STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In Re: Matthew D. Gilmond, Esq.
PRB File No. 2017-048
PRB File No. 2017-049
PRB File No. 2017-050

Decision No. 211

Disciplinary Counsel and Respondent, Matthew D. Gilmond, initiated these proceedings by filing a proposed stipulation of fact, a joint recommendation with respect to conclusions of law, and separate memoranda with respect to the issue of sanctions. The parties subsequently revised the proposed stipulation of facts while leaving intact their joint recommendation with respect to conclusions of law and their respective proposals regarding sanctions. Disciplinary Counsel requested that a 45-day suspension be imposed; Respondent requested a private admonition.

On November 21, 2017, the Hearing Panel issued a decision in which it accepted the parties' Second Revised Stipulation of Facts,[1] while reserving a decision on the parties' joint recommendation with respect to conclusions of law and on the appropriate sanction. The Panel held a hearing on December 13, 2017 to allow the parties to present oral argument with respect to their joint recommendation as to conclusions of law and to afford an opportunity for the parties to present any further evidence and oral argument with respect to the appropriate sanction. Disciplinary Counsel presented the testimony of Attorney Richard Rubin, Esq.;

[1] The parties submitted an initial revision of their proposed stipulation of facts before the Panel had decided whether to accept or reject the original proposed stipulation. The Panel issued a decision on September 27, 2017 rejecting the Revised Stipulation of Facts. The parties then submitted a Second Revised Stipulation of Facts, which was accepted by the Panel on November 21, 2017.

Respondent made a statement to the Panel at the hearing and submitted a letter of apology that he sent to Attorney Rubin on December 12, 2017.

STIPULATED FINDINGS OF FACT

Pursuant to A.O. 9, Rule 11(D)(5)(a), the Panel adopts the following facts to which the parties have stipulated:

1. The Respondent is an attorney admitted to practice law in the State of Vermont.

2. The Respondent was admitted to the Vermont Bar in November 1998.

3. Between his practice in Vermont and prior practice in Connecticut, the Respondent has been practicing law for approximately 25 years. Respondent's practice includes insurance defense, general litigation and certain sectors of health care law, for much of the time he has been practicing. As of the Spring of 2016, Respondent had handled less then [sic] 10 cases with Zurich North America ("Zurich").

4. On or about the Fall, 2014 the Respondent was assigned to represent Terry-Haggerty Retreaders, by insurer Zurich in the matter of Michael Marino v. Marshall Tire Group, Inc. and Terry–Haggerty Retreaders, LLC, Docket No. 313-5-14 Wncv. Respondent was the only attorney who was assigned to handle the defense of this matter.

5. The Respondent's initial contact at Zurich was Adjuster Sandy Haas.

6. Ms. Haas never had more than $50,000.00 worth of settlement authority and Zurich's major claims unit, which Ms. Haas was not a part of, would review matters worth more then [sic] that amount.

7. On or about March 30, 2016 the Respondent attended a mediation with Plaintiff's attorney Richard Rubin and counsel for co-defendant Marshall Tire Group, Inc.

8. The mediation was conducted by Attorney Arthur O'Dea.

9. At the time of the mediation, the Respondent hired a local adjuster to represent Zurich. The local adjuster was Janine Remarque of Frontier Adjusters, based in the Albany, New York area. A local adjuster was hired because the court rules require someone with authority to be present and consistent with common practice this reduces the burden of time and expense associated with traveling from Zurich's out-of-state offices. Ms. Remarque attended the meditation with Respondent at the offices of Ryan Smith and Carbine.

10. Ms. Remarque and the Respondent participated in a phone conversation on March 30, 2016 and in that phone conversation discussed the merits of the case with Zurich Adjuster Sandy Haas.

11. Respondent contends that settlement authority up to $300,000.00 was verbally extended to him by Ms. Haas during the phone conference on March 30, 2016. That contention is disputed by Ms. Haas. Respondent's contention is supported by Ms. Remarque.

12. The matter was reassigned from Ms. Haas to another adjuster on or about May 6, 2016.

13. The Respondent settled the matter at mediation for $300,000.00.

14. On March 31, 2016, the day after mediation, the Respondent sent Ms. Haas a "pretrial report." The pretrial report was requested on or about the time of mediation. The pretrial report indicated that medical bills alone were in excess of $46,000.00 and could likely double. The pretrial report valued the case at $400,000 - $500,000.

15. The pretrial report was sent after the case settled because Ms. Haas requested one as the Zurich file did not contain a pretrial report. Zurich had the relevant information from prior reports, but required the information to be in the pretrial report format as part of the case file.

16. On or about April 7, 2016, Plaintiff's Attorney Richard Rubin, sent Respondent a release.

17. On or about April 19, 2016, Attorney Rubin via email asked that the Respondent update him on the status of the settlement check. The Respondent responded via email that he would look into the matter with the insurer.

18. On or about April 26, 2016 the Respondent indicated via email that the check "should be here any day now…. I think the adjuster was away."

19. The Respondent called Sandy Haas after the mediation and could not reach her for approximately three weeks. Respondent was informed by Dana Shay that settlement authority was not documented in the file. Respondent does not possess any contemporaneous written documentation that settlement authority was extended by Ms. Haas or by any other or by any other [sic] Zurich adjuster in connection with the lawsuit.

20. In addition to the false statements set forth in paragraphs 17 – 18 above the Respondent made a number of additional false statements to Attorney Rubin regarding the alleged status of the settlement checks from Zurich. All statements were made via email unless otherwise noted. Those false statements made by the Respondent to Attorney Rubin are as follows:

a) April 29, 2016 – "I certainly hope and expect [that the check would arrive in the next day or so.]"

b) May 2, 2016 – "I did not receive the check and am contacting the adjuster to find out more and see what can be done to get this taken care of ASAP."

c) May 12, 2016 – "the check has not arrived although it was requested April 4, issued April 11 and mailed April 13. The carrier is treating that check as lost and decided to issue another. That should have been issued and overnighted yesterday."

d) May 16, 2016 – "it's not coming up on the FedEx tracker. The people that process the checks for Zurich are trying to sort it out."

e) May 24, 2016 – in a voice message the Respondent stated "problem last week processing check request…now resolved…should go out in next day or two, overnight…"

f) May 27, 2016 – "I'm hoping it comes via FedEx today."

g) May 30, 2016 – "It did not come in today."

h) June 2, 2016 – "I have learned that the check has been caught up in storm/flooding delays plaguing Texas. These weather problems have caused a number of shipping problems in that part of the country. Hopefully, we will learn more today as to when to expect the check."

i) June 23, 2016 – "They have not located the reissued check so they are going to cancel that and reissue again. I have suggested they try a different overnight carrier."

j) July 12, 2016 – "I am told that something in the system is preventing the check from actually going out. The current thinking is that it is because of the prior instances when the check was issued and cancelled. It seems that this is a new situation, so the solution has been hard to identify."

