STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

In Re: Melvin Fink
PRB File No. 2021-018

Disciplinary Counsel's Proposed Findings, Memorandum of Law and Recommendation of 60-day Suspension

Disciplinary Counsel requests that the panel make the following findings of fact, conclude that Respondent violated Vermont Rule of Professional Conduct 4.2, and impose a 60-day suspension.

Facts

1. Respondent is a licensed Vermont attorney in private practice who lives in Springfield. He has 51 years of experience practicing law and substantial experience representing divorce clients.

2. Respondent represents Wife in a divorce from Husband, which was an active, pending matter as of September 27, 2021.

3. Husband is a personal trainer.

4. Respondent and Husband both lived in Springfield and had met previously but did not know each other well. One of Respondent's neighbors is related to Husband and years ago Respondent represented Husband's mother on a matter and several of Husband's other family members on various matters.

5. Husband initially approached Respondent about representing him in his divorce, but Respondent declined because Wife had already hired him.

6. By letters dated May 13 and May 22, 2020, Respondent wrote to Husband and included terms of a proposed settlement agreement for how to divide property. The letters stated that Husband should turn the materials over to his attorney if he

was represented. DC-1, DC-2.

7. Husband did not respond to Respondent.

8. Sometime around the end of May 2020, husband hired Patricia Benelli and gave her the May 13 and May 22 correspondence from Respondent.

9. On June 1, 2020, Benelli wrote to Respondent stating "I am working with [husband] on this divorce matter," and "please send all correspondence . . . to me from now on." Benelli's letter also stated "I look forward to hearing from you and working with you to help our clients end their marriage peacefully and with a minimum of court involvement." DC-3.

10. On June 3, 4, and 12, 2020, Respondent and Benelli communicated back and forth about possible settlement terms of their clients' divorce and engaged in negotiations about how to divide property. DC-4, DC-5, DC-6, DC-8, DC-9.

11. On June 26, 2020 Wife (through counsel) filed a divorce action in Windsor family division. Service of the complaint was attempted by sheriff but not completed until July 20, 2020. DC-12.

12. Husband filed an Answer pro se dated July 29, 2020, which Benelli helped him with and notarized for him. DC-10.

13. Benelli's notary signature on the pro se form is clear and easy to identify. DC-10.

14. Husband's Answer was docketed by the court on August 3, 2020. DC-12.

15. By letter dated July 31, 2020, Respondent wrote to Benelli requesting that Husband share a government stimulus payment with Wife. DC-11. Benelli responded via email as follows:

I am writing in response to your letter of July 31. [Husband] would be happy to share the stimulus payment equally with [Wife]. Per your offer, please send the check to me, [Husband] will sign it, I will return it to you, [Wife] will sign it, cash it, and send [Husband's] share - $1200 – directly to him forthwith. DC-14.

16. By email dated July 31, 2020, Benelli wrote to Respondent as follows:

Attached please find a settlement proposal from [Husband]. He has secured a loan which will allow him to pay the $115,000 to [Wife] as soon as it can close. However the bank has conditioned it on his being released from the parties' current joint debts: "The borrower shall have his name removed from the residential mortgage debt at TD Bank and the personal recreational loan at One Credit Union prior to the closing on this loan." The personal recreational loan is on the camper, which the parties have agreed is to be [Wife's] property, so she should not have a problem having the debt in her name alone. It is my understanding that both parties want this divorce done as soon as possible, which is September 24, given the separation date. Please let me know your client's position regarding [Husband's] settlement proposal. DC-13.

17. Nothing in the lawyers' communication indicated Benelli was no longer representing husband or that Respondent had permission to negotiate with Husband directly about settling the divorce.

18. Respondent underwent a medical procedure around July 31 or August 1 and took a few days off of work.

19. Respondent received and reviewed a copy of the pro se Answer dated July 29, 2020 by U.S. mail sometime in the first week of August 2020.

