the case here and, therefore, the Panel concludes that a private admonition is the appropriate presumptive sanction. *See also In re Wool*, 169 Vt. 579, 733 A.2d 747, 751 (1999) (recognizing Standard 6.34 as pertinent where conduct was negligent and no harm resulted).

Aggravating and Mitigating Factors Analysis

Next, the Panel considers any aggravating and mitigating factors and whether they call for increasing or reducing the presumptive sanction of a private admonition. Under the ABA Standards, aggravating standards are "any considerations, or factors that may justify an increase in the degree of discipline to be imposed." *ABA Standards*, § 9.21, at 50. Mitigating factors are

[6] By contrast, Standard 6.33 provides for a public reprimand when the offending conduct results in "injury or potential injury to a party."

"any considerations or factors that may justify a reduction in the degree of discipline to be imposed." *Id.* § 9.31, at 50-51. Following this analysis, the Panel must decide on the ultimate sanction that will be imposed in this proceeding.

(a) Aggravating Factors

Based on the stipulated facts presented, the following aggravating factors under the ABA Standards are present:

§ 9.22(a) (prior disciplinary offenses) – Respondent has one prior private admonition from 2014. Because the prior discipline involved an unrelated issue, the Panel concludes that this factor should be given relatively little weight.

§ 9.22(d) (multiple offenses) – Respondent committed two violations of the Rules of Professional Conduct. His conduct violated both Rule 4.2 and Rule 5.3.

§ 9.22(i) (substantial experience in the practice of law) – Respondent has substantial experience in the practice of law. At the time of the conduct in question, Respondent had practiced law for approximately twenty years. Although a portion of that time was in other jurisdictions, the rule against contacting a represented party is universal.

(b) Mitigating Factors

Based on the stipulated facts presented, the following mitigating factors under the ABA Standards are present:

§ 9.32(b) (absence of dishonest or selfish motive) – There is no evidence suggesting that Respondent acted on the basis of a dishonest or selfish motive. Rather, it appears that Respondent acted inadvertently.

§ 9.32(e) (full and free disclosure to disciplinary board or cooperative attitude toward proceedings) – Respondent was cooperative during the course of the disciplinary process.

§ 9.32(l) (remorse) – Respondent promptly accepted responsibility for the misconduct in question and has expressed remorse for his misconduct.

(c) Weighing the Aggravating Mitigating Factors

The Panel concludes that no adjustment of the presumptive sanction is appropriate. The aggravating factors are balanced by the mitigating factors.

* * *

Finally, the Panel considers whether under the facts presented a private admonition is justified based on the substantive standard set forth in Rule 8(b) of A.O. 9 and whether that sanction is consistent with prior disciplinary determinations. Rule 8(b) provides that "[o]nly in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer, should an admonition be imposed." A.O. 9, Rule 8(b). As explained previously, the Panel concludes that the misconduct in this case was minor, that there was little or no actual or potential injury, and that the misconduct was isolated. In addition, Respondent has undertaken training of his nonlawyer assistant regarding the Rules of Professional Conduct and put written policies and procedures in place at the law firm to inform nonlawyer assistants in the future. Under these circumstances, the Panel concludes that there is little likelihood that the misconduct in question will be repeated.

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*,

2011 VT 77, ¶ 43, 190 Vt. 170, 34 A.3d 329 (Dooley, J., dissenting), the Panel has also considered whether past disciplinary determinations are consistent with the issuance of a private admonition in this case. The Panel concludes that issuing a private admonition in this case is consistent with prior disciplinary determinations. In *In re PRB File No. 2009-213*, PRB Decision # 134, a hearing panel found that the respondent had "fail[ed] to ensure that a paralegal, over whom he had direct supervisory authority, did not have direct contact with an opposing party who was represented by counsel, in violation of Rules 4.2 and 5.3." *Id.* at 1. Emphasizing that the represented party contacted by the paralegal suffered no injury, the panel concluded that a private admonition was appropriate. *Id.* at 4; *see also In re PRB File No. 2015.022*, PRB Decision # 190 (imposing private admonition on attorney who communicated with a represented party, without permission of counsel, after a court hearing); *cf. In re Wool*, 169 Vt. 579, 733 A.2d 747 (1999) (acknowledging presumptive sanction of private admonition under ABA Standard 6.34 for improper contact while imposing public reprimand based on other more serious conduct and the weight of aggravating factors). In *In re Free*, 161 Vt. 602, 640 A.2d 22 (1994), the Court increased the presumptive sanction for contacting a represented person from a private admonition to a public reprimand. However, it based the increase in particular on the respondent's extensive prior disciplinary record for which respondent received serious sanctions. Here, although Respondent does have a prior record, it consists of a single prior private admonition for an unrelated matter. Under these circumstances, the Panel assigns little weight to the prior disciplinary record and believes that a private admonition is appropriate.

ORDER

Pursuant to A.O. 9, Rule 11(D)(5)(a)(ii), the Panel accepts the parties' jointly proposed October 3, 2018 supplemental stipulated facts and adopts them as the Panel's own findings of

fact together with the previously accepted statements of facts. Based on the Panel's findings of fact and conclusions of law, Respondent is hereby admonished for violation of Rules 4.2, 5.3(a), and 5.3(b) of the Vermont Rules of Professional Conduct.

Dated: November 13th, 2018.

Hearing Panel No. 9

By:_____
Karl C. Anderson, Esq., Chair

By:_____
M. Kate Thomas, Esq.

By:_____
Joanne Cillo, Public Member