k) July 21, 2016 – In a voice message Responded stated "I got some information from Zurich today. Um, the technical difficulty in terms of reissuing the check has been solved, and that is in the process [sic], so I'm hoping to have it within, uh, several days."

l) July 26, 2016 – "I checked earlier and things are on track to get the check out today or tomorrow."

m) July 27, 2016 – "the check was issued today. I will keep you posted."

n) July 29, 2016 – "The check is being sent (overnight) today, so I should have it Monday."

o) August 1, 2016 – "I have not received the check yet. I am trying to get more information from the adjuster."

p) August 9, 2016 – "I had several phone conversations yesterday with people in different roles/levels and they have told me they will address the situation ASAP."

q) August 10, 2016 – "I am addressing the interest as well. I have not used a wire transfer before in a settlement, but will propose it."

r) August 12, 2016 – "I just got off the phone with Zurich…. The focus was on getting the check out as the wire transfer idea, while good, could create problems by switching the payment method at this point.

s) August 16, 2016 – "I've been on the phone with them several times this week- Zurich was waiting for one last piece to get resolved."

t) August 17, 2016 – "I got confirmation that the last issue has been resolved. I will keep you updated on the issuance (printing) of the check and shipping."

u) August 19, 2016 – "I just got a call from Zurich telling me the check should be issued/printed first of next week. I will keep you posted as I hear more."

v) August 26, 2016 – "I got off the phone either [sic] carrier. I was mistaken. The check is being sent today. I misunderstood the adjuster."

w) August 29, 2016 – In a voice message the Respondent stated "the matter was administratively reassigned, part of an automatic thing with other files…. Just need to make sure that he has cleared the check."

x) August 31, 2016 – "He [traveling adjuster] plans to get to an internet connection this morning to log on and do what he needs to do to get the check sent. I will follow up later with the payment person and will be in touch."

y) September 2, 2016 – "[Adjuster] was able to log on and clear the process for the check to be issued. It should go out Monday."

z) September 6, 2106 – "I did receive confirmation that the check is going out today."

aa) September 7, 2016 – "[t]he additional information I received is that the check was printed yesterday and will be sent today….they were told to send overnight and said they would send it FedEx."

bb) "September 8, 2016 – "I have not received the check from FedEx. I am trying to get the tracking number to check on its status. I will keep you posted when I learn more."

cc) September 9, 2016 – "The check went out Wednesday but not by FedEx. It was coded to go out by FedEx and confirmed multiple times by the adjuster and I. Someone in the mail room screwed up and sent it via regular mail."

dd) September 12, 2016 – "The check did not come in the mail. The adjuster asked that we give until Wednesday."

ee) September 13, 2016 – "No check today but hopefully tomorrow."

ff) September 14, 2016 – "I've been tied up all day but am working on the wire transfer option."

gg) September 20, 2016 – "We are expecting to have the wire transfer funds tomorrow."

21. During approximately the same time period that the Respondent was making false statements to Attorney Rubin, he was also making misleading statements to Ms. Haas's successor adjusters at Zurich. The Respondent never discussed with any successor adjuster his belief that he had received settlement authority from Ms. Haas and had in fact settled the case at the March 30, 2017 [sic] mediation. All statements were made via email unless otherwise noted. The misleading and incomplete statements to Zurich included the following:

a) May 9, 2016 – Although he sent Dana Shay the successor Zurich adjuster to Ms. Haas the deposition of the Plaintiff on request, the Respondent never informed Ms. Shay that the matter had settled on March 30, 2016.

b) May 27, 2016 – Ms. Shay indicates "I've referred this to the Major Case Unit. I'm waiting to see if they take the case. I can't see them leaving it with me given the exposure, but we'll see what happens." Respondent did not tell Ms. Shay that the matter had already settled.

c) June 24, 2016 – Patricia Sparlin successor Zurich adjuster to Ms. Shay asks "[w]hat is the litigation plan going forward" and the Respondent did not tell Ms. Sparlin that the matter had already settled.

d) June 29, 2016 – After responding to Ms. Sparlin's inquiry about Plaintiff's medical issues at length, the Respondent states "[m]y primary concern is time, as plaintiff was expecting movement from us months ago."

e) July 5, 2016 – Ms. Sparlin states "[g]iven the potential value of this claim, I may need to refer this matter to MCU, and/or obtain authority from the MCU [Major Case Unit] team manager." The Respondent did not tell Ms. Sparlin his belief that settlement authority was given and exercised months ago.

f) July 29, 2016 – Respondent writes to Ms. Sparlin "Any chance you could give me an update on progress toward getting settlement authority." This was more then [sic] four months after the case settled at mediation, wherein the Respondent believed he had settlement authority.

g) August 4, 2016 – Respondent writes to Ms. Sparlin "Do you have any idea when you might have a decision [as to settlement authority]."

h) August 22, 2016 – In response to a series of questions from the new adjuster from the MCU, Tom Flanagan, instead of informing Mr. Flanagan

that the matter settled in March, the Respondent states "please let me know when you are available for a telephone conference and how to reach you."

i) August 31, 2016 – Mr. Flanagan instructs Gilmond to "correspond with whomever you would be representing at the time of trial for their buy in and input [regarding potential settlement]."

22. On August 22, 2016 Attorney Rubin wrote to Harry Ryan, one of Respondent's partners and stated that "[w]e spoke of the inability of your office to pay the $300,000.00 settlement in this case for more then [sic] four months. You told me you were not Matt Gilmond's supervisor, but would address it. Several months ago, John Zawistoski said that he would deal with it." As of this date Respondent had failed to inform either Attorney Zawistoski or Attorney Ryan that the Zurich adjusters he had been corresponding with were unaware that the Respondent had already settled the matter.

23. On or about May 17, 2016, Attorney Rubin moved to enforce the settlement, entry of judgment and interest against Terry Haggerty Retreaders. Exhibit 1. On June 9, 2016 the Court gave Respondent until June 21, 2016 to respond because it was "loath even to open and read a confidential settlement agreement." Exhibit 2. On June 29, 2016, after having received no response from the Respondent and after checking with the Respondent in writing on June 27, 2017, the Court granted Attorney Rubin's motion. Exhibits 3, 4. The Court gave the parties a final 10 calendar days to resolve the matter before judgment was entered, thus publicly revealing the settlement amount and interest awarded. Exhibit 4. The Respondent failed to take any steps to inform the Court of his position and judgment was entered with the settlement amount on July 11, 2016. Exhibit 5.

24. On or about October 3, 2016 Ryan Smith and Carbine reported Respondent for alleged unprofessional conduct. On or about October 4, 2016 Attorney Rubin reported Respondent for alleged unprofessional conduct. On or about October 12, 2016 Respondent self-reported his alleged unprofessional conduct. This self-report expressed a desire to apologize to Attorney Rubin and his client.