20. Respondent did not ask Benelli about whether Husband was still her client.

21. Neither Husband nor Benelli ever told Respondent that Husband was ending the attorney-client relationship with Benelli.

22. On August 17, 2020, Respondent initiated a phone call directly to Husband, left a message, and Husband called him back. Husband and Respondent spoke for approximately six minutes.

23. During the call, Respondent invited husband to his office to "sit down and talk." Husband conveyed enthusiasm in his response and indicated that he really wanted to move forward to try to get the matter resolved. Husband then stated, "let me get ahold of my lawyer."

24. Respondent told Husband that contacting his lawyer would not be necessary because "I see you filed a pro se appearance."

25. Following Respondent's comment that Husband need not include his lawyer, Husband agreed to a date and time for meeting with Respondent, hung up with Respondent and then immediately called Benelli.

26. After Husband called Benelli, she immediately emailed Respondent reminding him that she represented husband in the divorce matter and stating, "you are to communicate with my client only through me." She also proposed a settlement conference with everybody present. DC-14.

27. On August 21, 2020, Respondent replied to Benelli, stating "Don't pontificate to me. [Husband] filed a pro se appearance. He represents himself, period." DC-14.

28. Respondent did not indicate that he would cease direct contact with Husband or apologize after Benelli stated that Respondent must not contact her client directly.

29. On August 24, 2020, Benelli responded to Respondent's August 21 email as follows:

> Your email implies that you are still not accepting that [Husband] is represented. He is, period. You are not to have any more direct contact with him, period. You are fully aware that I am representing [Husband]. We have been exchang[ing] settlement proposals and other communications, even after the divorce action was filed. You are fully aware that I do not have to enter an appearance in court to be representing [Husband]. DC-14.

30. No meeting ever occurred between Respondent and Husband and no settlement conference ever occurred with all parties and their counsel present.

31. On October 6, 2020, Benelli file a notice of appearance for Husband in the action for divorce pending in Windsor Family Division. R-3.

Respondent's conduct violated Vermont Rule of Professional Conduct 4.2

Rule 4.2 bars a lawyer from communicating with a person the lawyer knows to be represented by another lawyer about the subject of the representation, unless he has the consent of the other lawyer or authorization by the court.

Here, the evidence shows that Respondent knew husband was represented by Benelli regarding the subject matter of settling husband and wife's divorce, including dividing property. In May 2020, Respondent had written to husband twice with an offer of settlement for the divorce. On June 1, 2020, Benelli wrote to him stating that husband had given her Respondent's offers and went on to raise issues with Respondent related to the division of property. Benelli further stated that she looked forward to working with Respondent to help their clients end their marriage.

The timeline of communications shows that, at a minimum, Respondent had a duty to check with Benelli before his direct phone call on August 17, 2020 to husband. First, Respondent had communicated directly with Benelli in June and July about settlement terms for the divorce. Second, even after husband filed his pro se answer dated July 29, 2020, Respondent wrote to Benelli on July 31 about dividing check for the parties and Benelli responded. On July 31, Benelli also wrote Respondent separately with a comprehensive settlement proposal via email.

Nevertheless, even though Respondent had been in communication exclusively with Benelli between June 1 up until August 17, 2020 about settling the divorce, he contacted husband and asked to meet with him about the exact same subject he had already been in negotiations with through counsel. Not knowing the possible risks to his own interests, husband responded with enthusiasm when he was invited to "sit down and talk" directly with opposing counsel about reaching a settlement. At the same time, husband directly said to Respondent "let me get ahold of my lawyer." At that point there could no longer be any doubt that Respondent had an ethical duty to check with Benelli or at least ask husband what he meant. Instead, Respondent told husband that she didn't have to be there. Respondent's continued pursuit of the matter and scheduling of a specific date for negotiations with husband supports the conclusion that Respondent was knowingly attempting to circumvent having opposing counsel present.

