STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

In re: Errol Tabacco, Esq.
PRB Docket No. 2018-070

Decision No. 219

Disciplinary Counsel initiated this proceeding by filing a petition of misconduct alleging that Respondent, Errol Tabacco, violated Rule 8.4(b) of the Rules of Professional Conduct based on his conviction on one count of domestic assault, in violation of 13 V.S.A. § 1042, and one count of simple assault by mutual affray, in violation of 13 V.S.A. § 1023(b). The parties subsequently filed a proposed stipulation of facts for the Hearing Panel's consideration, along with jointly proposed conclusions of law to the effect that Respondent violated Rule 8.4(b) and a joint recommendation that Respondent be suspended from the practice of law for a period of fifteen months. The parties also requested an opportunity to present further evidence to the Panel on the issue of sanctions. On August 8, 2018, the Hearing Panel issued a decision in which it accepted paragraphs 1 through 15, 17, and 18 of the proposed stipulation and granted the parties' joint request to present additional evidence.

The final merits hearing was held on October 10, 2018 and the parties presented additional evidence to the Panel. Respondent was represented by P. Scott McGee, Esq. At the hearing, Disciplinary Counsel offered Exhibit DC-A into evidence, consisting of two affidavits, together with a motion requesting that the Panel place the affidavits under seal. Disciplinary Counsel indicated that if the Panel were to deny the motion to seal then the offer of the affidavits into evidence should be deemed withdrawn. The Panel has issued a separate ruling on this date denying the motion to seal and, in accordance with Disciplinary Counsel's position, has directed the Program Administrator to remove the two affidavits from the record of this proceeding and return them to Disciplinary Counsel. The Panel has not considered the two affidavits in rendering this decision.

With the factual record now complete, the above matter is ripe for a decision on the merits of the issues presented. Based on the stipulated facts that have been accepted by the Panel and the additional evidence in the record, the Panel issues the following findings of fact,[1] conclusions of law and order:

FINDINGS OF FACT

1. Respondent, Errol Tabacco, is 44-year-old attorney. His license is presently on "inactive" status. He presently works in a field that does not require him to practice law. He is, nonetheless, a member of the Vermont Bar.

2. Respondent graduated from college in 1996 and graduated from Vermont Law School in 1999. He took and passed the Vermont Bar in 1999 and was admitted to the Vermont Bar and achieved his first licensure in 2000.

3. Respondent worked for one year in the Legislative Council's office and then in 2001, he took a job which did not require him to actively practice law. He put his license into "inactive" status but he has remained a member of the Vermont Bar.

4. Respondent was married in 2000 and has two children of that marriage, ages 15 and 17.

5. In 2004 defendant and his wife were divorced.

6. In 2009 defendant began a relationship with Heidi Putnam, the complaining witness in this matter.

7. In 2010, Ms. Putnam became pregnant with a child fathered by Respondent. Their child was born on June 27, 2011.

8. The relationship between Ms. Putnam and Respondent went through periods of animosity and estrangement followed by periods of sexual intimacy and reestablishment of a relationship.

[1] Paragraphs 17 and 18 of the proposed stipulation of facts have been renumbered to provide sequential numbering of the findings of fact.

9. On or about March 17, 2017, they were together at Ms. Putnam's house.

10. They had a falling out.

11. Ms. Putnam's adult son was present in the home at the time.

12. As Respondent was preparing to leave the house, he believed Ms. Putnam was planning to search the internet on her cell phone seeking other male companionship. He decided to take her cell phone to prevent that.

13. An altercation broke out.

14. Respondent was charged and convicted of a misdemeanor-level domestic assault for his actions in his altercation with Ms. Putnam, and he was charged and convicted of a 60-day misdemeanor mutual affray assault in connection with his altercation and fighting with Ms. Putnam's son. Respondent pled guilty to both charges.

15. Respondent was given a deferred sentence on the domestic assault conviction, and he was sentenced to serve 30–60 days for the mutual affray conviction involving Ms. Putnam's son, with all suspended and Respondent placed on probation.

16. Respondent has successfully completed a Batterers' Intervention Program ("BIP") through the Vermont Department of Probation. He was ordered to complete the BIP as a condition of his probation.

17. There have been no further incidents of assaultive behavior involving Respondent, and Respondent and Ms. Putnam have discontinued their personal relationship but continue to parent their child.