25. On or about late September, 2016 the Respondent was called into a 45 minute meeting with his then partners to discuss the allegations as set forth above. The meeting resulted in his involuntary separation from Ryan Smith and Carbine.

26. As a result [of] the Respondent's actions and inaction, the Firm and Zurich agreed on October 26, 2016 that Zurich would pay the $300,000.00 settlement as all parties agreed that it was reasonable given the facts and circumstances of the Plaintiff's claims. Ryan Smith and Carbine agreed to reimburse Zurich for the $16,350.400 in interest awarded by the Court.

27. When interviewed the Respondent stated: "Despite thinking a lot about that [the facts referenced above] in the last months, it is still a little hard for me to explain only because it was wrong, it was stupid, I shouldn't have done it. And I don't really have a logical explanation. I think I was confused about what was going on at Zurich and panicked and didn't want to let on to him [Attorney Rubin] that there was any kind of problem." The Respondent also indicated that "I can't sit here and really explain these things to you....I'm doing what I can, but despite everything I've been through, and all the thinking I've done about it, ... We're trying to have a discussion that's rational and I think a lot of this was irrational."

28. In February, 2015 the Respondent suffered a serious ankle fracture and dislocation with a lengthy rehabilitation and healing process. During the Summer of 2015, his injury had a

collateral effect of causing Respondent serious hip pain and lack of sleep. The Respondent's mother passed away in May, 2015.

29. Since the Fall of 2016, the Respondent has been seeing a psychologist since his involuntarily [sic] separation from Ryan Smith and Carbine. Further, Respondent has voluntarily not sought employment as a lawyer since that time. In that time and with professional help, Respondent's position is that he has gained the tools to properly deal with future professional obligations.

30. When interviewed on December 14, 2016 Attorney Zawistoski was not aware of any mental health issues that the Respondent had reported and indicated that the Firm had no problems with Respondent's performance prior to this incident. In his exit interview with the Firm, Respondent admitted that his correspondence with Attorney Rubin had been a "sham."

31. The Respondent has fully cooperated with Disciplinary Counsel's investigation and did not seek to excuse his actions or otherwise diminish the gravity of his conduct.

ADDITIONAL FINDINGS OF FACT BASED ON EVIDENCE AT HEARING

Attorney Rubin experienced substantial frustration and had to perform additional work in the case as a result of Respondent's failure over a protracted period of time to arrange for delivery of the payment that had been promised to Attorney Rubin's client in the parties' settlement agreement. He also experienced a sense of having had his trust violated when he learned of Respondent's repeated misrepresentations to the effect that the settlement payment would be forthcoming shortly.

Attorney Rubin relied on Respondent's representations regarding the settlement payment and conveyed those statements to his client in the course of providing updates on the status of the settlement agreement. He felt that over time, as Respondent's misrepresentations continued and

the settlement payment was not forthcoming, his client started to lose some confidence in his representation and in the legal system as a whole.

Respondent was experiencing emotional stress at the time of the events in question. Respondent utilized running and walking for stress management but due to the lingering medical problems associated with his ankle injury and related hip condition he was unable to exercise during the time period in question. In addition, he was still finding it difficult to cope with the May 2015 passing of his mother. Although no expert testimony or clinical diagnosis was presented at the sanctions hearing, the Panel finds that Respondent was feeling depressed to some degree during this period of time.

Respondent is not currently practicing law. He caused his law license to be transferred to "inactive" status in June 2017 and remains on inactive status at this time.[2] Respondent stated at the hearing that he is presently focused on continuing his counseling and that he has felt the need to take some time for self-reflection prior to resuming the practice of law. He did not indicate when he anticipated being ready to resume the practice of law.

Respondent has not reimbursed his former law firm, Ryan Smith & Carbine, for the firm's payment of the interest that was awarded in the trial court's entry of judgment.

Respondent acknowledges that his dealings with both Attorney Rubin and Zurich's adjusters, as described in the parties' stipulation of facts, were dishonest and that he knew at the time of his conduct that he was being untruthful in his statements to Attorney Rubin and Zurich's adjusters. Respondent also acknowledges that he could have attempted to contact the supervisor

[2] Respondent's inactive status does not alter the Professional Responsibility Board's jurisdiction to impose discipline. *See* A.O. 9, Rule 5(a) (the board's jurisdiction extends to "[a]ny lawyer admitted in the state" and to "acts committed prior to . . . transfer to inactive status.").

of Ms. Haas at Zurich during the time period following the mediation when he was unable to reach Ms. Haas and that he should have done so.

Respondent delayed in providing an apology for his conduct until the day before the sanctions hearing, when he sent a letter of apology to Attorney Rubin. Respondent's Exhibit A (letter, 12/12/17). However, the Panel does find that Respondent is remorseful for his conduct.

CONCLUSIONS OF LAW

The Panel concludes that Respondent committed a number of violations of the Code of Professional Responsibility.

Rule 1.3

Rule 1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." The Comments observe that "[a] client's interests often can be adversely affected by the passage of time . . . [and] [e]ven when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness." Comment 3, V.R.Pr.C. 1.3.

The Panel concludes that Respondent violated Rule 1.3 by failing to act with reasonable diligence and promptness in his representation of Terry-Haggerty Retreaders ("Terry-Haggerty"). Respondent failed to take the necessary steps to bring about a timely completion of the obligation of Terry-Haggerty under the settlement agreement that Respondent had negotiated to resolve the claims against Terry-Haggerty in the lawsuit. Although Zurich, as insurer, paid for Respondent's defense of Terry-Haggerty and ultimately provided the settlement funds, it is important to recognize that prior to the insurer's payment of the settlement, Terry-Haggerty's interests remained in jeopardy and in need of protection. This is illustrated by the fact that the failure of Respondent to secure timely payment to plaintiff resulted in a judgment being entered

against Terry-Haggerty, along with an award of interest, with interest continuing to accrue daily, at the statutory rate of 12%. *See* Exhibit 5.[3]

The fact that the judgment was ultimately satisfied by Zurich's payment and by Respondent's law firm's reimbursement to Zurich for the interest component of the judgment does not relieve Respondent of this violation. By failing to inform Zurich that he had settled the lawsuit and by not requesting the settlement payment, Respondent violated Rule 1.3 with respect his representation of Terry-Haggerty. *Cf. In re Hailey*, 792 N.E.2d 851, 862-63 (Ind. 2003) (attorney's delay in paying third-party creditors following receipt of settlement proceeds violated Rule 1.3).[4]

Rule 1.4(a)(3)

Rule 1.4(a)(3) provides that "[a] lawyer shall . . . keep the client reasonably informed about the status of the matter." V.R.Cr.P. 1.4(a)(3). The parties take the position in their proposed conclusions of law that Zurich should "stand in place of the client" and that Respondent violated Rule 1.4(a)(3) by failing to keep Zurich's adjusters informed about the status of the litigation in which he represented Terry-Haggerty. *See* Second Revised Stipulation of Facts and Joint Recommendations at 12. The parties' stipulation of facts does not set forth

[3] Although the parties' stipulation of facts does not expressly reveal the procedural mechanics of the settlement agreement, the typical settlement in a personal injury case where the only claims are monetary ones would involve a dismissal of the plaintiff's claims in consideration for the payment of money – as opposed to an entry of judgment against a defendant. And, based on the stipulated fact that Attorney Rubin sent Respondent a release following the mediation (Finding # 16) and the representation in the motion to enforce the settlement that plaintiff executed a release in favor of Terry-Haggerty and transmitted it on April 7, 2016 (Exhibit 1), it appears that the settlement contemplated dismissal of the claims upon payment. Otherwise, a release would not have been necessary.