That Respondent may not have actually received, opened and read Husband's July 29 pro se answer to the divorce complaint until the first week of August does not lead to a different result. When Respondent reviewed the case file and decided how to proceed, the date on the pro se answer of July 29, 2020 unequivocally shows when it was signed. The subsequent communications between counsel that occurred after that date, in which counsel continued to negotiate the very same issues about settling the divorce, established that Benelli continued to represent Husband on the matter.

Likewise, Respondent's assertion that the Family Division rules addressing limited scope representation justified or excused his direct contact with Husband is factually and legally incorrect. Benelli wrote to Respondent on June 1, 2020 and explained that she was representing husband in the divorce and looked forward to working with Respondent to help their clients end

their marriage with minimum of court involvement. By writing Respondent, Benelli identified the issues on which Respondent was not allowed to communicate directly with husband, that is, negotiations about resolving the divorce. The no-contact requirement cannot be waived by the client, and the pro se answer did not negate Benelli's notice to Respondent that she represented Husband. *See, e.g.*, *In re Capper*, 757 N.E.2d 138 (Ind. 2001) (must communicate through counsel even if client claims to have discharged counsel).

If there was still some question as to the scope of the representation, the scope was again clarified when Benelli and Respondent continued to engage in negotiations in June and July 2020. Most critically, on July 31, Respondent received a proposal to resolve the divorce from Benelli even after husband had signed his pro se appearance. Viewing this evidence as a whole, it establishes that Respondent (1) had actual knowledge that Benelli represented husband in negotiations surrounding the divorce and (2) his direct call to husband sought to address with husband this specific topic without his lawyer present ("the subject of the representation").

Communication with a represented defendant violates "one of the most elementary premises of the adversary system." *In re Howes*, 940 P.2d 159, 170 (N.M. 1997). For this reason, many jurisdictions take the view that violations of the no contact rule are to be strictly construed and do not allow lawyers to devise work-arounds to the prohibition under a theory they might not intend to violate the rule or technically violate the rule. *E.g. In re Anonymous*, 819 N.E.2d 376 (Ind. 2004); *Matter of Discipline of Callister*, 401 P.3d 211, 2017 WL 3160232, at *2 (Nev. 2017) (reversing panel's conclusion that the respondent acted negligently in improperly communicating with a witness and observing that "From the letter and email it appears that [the respondent] intended to do exactly what he did. If [the respondent] was negligent, it was in not

recognizing that his conduct violated the Rules of Professional Conduct until after the fact. But ignorance or mistake of law does not transform an intentional act—improperly influencing, or attempting to influence, fact witness testimony—into negligence."); ABA Formal Ethics Op. 95-396 (1995) (explaining "authorized by law" exception as referring to a statute or court rule that expressly allows a particular communication to occur).

In Vermont, the authority that exists regarding the bounds of Rule 4.2 supports that the prohibitions on contact with a represented party are strictly construed and that lawyers have an affirmative duty to inquire directly with counsel if there is some ambiguity before engaging in direct contact. In *In re Illuzzi*, 160 Vt. 474 (1993), the respondent represented two personal injury plaintiffs and sought to reach a settlement for them with the defendant's insurer without going through their corporate counsel, even after corporate counsel reminded him she represented the insurer. The respondent argued that Rule 4.2 did not prohibit his direct contact with the insurer because it was not a named party to the lawsuit. *Id.* at 480. The Court rejected this argument, holding that "[t]he language of the rule suggests no limitation on the word 'party'" and that "[t]he rule clearly prohibits direct contact without defense counsel's prior consent." *Id.* The Court further noted that the bounds of the rule operated to impose the affirmative duty upon the respondent to ask to confirm that direct contact with the represented party was allowed if there was some doubt: "Even assuming a representative of GEICO initiated the contact . . . given the prior history of the case, respondent was obligated to make a call or write a letter to attorney Miller to confirm that the contact was permissible." *Id.* at 488-89; *see also In re Smith*, 169 Vt. 617 (1999) (affirming violation of Rule 4.2 where the respondent's client falsely told the respondent the opposing party was no longer represented and the

respondent did not verify the information with counsel before having direct contact stating "respondent had the duty to contact Attorney Tonelli and request permission to contact her client"); *In re Wool*, 169 Vt. 579 (1999) (finding violation of the no-contact rule where lawyer sent copies of motions directly to opposing party who was represented by counsel).