18. During the October 10, 2018 hearing, Respondent submitted a letter addressed to the Hearing Panel in which he indicated that he "deeply regret[ted] [his] involvement in the argument with [Ms. Putnam] and punching and grappling with her adult son. . . . I was in the wrong. I accept

responsibility for my actions and I apologize for my behavior. *** I became involved in angry exchanges and behavior for which I have deep remorse." In addition, Respondent submitted an affidavit dated September 5, 2018 along the same lines.

19. During the October 10, 2018 hearing Respondent submitted a letter from his sister, an attorney admitted to practice in New York and New Jersey. The letter touts Respondent's involvement in a transaction that purportedly preserved his farm as wildlife habitat while at the same time increasing the size of his farm and his involvement with a group of persons in the founding of a "social and agricultural community and residence for adults with developmental disabilities" in Hardwick, Vermont.

CONCLUSIONS OF LAW

Rule 8.4(b)

Rule 8.4(b) provides as follows:

> It is professional misconduct for a lawyer to . . . engage in a "serious crime," defined as illegal conduct involving any felony or involving any lesser crime a necessary element of which involves interference with the administration of justice, false swearing, intentional misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a "serious crime[.]"

V.R.Pr.C. 8.4(b).

The Panel has found, based on the stipulated facts, that Respondent was convicted of two crimes that constitute misdemeanors. *See* 13 V.S.A. § 1 (defining "felony" as "any offense whose maximum term of imprisonment is more than two years"); *id.* § 1042 (prescribing maximum term of imprisonment of "not more than 18 months" for crime of domestic assault); *id.* §1023(b) (prescribing maximum term of imprisonment of "not more than 60 days" for crime of simple assault by mutual affray). Therefore, the "felony" prong of the rule does not apply.

In addition, the elements of the two offenses do not meet any of the criteria that are listed in the

"lesser crime" prong of the rule. *Compare* 13 V.S.A. § 1042 & §1023(b) *and* V.R.Pr.C. 8.4(b). Neither offense includes any of the elements specified in the text of Rule 8.4(b).

Nevertheless, the Panel concludes that the term "serious crime" in Rule 8.4(b) should be interpreted to include a reference to any felony or lesser crime that reflects on a respondent's fitness as a lawyer.[2] It reaches this conclusion by examining the regulatory provisions in A.O. 9 in their entirety.

At the outset, the Panel observes that Comment 2 of Rule 8.4 includes language suggesting that "offenses involving violence" fall within the scope of the rule. It states, in pertinent part, as follows:

> Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in term of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. *Offenses involving violence,* dishonesty, breach of trust, or serious interference with the administration of justice are in that category.

V.R.Pr.C. 8.4, Comment 2 (emphasis added).

But there are two fundamental problems with treating Comment 2 as dispositive of the issue. First, as is made clear in the introductory Scope section of the Rules, "[t]he comments are intended as guides to interpretation, but the text of each rule is authoritative." V.R.Pr.C., Scope, ¶ 21, at 712. Put another way, in the event of a conflict between a comment and the text of a rule, the text of the rule controls over the language of the Comment. The reference in Comment 2 to offenses involving violence

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[2] The Panel, on its own motion, previously raised the issue of whether the petition of misconduct in this case stated a claim under Rule 8.4(b). It requested briefing from the parties and then issued a decision on August 8, 2018 concluding that the petition stated a cognizable claim. In the interests of presenting a comprehensive decision addressing all factual and legal issues and allowing for the fact that the Supreme Court may review a panel decision even when neither party appeals, the Panel has incorporated the substance of its prior ruling interpreting Rule 8.4(b).

is plainly not consistent with the text of Rule 8.4(b) describing the category of "lesser crimes" contemplated. The listed criteria are specific and unrelated to acts of violence.

Second, a key textual difference between Vermont's Rule 8.4(b) and Model Rule of Professional Conduct 8.4(b) suggests that Comment 2 should not be viewed as enlarging the scope of the rule. Model Rule 8.4(b) provides that "[i]t is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness *or fitness as a lawyer in other respects*." M.R.Pr.C. 8.4(b) (emphasis added). Significantly, Vermont's Rule 8.4(b) does not contain a "fitness" clause. Moreover, a close reading of Comment 2, which was taken verbatim from the Model Rules, reveals that it was written to inform an understanding of the "fitness" clause in Model Rule 8.4(b). *See* V.R.Pr.C. 8.4, Comment 2 ("Many kinds of illegal conduct reflect adversely on *fitness to practice law* . . . .") (emphasis added). The absence of fitness language in Vermont's Rule 8.4(b) arguably indicates an intention to narrow the scope of the rule.