[4] In their joint proposed conclusions of law, the parties advance the theory that Respondent had a duty to Zurich under Rule 1.3 and breached that duty and suggest that Zurich should be considered a client of Respondent's. Because the Panel has concluded that Respondent had a duty under Rule 1.3 to Terry-Haggerty that was breached and because the operative facts for the proffered theory relating to Zurich are the same facts, the Panel does not have to reach the question of whether Respondent breached a duty to Zurich under Rule 1.3.

any facts relative to Respondent's communication (or lack thereof) with Terry-Haggerty. Accordingly, unless Zurich can be considered a client of Respondent's there can be no violation under this rule.

The following threshold question is presented: Is a liability insurance company that retains an attorney to provide defense of a claim against the company's insured properly considered a client of the retained attorney for purposes of Rule 1.4(a)(3)? Or should it be considered a third party? The Rules of Professional Conduct refer to both "clients" and "third parties." For example, while Rule 1.4(a)(3) requires a lawyer to "keep the client reasonably informed," *id.*, Rule 4.1 prohibits false statements to "third persons" made in the course of representing a client. It is clear that an opposing counsel would be considered a third party. It is not clear, however, whether a liability insurer should be considered a client or third party.

The precise nature of the relationship between an attorney retained by a liability insurer and the insurer has not been well-defined by Vermont law. In *In re Illuzzi*, 159 Vt. 155, 616 A.2d 233 (2009), the Court concluded that the prohibition on communication with an adverse "party" without prior consent of the attorney representing that party encompasses communications with an insurer that retains counsel to represent its insured. *See id.* at 159-60, 616 A.2d at 236. But the decision does not squarely address the question of whether an insurer should be considered a "client" of retained defense counsel.

Moreover, the issue is not clearly addressed by the Rules of Professional Conduct. In the context of addressing conflicts of interest, Comment 13 of Rule 1.7 indicates that "[a] lawyer may be paid from a source other than the client, including a co-client," absent any conflict of interest, but does not directly address the issue. In the context of further discussion of conflict-of-interest issues, Comment 11 of Rule 1.8 references situations in which a "third party" may

compensate an attorney, citing as two examples "an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees)," and makes the following observation:

> Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client.

V.R.Pr.C. 1.8, Comment 11.

The use of "third-party" in Comment 11 is in the context of discussing the source of payment and is not definitive as to the nature of the relationship between an insurer and an attorney the insurer has retained. Moreover, to the extent that the Comment contemplates legal representation in situations where there is no conflict of interest, it does not negate the possibility that the interests of an insurer and its insured may be sufficiently aligned, depending on the circumstances, to allow for common representation by the retained attorney. In sum, the answer is not clear from the Rules.

Cases in other jurisdictions have addressed the issue primarily when considering whether an insurer can pursue a legal malpractice claim against an attorney it previously retained to defend an insured. In that context, many courts have recognized that "a tripartite relationship exists among the insurer, insured, and counsel, with both insurer and insured as co-clients of the firm in the absence of a conflict of interest." *Hartford Ins. Co. of Midwest v. Koeppel*, 629 F.Supp.2d 1293, 1299 (M.D. Fla. 2009) (quotations omitted) (surveying state and federal case law). But other courts have concluded that the insurer may sue for legal malpractice as "a non-client beneficiary of the firm's legal services." *Id.*

For the following reasons, the Panel concludes that Zurich should be considered a client within the meaning of that term in Rule 1.4(a)(3). First, there can be no dispute that an insurer which retains an attorney to provide defense on behalf of an insured has, at the very least, a special relationship with the retained attorney and the insured. In order to monitor the defense and evaluate issues of indemnity, an insurer needs to receive regular and accurate updates from the retained attorney. In addition, unless and until a conflict of interest arises with the interests of the insured, the interests of the insured and insurer are aligned with one another. Indeed, that alignment of interests explains the holding in *Illuzzi*.

Finally, it would not serve the purposes of the Rules of Professional Conduct – to protect the public – to place liability insurers in the same category with all other third parties. Even assuming insurers are considered third party beneficiaries, as opposed to co-clients, the relationship is important to the successful provision of legal services to an insured. That is illustrated by the facts of this case, where plaintiff's failure to inform Zurich of the settlement agreement led ultimately to a judgment being entered against Zurich's insured. If an insurer is not considered a client of the retained attorney, the relationship is nevertheless so close to being a client relationship, assuming there is no conflict of interest present, that it should be considered as such for purposes of the ethics rules. It makes no sense to lump a liability insurer in the same category as third parties who have no relationship whatsoever to an insured.

Based on this reasoning and the factual record, the Panel concludes that Zurich is appropriately considered a client under the factual circumstances presented. On the record presented, there is no reason to believe that any conflict had arisen in the case. It is undisputed that the positions of the insured and insurer were aligned during the period of time in question.

Moreover, the Panel concludes that Respondent violated Rule 1.4(a)(3) by failing to inform Zurich that the lawsuit had been settled and that payment was due under the settlement agreement. There can be no doubt that keeping Zurich "reasonably informed" of the status of the lawsuit would encompass advising Zurich's adjusters in a timely manner that Respondent had settled the case at the mediation and conveying the terms of the settlement agreement to the adjusters. Respondent failed to do so and, therefore, violated the rule.

Respondent's failure jeopardized and ultimately harmed Zurich's interests, as the insurer of Terry-Haggerty, in achieving a settlement of the pending litigation through the mechanism of a confidential settlement agreement and without any additional exposure to liability for late payment. As a result of Respondent's failure, a judgment was eventually entered against Zurich's insured, along with an award of interest, and the terms of the settlement agreement were placed on the public record. In sum, Respondent's failure to keep Zurich reasonably informed violated Rule 1.3.

Rule 4.1

Rule 4.1 provides, in pertinent part, that "[i]n the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person." V.R.Pr.C. 4.1; *see also* Comment 1 ("A lawyer is required to be truthful when dealing with others on a client's behalf"). Misrepresentation can occur through the making of false statements or "partially true but misleading statements," or by "omissions that are the equivalent of affirmative false statements." *Id.*, Comment 1.