Rulings by Vermont panels not reviewed on appeal likewise indicate other aspects of the rule are to be strictly construed and violations of rule are an ongoing problem. In PRB Decision No. 218 (2018), an attorney was sanctioned for a violation of Rule 4.2 when he emailed opposing counsel with a copy to her client. In PRB 9 (2000) the panel sanctioned an attorney with unauthorized contact with a represented party and noted a concern that attorneys "continue to communicate with represented clients in violation of [the no contact rule] despite numerous cases emphasizing the impropriety of such contacts." Another recent case arose in which the panel found a violation of Rule 4.2 where the respondent asserted he believed he had opposing counsel's permission or court authorization to have direct contact with the party. This order was vacated by the Supreme Court in light of the respondent's death while the matter was pending on appeal, so the order has no precedential value. *In re Pannu*, PRB Decision No. 229 (2019).

Rule 8.4(a) states that it is misconduct to attempt to violate any rule. Respondent's invitation to husband to "sit down and talk" prompted husband to express his enthusiasm and willingness to meet to try to resolve the divorce action. Husband then added he needed to speak to his lawyer, to which Respondent suggested that he technically did not. To the extent Respondent's phone call with husband may be viewed as having merely set a future meeting date to discuss divorce settlement terms, the call could be construed as an attempt to violate Rule 4.2 rather than a violation itself within that call. Under either circumstance or reading of the facts,

the conduct is prohibited.

Vermont's Rule 4.2 is based upon the model rule. Material interpreting model rules and authority from other jurisdictions may provide helpful guidance, but those materials are not binding law.

The American Bar Association addressed the issue of the no-contact rule in circumstances where a person may be represented in a limited scope situation and some ambiguities that could arise. ABA Formal Opinion 472 (2015). In that advisory opinion interpreting the model rules, the ABA noted that, as with all rules of professional conduct, rules 1.2 and 4.2 are rules of reason that must be applied "with reference to the purposes of legal representation and the law itself." ABA Formal Opinion 472 at 2 (quoting Model Rules of Prof. Conduct Preamble & Scope). The opinion discusses what duties might apply to each lawyer - the lawyer providing limited scope representation and the opposing counsel who seeks direct contact. The limited-scope lawyer should identify the issues (the "subject of the representation" as phrased in the rule):

> If a lawyer who is providing limited-scope services is contacted by opposing counsel in the matter, the lawyer should identify the issues on which the inquiring lawyer may not communicate directly with the person receiving limited-scope services. A lawyer providing limited-scope legal services to a client generally has no basis to object to communications between the opposing counsel and the client receiving those services on any matter outside the scope of the limited representation.

ABA Formal Opinion 472 at 4. At the same time, the opposing lawyer cannot try to evade the requirement of going through counsel by not asking where asking would be logical and appropriate:

> "[W]hile the black letter of Model Rule 4.2 does not include a duty to ask whether a person is represented by counsel, this Committee reiterates the warning of

> Comment 8 to Rule 4.2 that a lawyer cannot evade the requirement of obtaining the consent of counsel before speaking with a represented person by "closing eyes to the obvious."

Id. at 6.

Here, Respondent's failure to inquire with Benelli about getting permission was a step to evade dealing with Benelli directly. When husband brought up his lawyer, the only way Respondent could have continued to pursue the matter with husband directly would be by closing his eyes to the obvious problem – that he needed to check with Benelli.