This concern is only reinforced by a review of the history of Vermont's Rule 8.4 and the Vermont case law. The Supreme Court adopted the Vermont Rules of Professional Conduct in 1999. The Reporter's Notes observed that Vermont's drafters "opted to replace [the language of Model Rule 8.4(b)] with the more specific prohibition contained in [the predecessor Vermont Code of Professional Responsibility] DR 1-102(A)(3) as amended in 1989." V.R.Pr.C. 8.4 (2009), Reporter's Notes at 900. Moreover, when it was first adopted, Vermont's Rule 8.4 included a subdivision (h), which provided that "[i]t is professional misconduct for a lawyer to . . . engage in any other conduct which adversely reflects on the lawyer's fitness to practice law." As was noted by the Reporter's Notes at the time, "Model Rule 8.4 does not contain paragraphs (g) or (h). These were incorporated from the present Vermont Code." *Id.* at 900.

Thus, at the time of its adoption, Vermont's Rule 8.4 contained the functional equivalent of

Model Rule 8.4(b) through a combination of Rule 8.4(b) and Rule 8.4(h). The "fitness to practice law" guidance in Comment 2, including the references to "offenses involving violence," made sense at that time because Vermont's Rule 8.4 included a "fitness" provision—albeit in Rule 8.4(h).

However, in 2009 the "fitness" provision in Rule 8.4(h) was deleted from the Vermont Rule. The Reporter's Notes state that "[t]he present amendment follows the Model Rules in deleting subdivision (h) and related language in Comment [5] in light of the omission from these Rules of ABA Model Rule 1.8(j) prohibiting sexual relations with a client (see Reporter's Notes to V.R.Pr.C. 1.8 and comment [17] to that rule and the fact that as drafted the provision was overly broad." V.R.Pr.C. 8.4 (2009), Reporter's Notes at 900. The omission of the "fitness" provision in 2009 arguably undermines reliance on Comment 2.

Finally, the case law decided under the pre-2009 amendment of Vermont's Rule 8.4 reveals that the "offenses involving violence" language in Comment 2 was viewed as providing guidance under subdivision (h), not subdivision (b). In *PRB Docket Nos. 2002.043 & 2003.031*, 2004 WL 5581930 (not reported), the Vermont Supreme Court affirmed a hearing panel's conclusion that a respondent's misdemeanor conviction for simple assault on a man in a wheelchair violated Rule 8.4(h). Rejecting the respondent's argument that his conduct was not covered by the Rules of Professional Conduct because it involved a non-client, the Court held that the conduct violated Rule 8.4(h)'s prohibition of conduct adversely reflecting on a lawyer's fitness to practice law. *Id.* *2. In so concluding, the Court also linked Comment 2 to Rule 8.4(h) and cited to an earlier decision that affirmed a similar application of Rule 8.4(h):

> *The comments to Rule 8.4(h) specify that offenses involving violence indicate a lack of those characteristics relevant to law practice.* Indeed, we indicated in an earlier case involving [respondent] that his conviction for "street fighting" adversely

> reflected on his reputation as a member of the bar, and violated a disciplinary rule identical to the one at issue in this appeal.

Id. (emphasis added) (citation omitted).

In the earlier case cited, respondent was convicted of the offense of simple assault by mutual affray---one of the two offenses allegedly committed by Respondent in the present case. Applying the fitness provision in subdivision (h), the Court reasoned that:

> respondent's criminal conduct here demonstrates a lack of judgment, control, maturity and good sense which adversely reflects on his reputation as a member of the bar. This sort of criminal conduct calls into question respondent's character and his ability to abide by the law.

In re Andres, 170 Vt. 599, 602, 749 A.2d 618, 621-22 (2000) (mem.)