A false statement is material if the recipient would reasonably have been expected to take some action if a true statement had been made. *See In re PRB Docket No. 2007-046*, 2009 VT 115, ¶ 6, 187 Vt. 35, 989 A.2d 523 (2009) (false statement that witness's conversation was not

being tape-recorded was material because "Respondents believed that the witness would have terminated the call if he had found out that he was being taped").

There is no dispute that Respondent made false statements to opposing counsel in the litigation, and it is well-established that false statements made to opposing counsel come within the scope of the prohibition set forth in Rule 4.1. *See, e.g., Attorney Grievance Comm'n of Maryland v. Steinberg*, 0910 A.2d 429, 446 (Md. Ct. App. 2006) (attorney violated Rule 4.1 by falsely stating to opposing counsel that his client refused to be deposed). Moreover, the statements were made in the course of Respondent's representation of Terry-Haggerty. Respondent made dozens of false or misleading statements of material fact to opposing counsel over the course of many months. *See* Findings of Fact # 18, 20. He repeatedly stated or implied that the settlement payment in connection with the litigation would soon be forthcoming when, in fact, he knew it would not. Respondent has admitted that the statements he made to Attorney Rubin were "a sham." He knew that the statements were false or misleading because he knew he had not informed Zurich that the case had been settled and, therefore, knew that a settlement check was not in the process of being produced.

Respondent's statements to Attorney Rubin were clearly material. If Respondent had told Attorney Rubin the truth – that he had not yet informed Zurich of the settlement – Attorney Rubin would certainly have taken some action sooner to compel payment of the settlement. The materiality of the statements is evidenced by the fact that, after months of being promised that the check was "on the way," Attorney Rubin did take action – by filing a motion to enforce the settlement agreement. In sum, Respondent repeatedly violated Rule 4.1 by knowingly making false statements to Attorney Rubin.

* * *

As the Panel has concluded that Zurich should be treated as a "client" and not as a third party, the Panel does not deem the statements Respondent made to Zurich's adjusters and his omissions in response to their statements as violative of Rule 4.1. However, the Panel observes that if in the course of any review the Supreme Court were to conclude that Zurich may not be considered a client under the Rules of Professional Conduct, then Respondent's misleading statements and omissions in his communications with Zurich's adjusters would, in the alternative, constitute violations of Rule 4.1.

Following Respondent's settlement of the plaintiff's tort claim at the March 30, 2016 mediation, Respondent made numerous false statements to his client's insurer, Zurich, through a combination of statements that were either only partially true and misleading, and through repeated omissions in failing to inform Zurich's adjusters – in response to questions or statements from the adjusters indicating their understanding that the case had not yet been settled – that the case had, in fact, already been settled. *See* Finding of Fact # 21. For example, Respondent's statement, made on June 29, 2016, that "plaintiff was expecting movement from us months ago" was patently misleading if not outright false – the case was settled months earlier at the mediation. And time after time, Respondent said nothing in response to inquiries from Zurich's adjusters that made clear their understanding that the case was pending and had not yet settled.

Respondent has stipulated that "he never discussed with any successor adjuster his belief that he had received settlement authority from Ms. Haas and had in fact settled the case at the March 30, 2016 mediation." Finding of Fact # 21. Respondent knew that the case had previously settled and, nevertheless, continued to pretend that it had not. He should have informed the adjusters that the case had settled and the amount of the settlement and failed to do

so. The statements in question were made knowingly and were false within the meaning of Rule 4.1.

Respondent's false statements were material. Assuming Respondent had informed Zurich's adjusters that the case had settled and told them the terms of the settlement the adjusters would have logically inquired into whether, in fact, settlement authority had been given to Respondent by the Zurich adjuster assigned to the case at the time, Ms. Haas.[5] In addition, if Zurich had been timely informed of the settlement it would have logically taken some action to prevent interest from accruing on the settlement payment. With the possibility of interest accruing at the statutory rate of 12% per annum, Zurich had an incentive to take action to reduce any exposure it might have for payment of interest on the settlement amount. Thus, the statements were material. In sum, Respondent repeatedly violated Rule 4.1.

Rule 8.4(c)

Rule 8.4(c) provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The Vermont Supreme Court

[5] Disciplinary Counsel indicated through the original proposed stipulation of facts and his separate sanctions memorandum that there was conflicting evidence on the issue of whether Respondent had been given authority by the original Zurich representative, Ms. Haas, to settle the case. *See* Findings of Fact # 6, 11, 19, 21. Disciplinary Counsel decided not to press that factual issue and, instead, to proceed by presenting a set of stipulated facts and alleged violations that assumed the truth of Respondent's asserted belief that he had received sufficient settlement authority. *See* Disciplinary Counsel's Proposed Sanction Mem., , 4/3/17, at 3 ("Respondent evidently believed he had received the $300,000 authority . . . ."). In accepting the parties' stipulation of facts, the Hearing Panel decided for two reasons to defer to Disciplinary Counsel's prosecutorial discretion and not require an evidentiary hearing to resolve the issue of whether, in fact, Respondent had received sufficient settlement authority – an issue that could conceivably have led to additional charges of unprofessional conduct. First, in light of the conflicting evidence on the issue and the applicability of the more stringent "clear and convincing evidence" standard in this proceeding, *see* A.O. 9, Rule 16(C), a prosecuting attorney could reasonably have decided not to allege a violation on a theory that settlement authority had not been given. The Hearing Panel felt that such a determination should receive some deference. Second, while the insurer's eventual agreement that the $300,000.00 settlement was reasonable, *see* Finding of Fact 26, would not excuse a previously unauthorized settlement, it arguably lessened the need to address the issue in this particular case. The Panel's deference was based on the specific circumstances of this case.

has held that "[t]he rule was meant to reach only conduct that calls into question an attorney's fitness to practice law." *In re PRB Docket No. 2007-046*, 2009 VT 115, ¶ 9, 187 Vt. 35, 989 A.2d 523 (2009); *see also id.* ¶ 12 ("[W]e are not prepared to believe that *any* dishonesty, such as giving a false reason for breaking a dinner engagement, would be actionable under the rules.").

In reaching this interpretation, the Court considered the relationship between the prohibition in Rule 4.1 – against "knowingly mak[ing] a false statement of material fact or law to a third person" – and the description of misconduct in Rule 8.4(c). The Court concluded that its narrower interpretation of Rule 8.4(c) was needed to keep Rule 4.1 from being "reduced to mere surplusage." *Id.* ¶ 12. At the same time, it observed that "some false statements made to third persons during the course of representation could also reflect adversely on a lawyer's fitness to practice, thus violating both rules." *Id.* ¶ 14.

