STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

In Re: William Cobb
PRB File No. 2020-099, 2020-103

Disciplinary Counsel's Proposed Findings, Memorandum of Law and Recommendation of Two-year Suspension

Disciplinary Counsel requests that the panel make the following findings of fact, conclude that Respondent violated Vermont Rules of Professional Conduct 8.4(d), 1.1, 1.3, 1.6 and 8.4(c), and impose a two-year suspension.

Facts

1. Respondent is an attorney licensed to practice in Vermont who maintains a solo practice in St. Johnsbury and sits part time as a probate court judge in Caledonia County. Answer ¶ 1; DC-20.

2. The misconduct alleged arises out of two separate, unrelated client matters. In the first matter, Respondent represented client KH in a civil action against the mother of KH's deceased child (AJ), who died in the custody of the Vermont Department for Children and Families (DCF). Answer ¶ 2.

3. In the second matter, Respondent represented client MK in a criminal sex assault case involving alleged victims in both Windsor and Caledonia Counties. Answer ¶ 3.

4. In KH's civil action, Mother (KL) of the deceased juvenile sought to settle the disposition and apportionment of a monetary settlement from DCF for the death of KL and KH's child. Respondent's client KH's position was that mother was barred from receiving any portion of the settlement funds because of her own neglect of the juvenile AJ. Answer ¶ 4.

5. Respondent began representing client KH around May 2019. Tr. Oct. 15 at 21-22.

6. On May 31, 2019, Respondent requested KH's client file from KH's former attorney, Larry Myer, who represented KH in the underlying 2016 DCF proceeding which resulted in AJ being placed in DCF custody. DC-5.

7. On the same day, KH independently called Myer and requested release of his client file to Respondent, which contained records of the confidential juvenile proceedings. Tr. Oct. 15 at 202-03.

8. Myer provided Respondent KH's entire client file, believing he was required to and presuming that Respondent's handling of the file would be consistent with statutory requirements. Tr. Oct. 15 at 203.

9. On January 11, 2020, Respondent filed a motion for summary judgment in KH's civil matter, setting out his view of the facts and law in support of KH's position that mother was barred from receiving any portion of the settlement funds because of her own neglect of the deceased juvenile. Answer ¶ 5; DC-1a; 2a.

10. The motion and accompanying documents filed by Respondent in this public civil action described, in detail, confidential juvenile court information and referenced "Exhibits A-L" in support of the recitations. According to Respondent's filing letter filed with the documents, "Exhibits A-L" were filed "under seal"[1] with the Washington Civil Division. Answer ¶ 6; DC-1; DC-2; DC-3.

11. Respondent's Motion and Statement of Undisputed Material Facts disseminated

1 No Motion to Seal or other written submission or reference to Vermont Rules for Public Access to Court Records 6 or 9 was filed with Respondent's filing dated January 11, 2020.

confidential juvenile information within the public filings. DC-1; DC- 2; Oct. 15 Tr. at 41-44.

12. For example, Respondent named by first and last name and date of birth another child of Mother's, AC, who is still living and was unconnected to Respondent's client. The document provided intimate details of AC's involvement in DCF proceedings, and information directly from DCF documents about the nature of the juvenile's circumstances and situation. DC-1 at pp. 1-5; DC-2 at pp. 3-6.

13. Juvenile AC was not Respondent's client's child, and KH had been incarcerated throughout the pendency of the juvenile matter involving AC. Oct. 15 Tr. at 41, 202.

14. Respondent took no steps to notify AC's attorney, who had no opportunity to intervene to protect AC's interests before the disclosures were publicly filed. Answer ¶ 9.

15. Respondent's conduct surrounding his handling of the juvenile court information violated the statute that governs access to and dissemination of juvenile court material. *See* 33 V.S.A. § 5117 (2019)[2.]

16. Under that statute, the court designates juvenile court records confidential: "such records and files shall not be open to public inspection nor their contents disclosed to the public by any person." 33 V.S.A. § 5117(a).