Other pre-2009 amendment decisions involving misdemeanor convictions relied on the "fitness" provision in subdivision (h) and therefore undermine reliance on Comment 2. For example, in *In re van Aelstyn*, PRB No. 2004.026 (PRB Decision # 112), issued 7/28/08, the respondent was convicted of two counts of felony extortion and one count of misdemeanor stalking. The hearing panel concluded that (1) the felony extortion convictions established a violation of Rule 8.4(b), observing that "any felony qualifies as a 'serious crime' [under Rule 8.4(b)];" and that (2) the conduct underlying the misdemeanor conviction for stalking adversely reflected on the respondent's fitness to practice law, in violation of Rule 8.4(h). *Id.*, Conclusions of Law; *see also In re Taylor*, 171 Vt. 640, 641,768 A.2d 1273, 1275 (2000) (concluding that the conduct underlying respondent's misdemeanor nonsupport conviction reflected adversely on his fitness to practice law, in violation of Rule 8.4(h)).[3]

[3] Similarly, cases cited by Disciplinary Counsel from other jurisdictions that find violations of Rule 8.4(b) based on convictions for violent offenses, including domestic assault, relied on "fitness" provisions that were either derived from Model Rule 8.4(b) or otherwise included in the operative disciplinary rule. *See, e.g., Florida Bar v. Kandekore*, 766 So.2d 1004, 1005 (Fla. 2000); *In re Bowman*, 111 So.3d 317, 323 (La. 2013); *State ex rel. Oklahoma Bar Assoc. v. Zannotti*, 330 P.3d 11, 15 (Okla. 2014); *Attorney Grievance Com'n v. Painter,* 739 A.2d

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Although Comment 2 by itself cannot provide a basis for concluding that the alleged conduct would violate Rule 8.4(b), the Panel's consideration of another provision – Rule 17 of A.O. 9 – supports a conclusion that a "fitness" provision should be implied in Rule 8.4(b). Rule 17 of A.O. 9 provides for interim suspension of a lawyer based on a conviction of a "serious crime," *see* A.O. 9, Rule 17(B) ("Upon being advised that a lawyer subject to the disciplinary jurisdiction of the Court has been convicted of a crime, disciplinary counsel shall determine whether the crime constitutes a 'serious crime' warranting immediate suspension"), and defines the term "serious crime" to include Model Rule 8.4(b)'s "fitness" language: "A 'serious crime' is any felony or lesser crime *that reflects on the lawyer's* honesty, trustworthiness, or *fitness as a lawyer in other respects* or any crime a necessary element of which . . . ." *Id.*, Rule 17(C) (emphasis added).[4] Rule 17 further provides that "[t]he Court shall place a lawyer on interim suspension immediately upon proof that the lawyer has been convicted of a serious crime . . . ." *Id.*, Rule 17(D)(1).

It is well-established that determining the intent of a regulatory provision requires that the regulatory scheme be considered as a whole. *See, e.g., Conservation Law Found. v. Burke,* 162 Vt. 115, 121, 645 A.2d 495, 499 (1993) ("We must view the hazardous air contaminant regulations as a whole"); *TD Banknorth, N.A. v. Dep't of Taxes*, 2008 VT 120, ¶ 15, 185 Vt. 45, 53, 967 A.2d 1148, 1154 (2008) ("[P]roper construction requires the examination of the whole and every part of the statute"). In addition, a regulatory provision should be interpreted to avoid absurd or unjust consequences and to

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24, 28 (Md. 1999); *In re Magid*, 655 A.2d 916, 918 (N.J. 1995). By contrast, as presently constituted, Vermont's Rule 8.4(b) lacks a fitness provision.

[4] Rule 17(C) essentially combines under the definition of "serious crime" both the language of Model Rule 8.4(b) and the language present in the definition of "serious crime" in Vermont's Rule 8.4(b).

further the purposes of the law. *See, e.g.*, *State v. Grenier*, 2014 VT 121, ¶ 33, 198 Vt. 55, 73, 110 A.3d 291, 303 (2014) ("we must endeavor to ensure that [deference to an agency's interpretation of its regulation] does not result in unjust, unreasonable or absurd consequences"); *Sargent v. Town of Randolph Fire Dep't*, 2007 VT 56, ¶ 9, 182 Vt. 546, 548, 928 A.2d 525, 528 (2007) (interpretation of regulatory provision should take into account the regulation's "effects and consequences, and the reason and spirit of the law").