Despite the absence of words relating to a requisite state of mind in Model Rule 8.4(c), courts have generally held that knowledge or recklessness on the part of the lawyer is required. *See, e.g., Attorney Grievance Comm'n of Maryland v. Dore*, 73 A.3d 161, 174 (Md. Ct. App. 2013) ("[S]o long as an attorney *knowingly* makes a false statement, he necessarily engages in conduct involving misrepresentation.") (emphasis added); *In re Cutright*, 910 N.E.2d 581, 589-90 (Ill. 2009) (requiring "some act or circumstances that showed the respondent's conduct was purposeful"); *Iowa Supreme Court Disciplinary Board v. Netti*, 797 N.W.2d 591, 605 (Iowa 2011) ("[T]he better view is to require some level of scienter that is greater than negligence to find a violation of [Rule 8.4(c)]"; court unable to determine if respondent made a "knowing" misrepresentation); *Romero-Barcelo v. Acevedo-Vila*, 275 F.Supp.2d 177, 191 (D.P.R. 2003) (rule covers misrepresentation made with knowledge or reckless ignorance of their truth or falsity); *Ansell v. Statewide Grievance Commission*, 865 A.2d 1215, 1222 (Conn. App. Ct. 2005)

(attorney violates the rule "if he intended to engage in the conduct for which he is sanctioned whether or not [he] knows that he violates the rule").

To make a "knowing" misrepresentation, an attorney must only know that the content of the communication is not accurate. *See, e.g., Attorney Grievance Comm'n of Maryland v. Siskind*, 930 A.2d 328, 344 (Md. Ct. App. 2007) ("[I]n order to establish its case against [an attorney], Bar Counsel is required to prove with clear and convincing evidence that [the attorney's] supposed false statements were made with the *knowledge that such statements were false when he made them*. In other words, the misrepresentation must be made by an attorney who *knows* the statement is false, *rather than the product of mistake, misunderstanding, or inadvertence.*") (quotations omitted) (emphasis added).

The Panel concludes that Respondent engaged in dishonest conduct through his dealings with opposing counsel, Attorney Rubin, and with Zurich's adjusters, and that his conduct calls into question his fitness to practice law. He made misrepresentations to Attorney Rubin. He made misrepresentations and engaged in dishonest conduct in his dealings with Zurich's adjusters by failing to inform them that he had settled the tort action in which he represented Terry-Haggerty when he knew that the adjusters were operating under the impression that the action was still pending.

The Panel further concludes that Respondent knowingly engaged in this conduct. Respondent has admitted that he engaged in "sham" communications with Attorney Rubin and that his conduct was dishonest. He further admits that he never informed Zurich's adjusters that the case had settled. Under these circumstances, it is apparent that his conduct was not the product of any mistake or inadvertence. It was a deliberate course of conduct that went on over a period of several months.

The conduct in question reflects adversely on Respondent's fitness to practice law. Dealing with opposing counsel and with insurance companies in connection with the defense of tort litigation are common activities in the practice of law. Moreover, this case is readily distinguishable from *Docket No. 2007-046*, in which the Court ruled that attorneys who surreptitiously tape-recorded a phone conversation with a witness violated Rule 4.1 but did not separately violate Rule 8.4(c) because in undertaking an isolated incident of tape-recording the attorneys "earnestly believed that their actions were necessary and proper" in the course of representing a client in a criminal case. 2009 VT 115 ¶ 19. Respondent was not attempting to advance his client's interests when he engaged in dishonesty and misrepresentation.

Accordingly, the Panel concludes that Respondent committed repeated violations of Rule 8.4(c) in his dealings with Attorney Rubin and Zurich's adjusters.

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)); *see also Standards for Imposing Lawyer Sanctions* (ABA 1986, amended 1992) (*"ABA Standards"*), Purpose and Nature of Sanctions, § 1.1 at 19 ("The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not

discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession.").

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 (mem.).

"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. *See* V.R.Pr.C., Scope (explaining that severity of sanction "depend[s] on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations"). The 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

Respondent violated the following duties: under Rule 1.3 of the Vermont Rules of Professional Conduct, the duty of diligence – i.e. to act "with reasonable diligence and promptness" in the course or representing a client; under Rule 1.4(a)(3), the duty to keep a client reasonably informed; under Rule 4.1, the duty to communicate truthfully in the course of representing a client; and under Rule 8.4(c), the duty to not to engage in conduct that amounts to dishonesty, fraud, deceit, or misrepresentation, to the extent that such conduct reflects on an attorney's fitness to practice law. "[T]he [ABA] standards assume that the most important

ethical duties are those obligations which a lawyer owes to clients." *ABA Standards*, Part II, Theoretical Framework, at 5.

Mental State

The second factor to be considered is the lawyer's mental state. "The lawyer's mental state may be one of intent, knowledge, or negligence." *ABA Standards*, § 3.0, Commentary, at 27. The sanctions inquiry examines mental state with respect to the actual or potential result of the misconduct. *See, e.g.*, *In re Disciplinary Proceeding Against Eugster*, 209 P.3d 435, 448 (Wa. 2009) ("[W]hen assessing a lawyer's mental state for purposes of imposing sanctions, we look to his state of mind relative to the consequences of his misconduct rather than the duty violated.").

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." *ABA Standards*, Part II, 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.* Part III, Black Letter Rules and Commentary, Definitions, at 19 (definitions of "intent," "knowledge," and "negligence").

The distinction between "knowing" and "negligent" misconduct has been explained as follows: "[W]as the lawyer aware of the circumstances that formed the basis for the violation? If so, the conduct was done knowingly. If the lawyer instead acted without awareness, but below

the accepted standard of care, then he acted negligently. Application of these definitions is fact-dependent." *In re Fink*, 2011 VT 42, ¶ 38.[6]

The Panel concludes that Respondent's mental state was that of "knowledge." He knew that his statements to Attorney Rubin were misrepresentations and that his interactions with Zurich's adjusters were dishonest. He was aware of what he was doing. At the same time, his conduct was not intentional as contemplated by the ABA Standards because he was not attempting to secure the entry of judgment against his client or to otherwise harm Terry-Haggerty or Zurich, or to harm Attorney Rubin's client or his own law firm. Rather, it appears that he was attempting to obtain an authorization of settlement from the Zurich adjusters who succeeded Ms. Haas – perhaps based on the fact that he was unable to reach Ms. Haas in the weeks following the mediation and had no written documentation of having received settlement authority[7] – and that he intended, upon receiving settlement authority from the successor adjusters, to inform Zurich of the settlement and arrange for payment. On this factual record, the Panel concludes that Respondent's mental state was not one of intent, but rather of knowledge.

The Panel rejects Respondent's assertion that his mental state was one of negligence. Respondent presented no evidence that would support a finding that he was unaware that he was making false statements. On the contrary, he admitted at the sanctions hearing that his conduct was dishonest and untruthful.

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[6] Moreover, "[t]he line between negligent acts and acts with knowledge can be fine and difficult to discern . . . ." *Id.* A finding of knowing misconduct may not be based upon a conclusion that a respondent should have known that certain results adverse to the client would likely follow from his or her acts or omissions. "In the context of sanctions . . . knowing conduct does not encompass both knew or should have known." *Id.* ¶ 38.