Applying the rule to the facts of this case becomes straightforward when evaluated "with reference to the purposes of legal representation and the law itself." ABA Formal Opinion 472 at 2 (quoting Model Rules of Prof. Conduct Preamble & Scope). The recognized purpose of the no-contact rule, reflected in the official comments, is to protect the client-lawyer relationship from interference by opposing counsel and to shield the client from improper approaches by opposing counsel. See ABA Formal Op. 95-396 (1995).

The origins of Rule 4.2, sometimes referred to as the "no contact rule," date to the 1908 Canons of Professional Ethics. At that time, the rule stated "[a] lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel." ABA CANONS OF PROF'L ETHICS No. 9 (1908). As the model rule evolved closer to its current form, ethics committees and courts "viewed the no-contact rule as providing necessary protection to lay persons who often lack the knowledge, training, and skills to protect their own interests, particularly when dealing with a lawyer representing an adversary." Geoffrey C. Hazard, Jr. & Dana Remus, *Toward a Revised 4.2 No-Contact Rule*, 60 HASTINGS L.J. 797,

799 (2009). Here, the application of rule serves its recognized purpose – to protect husband from interference with his own client-lawyer relationship and to protect husband, a person with no legal training or experience, from being improperly approached by a highly experienced divorce attorney to negotiate a matter without counsel on a topic Husband chose to seek help from his lawyer on.

In sum, while there may be limited specific guidance in the model rule about dealing with parities who are represented on a limited scope basis, the specific facts here do not make the evaluation of the ethical duties complicated. The evidence shows that Respondent had actual knowledge and that he knew the topic he sought to address was the exact subject of the representation.

Moreover, it is not unusual for rules to lack clear and specific prohibitions as to attorneys' ethical duties. Model Rule 4.2 is silent on several corollary issues surrounding communication with a represented party. For example, there is some ambiguity in the rule regarding whether a lawyer representing him or herself in a matter may speak to the opposing party directly if that party has counsel. *See, e.g.*, Margaret Raymond, *Professional Responsibility for the Pro Se Attorney*, 1 ST. MARY'S J. LEGAL MAL. & ETHICS 2 (2011) (identifying that the law is inconsistent in its treatment of pro se lawyers and application of the no-contact rule and arguing that whether the rule applies should be driven by a purpose-based analysis). Lack of clarity in the rule and variation in how jurisdictions apply does not lead to a different result under the specific facts of this case.

Aggravating factors under ABA Standard 9.22

The panel may consider eleven enumerated factors in aggravation when determining an appropriate sanction. The evidence supports the following conclusions relevant to these factors.

a. *Prior disciplinary offenses*: Respondent has a prior disciplinary history. *In re Fink*, 2011 VT 42. In that matter he received a public reprimand with probation for failing to put a contingent fee agreement in writing and for attempting to charge an unreasonable fee. Within that decision, another record of a "prior discipline for charging an excessive fee" is referred to. *Id.* ¶ 44. A PRB records search turns up limited information regarding this other instance of prior discipline, but it appears to have been a reprimand from 1987.

b. *Dishonest or selfish motive*: This factor does not apply.

c. *Pattern of misconduct*: This factor does not apply.

d. *multiple offenses*: This factor does not apply.

e. *Bad faith obstruction of the disciplinary proceeding*: This factor does not apply.

f. *submission of false evidence, false statements, or other deceptive practices during the disciplinary process*: This factor does not apply.

g. *refusal to acknowledge wrongful nature of conduct*: This factor applies. Respondent does not acknowledge that there was anything wrongful about the conduct.

h. *vulnerability of victim*: This factor does not apply.

i. *substantial experience in the practice of law*: Respondent has practiced for 51 years and therefore has substantial experience. *In re Disciplinary Proceeding Against Ferguson*, 246 P.3d 1236, 1250 (Wash. 2011) (concluding that "substantial experience" means 10 or more years of practice at the time of the misconduct).

j. indifference to making restitution: This factor does not apply to the circumstances of Respondent's matter.

k. illegal conduct, including that involving the use of controlled substances: This factor does not apply.