2 33 V.S.A. section 5117, entitled Records of Juvenile Judicial proceedings, was amended in October 2020 and again in June 2021. All citations and references to this statute are to the version in effect at the time of the conduct charged. A copy of the applicable 2019 statute is appended to the filing for reference. Nothing about the 2020 and 2021 amendments to the statute would allow Respondent's conduct or change designation of the records as confidential.

17. The statute does permit "inspection" of the records for some individuals in some circumstances, but strictly prohibits further dissemination and states: "Files inspected under this subsection shall be marked: UNLAWFUL DISSEMINATION OF THIS INFORMATION IS A CRIME PUNISHABLE BY A FINE UP TO $2,000.00." 33 V.S.A. § 5117(b)(2) and (c)(3) (Emphasis in original).

18. The records protected include "Any records or reports relating to a matter within the jurisdiction of the Court prepared by or released by the Court or the Department for Children and Families, any portion of those records or reports, and information relating to the contents of those records or reports." 33 VSA § 5117(e).

19. There is no ability for a party to any proceeding to waive confidentiality of the material under the statute, and the fact that a juvenile may be deceased also has no bearing on the designation of the records as nonpublic and confidential.

20. These statutory controls are something Respondent was aware of and chose to affirmatively disregard. Oct. 15 Tr. at 29-36; DC-4; DC-3; DC-8.

21. On January 9, 2020, two days before filing his Motion for Summary Judgment, Respondent sought court permission from Washington Family Division to access the records by filling out a "copy request form" and handing it in to the clerk's office. DC-4a at 1.

22. By entry order dated January 16, 2020, the request was denied by the family division stating there was "no authority stated in the request. Are there any

objections?" DC-4a at 2.

23. On January 29, 2020, Mother's counsel from the closed juvenile proceeding did file an objection to Respondent's "copy request," and her objection set out the statutory basis for the protection of the records. Mother's counsel served Respondent with a copy. Oct. 15 Tr. at 34-36.

24. By order dated February 3, 2020, the Family Division denied Respondent's request for the juvenile records noting that there was "no authority for his request for confidential records in the juvenile system. These records shall not be disseminated." DC-4a at 3.

25. Respondent was on notice of the Family Division's prohibition to his own access and dissemination of the records, but took no steps to remedy the disclosures he had already made in publicly-filed civil documents and the dissemination of the records themselves to the civil division. Oct. 15 Tr. at 29-36.

26. Another attorney practicing in the area of juvenile proceedings testified that Respondent's attempts to access and use the juvenile court file was unusual and described Respondent's request for the juvenile material without any reference to its statutory protection as "egregious." Oct. 15 Tr. at 211-12.

27. Respondent's testimony that he was unaware that his handling of and use of the records was improper was not credible. Oct. 15 Tr. at 29-35.

28. Respondent never sought to withdraw or amend his filings in the civil division.

29. The probate division handles adoptions and guardianships and a specific provision of 33 V.S.A. 5117 addresses the probate court's access and handling of juvenile

court records under subsections (c)(2) and (3).

30. As a probate division judge, Respondent was required to be aware of the confidential nature of DCF material and juvenile court files and the prohibition on dissemination.

31. Nevertheless, Respondent disseminated the information publicly and provided the records themselves "under seal" to the Civil Division without first obtaining court approval under subsection (b)(1)(E) or (F). DC-3; DC-7.

32. In filing the records with the Civil Division, Respondent also filed an affidavit attesting that they were "identical" to the records held by the Family Division. DC-7.

33. Respondent could not have known whether the records were in fact identical because he had not gained access to the family division records at the time he filed his affidavit.

34. Eight months after his "copy request" form, in August 2020, Respondent filed a Motion in both Family Division and Civil Division requesting that the Family Division transmit the record of the juvenile court proceeding to Civil Division. The request cited to the specific section of 33 V.S.A. § 5117 which would have allowed for inspection of the records by court order under some circumstances. DC-8.