[7] As noted previously, Disciplinary Counsel's charges assumed that Respondent at the very least believed he had received full authority from Ms. Haas. The Panel has proceeded on that assumption; however, it has not independently determined whether, in fact, Ms. Haas extended authority to him.

Injury and Potential Injury

The *ABA Standards* require the Hearing Panel to consider "the actual or potential injury caused by the lawyer's misconduct." *Id.* § 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.*, Part III, 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." *ABA Standards*, Theoretical Framework, at 6.

Respondent's misconduct resulted in substantial harm to Terry-Haggerty; to Respondent's law firm; and to the interests of the legal profession. With respect to his client, Respondent's misconduct resulted in a lengthy delay in the resolution of the lawsuit and, ultimately, the entry of a judgment order against his client to force the payment of the settlement. In addition, it resulted in the placement on the public record of the amount of the settlement, which was intended to be confidential, thereby undermining one of the terms of the settlement agreement.[8] The entry of a judgment order was not in Terry-Haggerty's interest, even though the judgment was ultimately satisfied by Zurich.

Respondent's law firm was also harmed. Because of the extensive time period over which Respondent's misconduct continued, the plaintiff in the lawsuit requested and was granted

[8] Admittedly, the record is not clear as to which party to the settlement agreement requested confidentiality. Typically, settling defendants and their insurers request confidentiality. But, even assuming the plaintiff made the request, then the plaintiff was harmed by the disclosure. There was harm in either event.

interest at the statutory rate of 12% per annum on the amount agreed upon in the settlement agreement. That award of interest was paid by Respondent's law firm.[9]

Finally, Respondent's conduct harmed the legal profession and the public's perception of the legal profession. For the legal system to work effectively, attorneys must rely on each other's representations and be able to trust in them. When lies are told, that relationship is damaged, as it was here. Respondent's conduct also called into question the integrity of the legal profession in the eyes of Attorney Rubin's client (the plaintiff in the lawsuit) and inevitably as well in the eyes of Respondent's client's insurer (Zurich). Respondent's conduct delayed the payment to plaintiff for more than five months. The fact that the delay was caused by misrepresentation and deception damaged the reputation of the legal profession.

Zurich, in turn, was placed in a position where a confidential settlement agreement was publicized through entry of judgment and an award of interest was entered against its insured – because Respondent failed to inform Zurich promptly that the case had been settled. The fact that Respondent's law firm ultimately paid the interest award does not eliminate the harm to the image of the legal profession caused by Respondent's conduct. Respondent's misconduct caused injury to the public at large by "decreas[ing] public confidence in the profession." *In re Fink*, 2011 VT 42, ¶ 36.

Presumptive Standard under the *ABA Standards*

The Panel concludes that the presumptive standard in § 4.42(a) is applicable. It states that: "Suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client." *Id.* § 4.42(a). Respondent knowingly failed to proceed in a diligent manner to complete the settlement. The Panel concludes that it

[9] As of the date of the sanctions hearing, Respondent had not reimbursed his law firm for that loss.

should not apply the standard in § 4.41(b) that calls for disbarment when "a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client." While there was harm to the client – the entry of a judgment and an award of interest – that harm was, as a practical matter, tempered by the fact that a settlement had been completed previously and insurance coverage was in play and eventually covered the liability. Under these specific factual circumstances, the Panel concludes that the harm to the client should not be considered serious.

In addition, the Standard in § 4.62 is applicable. It states that "[s]uspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client." The Panel has concluded that Zurich should be considered a client. There is no question but that Respondent knowingly deceived Zurich's adjusters as to the status of the litigation. His deception included some misleading statements and his failure to make statements correcting the adjusters' understanding that the case was still pending and had not yet been settled. As described above, Respondent's conduct caused injury and potential injury to Zurich.

Finally, the Standard in § 5.1 applies "in cases involving dishonesty, fraud, deceit, or misrepresentation." The pertinent section, premised on a mental state of "knowledge" and non-criminal conduct, is § 5.13. It provides that a "[r]eprimand is generally appropriate when a lawyer engages in . . . conduct [other than that specified in §§ 5.11 & 5.12] that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law." Respondent's conduct with respect to both opposing counsel and Zurich was dishonest and entailed misrepresentations. The dishonesty and misrepresentation in question was not criminal in nature and Respondent did not seek any personal gain from his conduct. At the

same time, his actions adversely reflect on his fitness to practice law. Therefore, a reprimand would be appropriate under this standard.

The *ABA Standards* state that when there are multiple instances of misconduct, "[t]he ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations . . . ." *ABA Standards*, Part II, Theoretical Framework, at 7. Accordingly, the Panel concludes that suspension is the appropriate presumptive sanction.

Aggravating and Mitigating Factors Analysis

Having concluded that suspension is the presumptive sanction that applies in this case, the Panel must consider any aggravating and mitigating factors and whether they call for a lesser or greater sanction than is presumed under the applicable standards. 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

Section 9.22 of the *ABA Standards* sets forth a list of aggravating factors that should be considered. *Id.* § 9.22, at 50. The following aggravating factors are present:

- § 9.22(b) (dishonest or selfish motive) – Respondent acted with a dishonest motive. He made knowing misrepresentations and knowingly failed to inform Zurich. He knew that his conduct was false and deceptive.

- § 9.22(c) (a pattern of misconduct) – Respondent engaged in a pattern of misconduct over the course of approximately five months. He made repeated misrepresentations to opposing counsel and repeatedly failed to inform Zurich that he had settled the lawsuit against Zurich's insured.
- § 9.22(d) (multiple offenses) – Respondent committed dozens of violations of the Rules of Professional Conduct. Each misrepresentation and omission on his part in his dealings with opposing counsel and with Zurich constituted a violation.
- § 9.22(i) (substantial experience in the practice of law) – Respondent has practiced law for a total of twenty-five years.[10]

(b) Mitigating Factors

Section 9.32 of the *ABA Standards* sets forth a list of mitigating factors that should be considered. *Id.* § 9.32, at 51. The following mitigating factors are present:

- § 9.32(a) (absence of a prior disciplinary record) – Respondent has no prior disciplinary record.
- § 9.32(c) (personal or emotional problems) – Respondent was experiencing stress, based on some lingering medical problems and the passing of his mother, at the time of the events in question. Subsequently, Respondent sought psychological counseling based on his feelings of anxiety and depression. The Panel concludes that Respondent was experiencing personal or emotional problems at the time of the events. *See, e.g.*, *In re Obregon*, 2016 VT 32, ¶ 25, 201 Vt. 463 145 A.3d 226 (2016)

[10] The Panel considered whether under § 9.22(j) Respondent was indifferent to making restitution to his former law firm for its payment of the interest award in the judgment order. The Panel concludes on the basis of the evidence presented, that it cannot find Respondent "indifferent" to making restitution. Respondent testified at the sanctions hearing that he does not presently have the financial resources to reimburse his former firm for that loss. No other evidence was presented to the Panel on the issue of Respondent's financial resources.