Reading V.R.Pr.C. 8.4(b) and Comment 2 together with the interim suspension provision and definition of "serious crime" in Rule 17 of A.O. 9, the Panel concludes that a "fitness" criterion should be implied in Rule 8.4(b). Rule 17 evinces an intent to impose an immediate summary suspension based on a definition of "serious crime" that includes a lawyer's commission of any crime reflecting adversely on the lawyer's fitness to practice. If the Panel were to adopt a strict interpretation of Rule 8.4(b), it would result in absurd consequences: a lawyer could be suspended on the basis of a misdemeanor conviction that meets only the "fitness" clause in the definition of "serious crime" in Rule 17(C), but that same conduct could not ultimately be the basis for an adjudication of a violation of Rule 8.4(b). That outcome would be both absurd, given the underlying purpose of protecting the public, and unjust to a respondent and, therefore, could not have been the intent of the Supreme Court. Under the pertinent rules of interpretation, the scope of Rule 8.4(b) and the definition of "serious crime" in Rule 17(C) should be harmonized. Implying a "fitness" provision in Rule 8.4(b) will accomplish that goal.[5]

[5] Of course, the 2009 deletion of the "fitness" provision in Rule 8.4(h) constitutes some support for a narrow interpretation of Rule 8.4(b). But for two reasons the Panel concludes that the deletion should not be dispositive. First, the Reporter's Note explaining the 2009 deletion erroneously assumed it was "follow[ing] the Model Rules in deleting subdivision (h)" and its further explanation for the deletion (concluding that the "fitness" language was "overly broad [as drafted]") is cursory and unpersuasive. As explained above, Vermont's version of Rule 8.4 placed the "fitness" provision from Model Rule 8.4(b) in Vermont's Rule 8.4(h), and Model Rule 8.4(b) still contains the "fitness" provision. Thus, contrary to the Reporter's Note, the 2009 deletion of subdivision (h) in fact *deviated* from the Model Rule. In addition, there is no case law cited to the effect that a fitness standard is overly

The only other way to harmonize the two provisions would be to give *no* effect to the "fitness" provision in Rule 17(C). That would not only negate express language in Rule 17(C); it would also negate the protection of the public that is provided under Rule 17 and, therefore, that interpretation is not favored. In sum, based on its consideration of A.O. 9, Rule 17(C) and well-established rules of interpretation, the Panel will interpret the definition of "serious crime" in Rule 8.4(b) to include any misdemeanor offense that reflects adversely on a lawyer's fitness to practice.

In light of this interpretation and the Supreme Court's decisions in *PRB Docket Nos. 2002.043 & 2003.031* and *Andres*, the Panel concludes that the conduct for which Respondent was convicted violated Rule 8.4(b). The factual circumstances presented in this case—misdemeanor acts of violence in violation of the criminal law—closely resemble the factual circumstances in those decisions. Those decisions involved the commission of misdemeanor acts of violence, including assault by mutual affray. Attorney Tabacco's conduct in the commission of domestic assault and simple assault by mutual affray "demonstrates a lack of judgment, control, maturity and good sense which adversely reflects on his reputation as a member of the bar." *In re Andres*, 170 Vt. at 602.

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broad. On the contrary, the "fitness" standard has been applied on a case-by-case basis and without any criticism. *See, e.g., In re Andres*, 170 Vt. at 602 ("[R]espondent's criminal conduct here demonstrates a lack of judgment, control, maturity and good sense which adversely reflects on his reputation as a member of the bar. *This sort of criminal conduct* calls into question respondent's character and his ability to abide by the law.") (emphasis added). It appears likely that the proponent of the 2009 deletion did not take into account the prior Vermont case law that relied on the "fitness" provision in subdivision (h) or consider its relationship to Model Rule 8.4(b) when proposing the deletion. As confirmed by the *Andres* decision, a fitness criterion can be readily applied on a case-by-case basis. Second, the Reporter's Note for the 2009 deletion of subdivision (h) cannot be squared up with the inclusion of a "fitness" criterion in the Rule 17(C) definition of "serious crime." If one accepts the Reporter's Note's rationale for deleting subdivision (h)—that a "fitness" criterion is overly broad—then arguably the fitness criterion in Rule 17(C) should have been deleted at the same time. The fact that Rule 17(C) was not amended and remains unchanged supports the conclusion that the full legal landscape encompassing subdivisions (b) and (h) of Rule 8.4 was not properly understood by the proponent of the rule change.

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 general public and to the legal profession to refrain from engaging in criminal conduct. *See id.* ("The community expects lawyers to exhibit the highest standards of honesty and integrity . . .").

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 knowing. The sentencing transcript indicates that Respondent pled guilty to having "recklessly caused bodily injury" under both charges. Domestic assault under 13 V.S.A. § 1042 is defined as conduct that "wilfully or recklessly causes bodily injury . . . ." This definition suggests that recklessness is a mental state somewhere between "intentional" (i.e. wilful) conduct and negligent conduct. Therefore, one might argue that Respondent's conduct could have involved "knowing" conduct. Simple assault under 13 V.S.A. § 1023(a)(1) is defined as conduct that "attempts to cause or purposely, knowingly or recklessly causes bodily injury . . . ." Under this definition, an argument could be made that Respondent's state of mind was not knowing because he could have been convicted of knowing conduct and was not.