35. As a direct result of Respondent's conduct, the details of an 11-year-old child's history of involvement with DCF became available as a public record. DC-1; DC-2.

36. The second, independent and unrelated client matter involved MK. MK knew Respondent from around 2011 when they both coached little league baseball together for their sons. Answer ¶ 22; Tr. Nov. 1 at 7-8.

37. MK considered Respondent a friend. Tr. Nov. 1 at 9.

38. In June 2019, MK was arrested and charged with several sex crimes in Caledonia and Windsor counties. Answer ¶ 23.

39. MK contacted Respondent and Respondent agreed to represent him. Tr. Nov. 1 at 10.

40. MK qualified for assistance from a court-appointed attorney and was appointed counsel for the Caledonia County docket, Alan Franklin of Northeast Kingdom Law. Answer ¶ 25; DC-11; Oct. 15 Tr. at 159.

41. MK himself was uninvolved in the fee structure for Respondent's services and did not know what the fee agreement was. Nov. 1 Tr. at 9-10.

42. Respondent's fee agreement was arranged with MK's sister. In an email to the sister from June 5, 2019, Respondent arranged for a flat rate monthly of $1,000 per month for the first eight months, and then if the case was still pending it would be reduced to $400 per month. DC-11.

43. The fee email stated that Respondent would "plan on working on" both matters in both counties "but I may let the public defender's office in Caledonia start the case there and I will then figure out the logical step to either get it transferred to Windsor or to resolve it." DC-11.

44. The payments were covered between June 2019 and January 2020 by either MK's

spouse or his sister. Answer ¶ 27; DC-17.

45. MK recalled that Respondent told him that "the more we try to contact [Respondent], the more money it was going to cost," despite the fact that the fee agreement was for a flat monthly rate. Nov. 1 Tr. at 15.

46. MK was initially held without bail on the charges but eventually released on conditions to the custody of his sister. Answer ¶ 28; R-B; R-C.

47. His conditions of release did not permit him to have in-person contact with his daughters. Answer ¶ 29.

48. MK recalled meeting Respondent four or five times between June 2019 and January 2020. Nov. 1 Tr. at 10-17.

49. The meetings were described as being under half an hour. Nov. 1 Tr. at 14.

50. At one meeting, MK and Respondent discussed that depositions would be required, but MK was unclear about who was going to be deposed, and no depositions were ever scheduled before January 2020. Nov. 1 Tr. at 16, 26.

51. Under the scheduling stipulation filed by the parties, Respondent was scheduled to complete depositions in the Windsor case by November 15, 2019. DC-12.

52. At one meeting, MK and Respondent discussed an offer to resolve that had been received from the State. Nov. 1 Tr. at 13.

53. At one meeting, MK recalled discussing with Respondent that he wanted to see his children in person, which would have required Respondent to move to amend MK's conditions of release and to coordinate with Alan Franklin about seeking amendment to the Caledonia conditions. Nov. 1 Tr. at 13-14.

54. MK assumed that Respondent was coordinating and working with Alan Franklin regarding his criminal matters. Nov. 1 Tr. at 20, 24.

55. Contrary to his representations, Respondent made little to no effort to coordinate any of his work with Franklin, and Respondent did not respond to Franklin's attempts to coordinate with him. Nov. 1 Tr. at 43-47, 49; Oct. 15 Tr. at 159-60, 162, 163-64; DC-15.

56. MK's matter was scheduled for jury draw in Windsor for February 13, 2020. DC-13.

57. MK terminated Respondent's representation and retained new counsel in late January 2020.

58. MK testified that he felt he needed to change attorneys because "we were under the impression that we were going to court ill-prepared basically . . . .I felt like that I was going to court with no representation." Nov. 1 Tr. at 27-29.

59. Repeated requests were made that Respondent seek an amendment to MK's conditions so that he could have in-person contact with his daughters. DC-9; Nov. 1 Tr. at 43-47.