Mitigating factors under ABA Standard 9.32

The panel may consider thirteen enumerated factors in mitigation when determining an appropriate sanction. The evidence supports the following conclusions relevant to these factors.

a. absence of a prior disciplinary record: This factor does not apply.

b. absence of a dishonest or selfish motive: This factor applies.

c. personal or emotional problems: Respondent presented no evidence of any personal or emotional problems.

d. timely good faith effort to make restitution or to rectify consequences of misconduct: This factor does not apply to the circumstances of Respondent's matter.

e. full and free disclosure to disciplinary authority or cooperative attitude toward proceedings: This factor applies.

f. inexperience in the practice of law: This factor does not apply to the circumstances of Respondent's matter.

g. character or reputation: This factor does not apply to the circumstances of Respondent's matter.

h. physical disability: This factor does not apply to the circumstances of Respondent's matter.

i. mental disability or chemical dependency: This factor does not apply to the circumstances of Respondent's matter.

j. delay in disciplinary proceedings: This factor does not apply to the circumstances of Respondent's matter.

k. imposition of other penalties or sanctions: This factor does not apply to the circumstances of Respondent's matter.

l. remorse: This factor does not apply to the circumstances of Respondent's matter.

m. remoteness of prior offenses: The prior disciplinary history relates to conduct that occurred more than ten years ago.

Sanctions Analysis: Suspension is the appropriate sanction.

The purpose of sanctions imposed under the Rules of Professional Conduct is "to protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar." *In re Berk*, 157 Vt. 524, 532 (1991). *See also In Re PRB Docket No. 2016-042*, 154 A.3d 949,

955 (Vt. 2016) ("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.") (quotations omitted).

In determining a sanction for misconduct, the panel looks to the ABA Standards for Imposing Lawyer Sanctions and prior case law. *In re Andres*, 2004 VT 71, ¶ 14. Under the ABA Standards, the panel considers (1) the duty violated; (2) the lawyer's mental state; and (3) the extent of the injury caused by the violation. Based upon these considerations, the ABA Standards indicate a "presumptive sanction," which then may be modified by aggravating or mitigating factors. *See* ABA Standards, Theoretical Framework at xviii; § 3.0 at 125 (2019).

Here, suspension is the appropriate sanction under the ABA Standards for Imposing Lawyer Sanctions.

A. ABA Standards

1. Duty violated

Under the ABA Sanctions, the panel must first identify whether the duty breached was owed to a client, the public, the legal system, or the profession. ABA Standards § 3.0 at 130. Rule 4.2 involves Respondent's duty to the profession. He owed a duty to respect the bounds of another lawyer's attorney client relationship and not to attempt to leverage a pro se filing to allow him to circumvent opposing counsel.

2. Mental state

Next, the panel evaluates whether, at the time of misconduct, the lawyer acted intentionally, knowingly, or negligently. Intentional or knowing conduct is sanctioned more severely than negligent conduct. ABA Standards § 3.0 at 133. In the context of sanctions,

"knowledge" is "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." ABA Standards at xxi. "Negligence" is "the failure of a lawyer to heed 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*. Here, the evidence supports that Respondent knew that Husband was represented by counsel. The phone call on August 17, 2020 and attempt to set a meeting was knowing contact and not accidental. Respondent's subsequent communications with Benelli after the phone call with Husband further support the conclusion that nothing about the conduct was accidental or negligent.

3. Extent of injury

The extent of injury is defined by "the type of duty violated and the extent of actual or potential harm." ABA Standards § 3.0 at 138. Here, the actual harm is difficult to quantify but is likely minimal. In the phone call with Respondent, Husband did convey information about his negotiation position by volunteering that he was highly enthusiastic about settlement. It appears, however, based on the witness testimony, that Wife and Wife's counsel likely already knew that Husband was motivated to settle. Because the matter is still ongoing, no other additional testimony was sought or offered with more specific information relative to the scope of actual harm.