(accepting parties' stipulation that respondent's car accident and the effect of computer crashes justified finding a mitigating factor under § 9.32(c)). Respondent's emotional problems do not excuse his conduct; however, they do constitute a mitigating factor.

- § 9.32(e) (full and free disclosure to disciplinary board and cooperative attitude toward proceedings) – Disciplinary Counsel stipulated that Respondent has fully cooperated with Disciplinary Counsel's investigation. This conclusion must be tempered, however, by the fact that Respondent did not self-report his misconduct until after his former law firm and opposing counsel filed complaints against him. *See* Finding of Fact # 24.
- § 9.32(l) (remorse) – The Panel has struggled with this issue. The stipulation of facts indicates only that Respondent "expressed [in his self-report] a desire to apologize to Attorney Rubin and his client." Finding of Fact # 24. Respondent delayed in providing an apology until the day before the sanctions hearing, when he sent a letter of apology to Attorney Rubin. Respondent's Exhibit A (letter, 12/12/17). Moreover, in the Sanctions Memorandum Respondent filed with the original proposed stipulation in this proceeding he made various arguments that might be interpreted as an attempt to excuse or diminish his culpability – for example, he argued that due to anxiety and stress he "was not consciously aware of the nature of [his] conduct," Mem., 4/12/17, at 3; that his conduct involved "poor choices," *id.*, and that his mental state was one of negligence as opposed to knowledge, *id.* at 7. His letter of apology contained some similar attempted qualifications, as opposed to an unconditional apology. These statements have a tendency to call into question the sincerity of

Respondent's assertion of remorse. Taking into account all the evidence, including Respondent's testimony at the sanctions hearing, the Panel has found that Respondent is remorseful for his misconduct. However, under all the circumstances presented, the Panel cannot place much weight on this factor.

(c) Aggravating Factors Balance or Outweigh Mitigating Factors

Based on the preceding analysis, the Panel concludes that the presumptive sanction of suspension is appropriate. At a minimum, the competing factors balance themselves out and therefore do not call for reduction to a lesser sanction than suspension. Moreover, the relative strength of each of the aggravating factors and the relative weakness in the mitigating factor of remorse suggest that the aggravating factors outweigh the mitigating factors. In the final analysis, the serious nature of the misconduct, the large number of violations involving both opposing counsel and Zurich's insurance adjusters, and Respondent's substantial experience in the practice of law convince the Panel that suspension is the appropriate sanction.

* * *

The ABA Standards state that "[g]enerally, suspension should be for a period of time equal to or greater than six months, but in no event should the time period prior to application for reinstatement be more than three years." *Id.* Part IV, Standards for Imposing Sanctions, at 20. Of course, that recommendation is persuasive but not binding on the Panel.

The Panel has considered prior disciplinary determinations by the Supreme Court and the Professional Responsibility Program and determined that a six-month suspension is appropriate in this proceeding. 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 two Vermont Supreme Court decisions and various Professional Responsibility Board decisions for purposes of comparison. In *In re Blais*, 174 Vt. 628, 817 A.2d 1266 (2002), the Court upheld a five-month suspension plus a period of probation where respondent was found to have neglected client matters and to have made misrepresentations to three separate clients. In *In re Wysolmerski*, 167 Vt. 562, 702 A.2d 73 (1997), a three-year suspension was imposed where, over a period of eight years and while serving multiple clients, the respondent entered into unauthorized settlements, lied to clients about the status of their cases, and made false statements to other attorneys and to courts. In upholding the suspension, the Court concluded that the Board had given adequate consideration to respondent's personal and emotional problems.

Similarly, multi-month suspensions have been imposed in several Professional Responsibility Board decisions that the Supreme Court has chosen not to review. *See In re Sunshine*, PRB #2001-001 (four-month suspension plus probation imposed where respondent neglected a client matter and lied to client about status of lawsuit);[11] *In re Griffin*, PRB #2004-122 (thirty-month suspension imposed where the respondent demanded payment based on a bogus fee agreement on which he forged client's signature and where there was no actual injury to client but the actions were intended for respondent's personal gain); *In re Colburn*, PRB #2006-200, -251 & -267 (three-year suspension imposed where the respondent engaged in neglect and lack of diligence and made various misrepresentations to three separate clients regarding status of their cases and there existed a pattern of lying to his partners in the law firm as well, and where respondent was diagnosed with depression and PTSD necessitating a two-year hiatus from practice to engage in therapy, and even though there was no actual harm to clients and respondent did not lie to benefit himself personally).

[11] In *Blais*, the Vermont Supreme Court cited with approval to the decision in *Sunshine*. *See* 174 Vt. at 631.

The lengthy suspensions in *Wysolmerski*, *Griffin*, and *Colburn* were arguably due not only to the fact that the conduct involved neglect and misrepresentation but also to various other factors – for example, additional serious violations involved in some of those cases, the number of clients and matters involved, the duration of misconduct involved, and the nature of some of the respondents' motivation. By contrast, the misconduct in this case involved one case and Respondent did not seek to obtain any personal benefit through any of his misconduct. In addition, while actual harm did result from Respondent's misconduct – through the entry of judgment and the award of interest by the trial court – there was no financial loss to any client. And, as noted above, Respondent has no prior disciplinary record. These considerations suggest that a shorter suspension, along the lines of the suspensions imposed in *Blais* and *Sunshine*, would be more appropriate in this proceeding.

The Panel concludes that a six-month suspension is appropriate. Although Respondent has no prior offenses and the misconduct arose from a single case, his misconduct was egregious. The misconduct was directed at two entities – opposing counsel and Zurich's adjusters. Moreover, these were not isolated incidents. The misconduct involved repeated lying to opposing counsel over a multi-month period of time with dozens of false statements made. Likewise, Respondent repeatedly deceived Zurich's adjusters over that same period of time. It should be noted that Respondent's course of misconduct persisted even after plaintiff's attorney filed a motion to enforce the settlement agreement on or about May 17, 2016 (Exhibit 1) and after the Court entered judgment on July 11, 2016 (Exhibit 5). *See* Findings of Fact # 20-21. Finally, the harm that resulted from the misconduct was substantial – the entry of a judgment against Respondent's client and the undoing of a confidentiality agreement, with financial harm

visited upon Respondent's former law firm. For all these reasons, a six-month suspension is appropriate.

ORDER

It is hereby ORDERED, ADJUDGED and DECREED that Respondent, Matthew D. Gilmond, violated V.R.Pr.C. Rules 1.3, 1.4(a)(3), 4.1, and 8.4(c), as set forth above, and that Respondent is suspended from the office of attorney and counselor at law for a period of six months effective from the date of this decision.

Dated: ~~January~~ February 5, 2018.

Hearing Panel No. 2

By: _____
Joseph F. Cook, Esq., Chair

By: _____
James A. Valente, Esq.

By: _____
Greg Worden, Public Member