Although Respondent might have argued that his convictions did not establish that his state of mind was knowing, he has not done so. On the contrary, Respondent filed a memorandum with the Panel in which he did not contest the application of ABA Standard 5.12. That standard contemplates the imposition of suspension as a sanction "when a lawyer *knowingly* engages in criminal conduct . . . that seriously adversely reflects on the lawyer's fitness to practice." *Id.* (emphasis added). Respondent only questioned whether his conduct, because it did not involve work as a lawyer or involve a client, was "sufficient to 'seriously adversely reflect' on Respondent's fitness to practice law." *See* Respondent's Supplemental Memorandum With Respect to Sanctions, 9/5/18, at 1; *see also id.* at 1-2 (acknowledging that suspension sanction "is appropriate."). "Judicial admissions made by an attorney at trial for the purpose of dispensing with the formal proof of some fact are 'binding upon their clients ... and ... are in general conclusive.'" *In re R.S.*, 143 Vt. 565, 571–72, 469 A.2d 751, 755 (1983) (quoting *United States*

v. United States Fidelity & Guaranty Co., 83 Vt. 278, 281, 75 A. 280, 281 (1910)).

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.

Each of the criminal offenses to which Respondent pleaded guilty includes as an element that the defendant's conduct "causes bodily injury." See 13 V.S.A. §§ 1023(a)(1); 1042. On the record before the Panel, the extent of the physical injuries has not been detailed. However, it has been conclusively established that both Ms. Putnam and her son suffered bodily injury as a result of Respondent's conduct. Moreover, the Panel observes that whenever a person resorts to the kind of conduct admitted to by Respondent—for example, Respondent admits that he punched Ms. Putnam's son, *see* Exhibit R-1—there is a risk of serious physical and emotional injury. And, finally, a conviction for engaging in violent conduct causes significant reputational injury to the legal profession because the public expects lawyers to abide by the law.

Presumptive Standard under the ABA Standards

ABA Standard 5.12 applies in this case. It provides as follows:

> Suspension is generally appropriate when a lawyer engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously

adversely reflects on the lawyer's fitness to practice.*ABA Standards*, § 5.12, at 39.[6] The Vermont Supreme Court has recognized that even misdemeanor assault constitutes conduct that seriously adversely reflects on an attorney's fitness to practice law. *See PRB Docket Nos. 2002.043*, 2004 WL 5581930, *3 (citing Standard 5.12).

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 suspension. 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 "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(d) (multiple offenses) – Respondent's conduct involved two individuals and resulted in two convictions. He therefore committed two violations of the Rules of Professional Conduct.

§ 9.22(k) (illegal conduct) – Respondent's conduct violated the criminal law.[7]

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[6] Standard 5.11, calls for disbarment in the event of "serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false searing, misrepresentation, fraud, extortion, misappropriation, or theft; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or . . . any other conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice." *Id.* at 38. None of these elements are present here. Standard 5.13, which provides for a reprimand, is not applicable because it is limited to situations where "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." *Id.* at 39 (emphasis added). Respondent's conduct clearly falls within the parameters of Standard 5.12.

[7] The Panel considered whether Respondent's seventeen years of licensure as an attorney as of the date of the misconduct should trigger the "substantial experience in the practice of law" aggravating factor under § 9.22(i) and concluded that it should not. Respondent's license has been inactive for the vast majority of the time he has been

(b) Mitigating Factors

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

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

§ 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. However, the Panel cannot assign much weight to this factor because Respondent has a duty under V.R.Pr.C. 8.1(b) to cooperate in connection with any disciplinary investigation. *See, e.g., In re Richmond's Case*, 872 A.2d 1023, 1030 (N.H. 2005) ("[W]e do not ascribe significant weight to this factor because a lawyer has a professional duty to cooperate with the committee's investigation").

§ 9.32(k) (imposition of other penalties or sanctions) – Respondent was convicted of two criminal offenses and placed on probation. The convictions amount to a significant penalty.