Whether or not actual injury was caused by Respondent's conduct, there can be no doubt that Respondent's conduct caused great potential harm. Husband could have offered other information on the call, not knowing or understanding to what extent it could affect his own legal interests, in the midst of a contested divorce. The lack of actual injury (whether or not any

meeting ever took place) is essentially a circumstance of good luck for Respondent because there was no way for him to know what Husband might have said to him that could have benefitted Respondent's client and went against Husband's interests.

4. Presumptive sanction

In sum, Respondent violated a duty to the profession, acted knowingly in doing so, and there was significant actual or potential injury. Standard 6.32, states that "[s]uspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of a legal proceeding."

5. Aggravating and mitigating factors

The final step in analysis under the ABA Sanctions is to consider aggravating and mitigating factors that justify a departure from the presumptive sanction. ABA Standards §§ 3.0 at 141; 9.1 at 444. A list of factors which may be considered in aggravation and mitigation are set out at ABA Standards §§ 9.22 and 9.32. Proposed legal conclusions with respect to each factor are set out above.

As set forth above, this case involves several aggravating factors, including refusal to acknowledge wrongful nature of the conduct and prior instances of misconduct. Though aggravating factors may outweigh mitigating factors, there is no basis for asserting that the presumptive sanction of suspension should be adjusted upward to disbarment for the single instance of the rule violation.

The ABA Standards do not require that each and every mitigating and aggravating factor

be considered in deciding what sanction to impose. The language in Standards 9.1, 9.22, and 9.23 is permissive and advises that factors "may" be considered.

B. Prior Cases

When considering the issue of sanctions, panels also generally look to prior cases to compare the sanction and violations in those cases to the case before it, with the objective of achieving proportionality and consistency within the body of attorney discipline law. *See, e.g.*, *In re Neisner*, 2010 VT 102, ¶ 26. A few cases present some helpful comparisons.

The existing group of cases in Vermont involving contact with a represented part may provide some guidance to the panel, but in each of those cases, there were either additional rule violations, very different factual circumstances, different aggravating and mitigating factors, or a combination of these situations. *E.g. In re Illuzzi*, 160 Vt. 474 (1993) (six month suspension for contact with represented party where Respondent had numerous prior disciplinary offenses); *In re Smith*, 169 Vt. 617 (1999) (public reprimand with probation for violation of Rule 4.2); *In re Wool*, 169 Vt. 579 (1999) (public reprimand with probation); PRB Decision No. 218 (2018) (admonition for email to opposing counsel with a copy to her client); In PRB 9 (2000) (admonition for contact with represented corporate party where subject of the conversation was unrelated to merits of case).

A few useful comparative cases tending to support the propriety of a short period of suspension might be *In re Adamski*; 2020 VT 7, *In re Kulig*, PRB Decision No. 240 (2021) and *In re Bowen*, 2021 VT 7. In *Adamski*, the respondent received a fifteen-day suspension for engaging in dishonest conduct towards her law firm in connection with a settlement check. *In Kulig*, the respondent received a three-month suspension for conflicts of interest surrounding the

disposition of a client's estate property. *In Bowen*, the respondent received a three-month suspension for using information relating to the representation of a client to the disadvantage of the client in a property transaction and for disclosing confidential client information. In each of these recent cases, the respondent-lawyer was a highly experienced practitioner who engaged in knowing violations of the rules of professional conduct. The same description applies to this case, and a 60-day suspension is appropriate.

In sum, the ABA Standards indicate suspension is warranted. And, proportionality analysis also indicates a sixty-day suspension is appropriate. A sixty-day suspension would reflect the seriousness of the violations, deter future misconduct, preserve the public's confidence in the bar and fall in line with applicable standards.

In the event the panel finds a period of suspension is warranted, disciplinary counsel requests that an effective date of the order be delayed 30 days to allow Respondent sufficient time to address client needs and/or provide him opportunity to appeal.

DATED: October 25, 2021

Respectfully submitted,

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