§ 9.32(l) (remorse) – Respondent submitted a letter and affidavit to the Panel expressing his acceptance of responsibility and remorse for his misconduct. In addition, he testified at the hearing in response to questioning from the Panel to the same effect. The Panel concludes that the factor is applicable. However, the Panel will assign little weight to this factor for the following reasons. First, Respondent's written expressions of remorse were generated only on the eve of the final hearing. Examination of the sentencing transcript (Ex. DC- B) from the criminal proceedings also reveals that Respondent took no steps to express remorse for his conduct during the sentencing hearing. And, finally, the summary nature of Respondent's written submissions to the Panel and his testimony at the

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licensed. As a result, he has not actually *practiced* law for any significant period of time. In addition, no evidence was presented suggesting that Respondent had any specifically relevant legal expertise.

hearing left the Panel wondering about the extent to which Respondent's expression of remorse was truly heartfelt. As a result, the Panel assigns little weight to this factor.[8]

(c) Weighing the Aggravating Mitigating Factors

Based on the preceding analysis, the Panel concludes that no adjustment of the presumptive sanction is appropriate. Two of the mitigating factors carry relatively little weight. And the seriousness of the conduct – involving the crime of assault – must be given relatively great weight. Suspension is the appropriate sanction.

* * *

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 considered whether past disciplinary determinations are consistent with the issuance of a 15-month suspension in this case. In *In re PRB Docket Nos. 2002.043*, the Board imposed a 3-year suspension where a respondent was convicted of simple assault and placed on probation and subsequently violated the terms of his probation. The Board considered the fact that the respondent had been previously convicted of assault by mutual affray and had received discipline for that misconduct as well as other misconduct. In the

[8] Disciplinary Counsel and Respondent have proposed two additional mitigating factors which the Panel declines to apply in this case. Disciplinary Counsel maintains that "there is no evidence [that] Respondent's criminal conduct was dishonest or for self-gain." Mem., 9/14/18, at 4. The factor for "absence of a dishonest or selfish motive" set forth in § 9.32(b) seems ill-suited to a case involving assaultive conduct. Someone who engages in violent conduct is arguably acting with a selfish motive, by resorting to violence to resolve a dispute. And, in any event, the Panel is not convinced on the evidence presented that a selfish motive was absent. In addition, the mitigating factor for "timely good faith effort to make restitution or to rectify the consequences of misconduct" set forth in § 9.32(d) is not applicable. Disciplinary Counsel cites Respondent's completion of a domestic violence program through his probation and parole office. *See id.* But the consequence of Respondent's misconduct was bodily injury – to Ms. Putnam and her son – and no evidence was presented that the program addressed the bodily injury in any concrete way. Moreover, the sentencing transcript and docket sheet in the underlying criminal proceeding reveal that Respondent was *required* to participate in the program (the "BIP") as part of his sentence. It seems unlikely that the drafters of this mitigating factor thought it should apply to a court-ordered program.

prior case involving that same respondent, *In re Andres*, the Board recommended a public reprimand based on respondent's conviction for simple assault by mutual affray and neglect of client matters. The Panel cannot draw definitive guidance from these cases because of the different circumstances. The current case did not involve the number of violations or prior disciplinary record present in *PRB Docket Nos. 2002.043*. And because the current case involves both a conviction for domestic assault as well as one for assault by mutual affray, the circumstances arguably call for a more serious sanction than was imposed in the first *Andres* case.

In *In re van Aelstyn*, PRB No. 2004.026 (PRB Decision # 112), a hearing panel issued a suspension totaling three years (incorporating respondent's interim suspension for period that lasted approximately two years) where respondent was convicted of felony extortion and misdemeanor stalking. But the panel found the mental state of respondent to have been intentional, resulting in a presumptive sanction of disbarment, and then reduced the sanction to suspension based on the mitigating factors present. In addition, the sanction was not allocated between the various convictions. Here, Respondent's mental state was that of knowledge and the convictions were exclusively misdemeanors. Again, it is difficult to draw firm guidance.

The Panel has considered two other disciplinary decisions involving misdemeanor convictions. In *In re Pope*, 2014 VT 94, 197 Vt. 638, 101 A3d 1284, the respondent was convicted of misdemeanor identity theft and as a result her license was suspended by the State of New York for two years. The Vermont Supreme Court concluded that it should issue a reciprocal two-year suspension, applying ABA Standard 5.12. The Court imposed the suspension even though Respondent "had no prior disciplinary record, was generally cooperative, and had a record of community service." *Id.* ¶ 14. The crimes of assault and identity theft both involve actual harm to an identifiable person—the former causing physical harm, the latter financial harm, and both often inflicting psychological harm. In another case, *In re*

Taylor, 171 Vt. 640, 768 A.2d 1273 (2000), the Court imposed a 6-month suspension based on a lawyer's conviction for misdemeanor nonsupport and, in reaching this result, employed a comparison to a 6-month suspension that was imposed in another case for failing to pay state income taxes. Id. at 642, 768 A.2d at 1275. The disciplinary outcomes in these cases suggest that a conviction for domestic assault would merit at least a 6-month suspension.

Finally, the Panel observes that other jurisdictions have imposed lengthy suspensions based on domestic assault convictions. Not surprisingly, the length of the suspensions may depend on the specific facts. *See, e.g.*, *Matter of Zulandt*, 939 N.Y.S.2d 338 (2012) (imposing 3-year suspension where respondent had assaulted his former girlfriend and engaged in a prolonged assault evincing a "calculated pattern of cruelty); *In re Hunter*, 980 A.2d 755 (R.I. 2009) (imposing a 1-year suspension on respondent who was convicted of various offenses, including three misdemeanor counts of domestic assault; respondent had no prior disciplinary record); *People v. Hill*, 71 P.3d 1023 (Colo. 2003) (imposing 6-month suspension, all stayed pending two years of probation, based on respondent's conviction of misdemeanor assault for striking and injuring his stepson; recognizing numerous mitigating factors, including no prior disciplinary record, self-reporting of the incident, genuine remorse and cooperative attitude). These cases suggest that a multi-month suspension is appropriate whenever a respondent has been convicted of domestic assault, but they are fact dependent.

The parties in this proceeding have jointly recommended a 15-month suspension. Of course, the Panel is not bound by this recommendation and is charged with arriving at an appropriate sanction. However, based on the limited facts presented and the limited guidance available through the case law, the Panel is reluctant to second-guess the parties' joint recommendation and will accept the recommendation.

As noted above, the case law suggests a minimum sanction but does not provide ultimate guidance regarding the appropriate length of suspension in this case. In addition, the Panel observes that it was presented with limited facts in the parties' proposed stipulation, and no additional evidence concerning Respondent's specific conduct was presented at the sanctions hearing. No testimony concerning the conduct—from either the victims or Respondent—was presented at the hearing, and the parties' stipulation was abbreviated and cursory in its description of the conduct.[9] If more specific facts had been presented, the Panel might conceivably have arrived at either a shorter or longer suspension in this case. But the Panel was left with a sparse factual record beyond the fact of the convictions.

In the final analysis, the Panel cannot conclude based on the record before it that the recommended sanction is inconsistent with Vermont case law. Therefore, it will accept the recommended 15-month suspension in this case. At the same time, because any hearing panel decision constitutes potential precedent on the issue of sanctions in future cases, the Panel takes the position that its decision should be considered limited precedent on the issue of appropriate length of a suspension in any future disciplinary proceeding because of the limited factual record that was presented by the parties.

ORDER

It is hereby ORDERED, ADJUDGED and DECREED as follows:

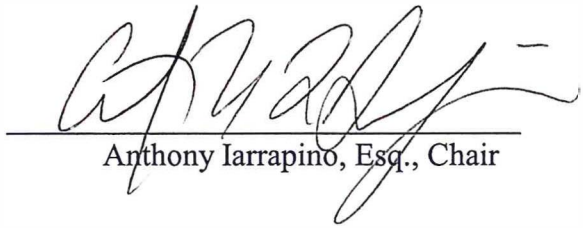
1. Respondent, Errol Tabacco, Esq., has violated Rule 8.4(b) of the Rules of Professional Conduct, as set forth above;

[9] As noted above, Disciplinary Counsel did offer affidavits from the victims on the date of the final hearing, but only on the condition that the affidavits would be sealed in their entirety and on the further condition that they would be withdrawn from the record if the Panel denied the request. For the reasons stated in its separate ruling, the Panel denied the request to seal the affidavits in their entirety and, pursuant to Disciplinary's Counsel's request, excluded them from the record as a result.

2. Respondent is suspended from the office of attorney and counselor at law for a period of fifteen months effective from the date of this decision.

Dated: November 19, 2018

Hearing Panel No. 1



Anthony Iarrapino, Esq., Chair

Emily Tredeau, Esq., Member

Scott Hess, Public Member