60. Much of the communication and organizing for MK's defense was coordinated through MK's spouse because at first, MK was incarcerated and after his release, MK needed help from his spouse understanding what was going on. Nov. 1 Tr. at 15, 37-38.

61. In October 2019, Respondent asked the Caledonia deputy state's attorney whether he would consent to an amendment to the conditions of release to allow MK to

see his daughters, but the deputy indicated he would not. Oct. 15 Tr. at 71-75.

62. Respondent never pursued the matter further, never raised the issue with the Windsor deputy, and never filed a motion despite the family's continued requests. Nov. 1 Tr. at 43-48.

63. Between October 2019 and January 2020, Respondent did not fully explain to the client or the client's family a specific reason why he was not taking any action regarding the client's desire for in-person contact with his children. Nov. 1 Tr. at 19-20; 43-53; DC-9.

64. Respondent's testimony that failing to pursue or address his client's desire to see his children was part of a strategy to potentially obtain a better plea deal was not credible in light of contradictory testimony by Alan Franklin, Heidi Remick, MK, EK, and MK's subsequent counsel. Oct. 15 Tr. at 183-86, 190; Oct. 15 Tr. at 159-60, 162, 163-64; Nov. 1 Tr. at 122-25; Nov. 1 Tr. at 19-20, 43-48, 60, 67-68, 71-75; DC-9.

65. When MK decided to hire new counsel in January 2020, his new attorney filed a motion right away, the matter was set for hearing, and by February 2020 the conditions were ordered amended so that MK could have contact with his daughters. Nov. 1 Tr. at 60.

66. The discovery material in MK's criminal matter included recorded interviews with the alleged victims. At arraignment, the State notified Respondent in the initial disclosures that the recordings had to be obtained directly from law enforcement and would be given to him upon request.

67. At no time during his representation of MK through January 2020 did Respondent request, obtain or review the recorded interviews with the alleged victims despite the fact that one of MK's dockets was set for jury draw in February 2020, and despite that Respondent listed on the stipulated scheduling order the alleged victims as individuals he intended to depose (but never made arrangement to do so).

68. Respondent's explanations regarding why obtaining or viewing the video interviews was unnecessary was not credible and was contradicted by other credible testimony. Nov. 1 Tr. at 62, 66, 67-68, 77-78, 85-86, 99; Oct. 15 Tr. at 160, 178, 191.

69. In August 2019, MK received a time-sensitive tiered offer to resolve the Windsor County charge, which Respondent would have had to advise MK on in light of the strength of the evidence, which Respondent had not reviewed because he had not obtained or viewed the interviews. DC-18.

70. The Windsor deputy State's Attorney assigned to the case, Heidi Remick, testified that Respondent never replied to the offer to resolve and never contacted her to discuss scheduling of depositions. Remick also had no memory of Respondent raising any discussion with her regarding MK's conditions of release. Oct. 15 Tr. at 183-86, 190.

71. When MK hired new counsel, the new attorney found no evidence that any substantive work had been done by Respondent on MK's matters. Nov. 1 Tr. at 67-68.

72. Respondent's explanations for why so little work had been done were not credible in light of his flat fee arrangement structured such that higher fees were paid to him earlier in the representation. Nov. 1 Tr. at 128-32.

73. MK's family paid a total of $8,000 in fees to Respondent. DC-17.

74. As of November 1, 2021, MK's criminal matters remained active and pending. Nov. 1 Tr. at 25.

75. In January 2020, Respondent transferred MK's file to the new counsel. Answer ¶ 38; Nov. 1 Tr. at 27-29.

76. In a cover letter email dated January 28, 2020, Respondent laid out some additional information to the new attorney, including some of his thoughts on the approach he purportedly was pursuing for MK and ideas about what he had planned for the upcoming months. DC-19a.

77. In the email, Respondent disclosed confidential client information about an unrelated case, regarding client BA's charges and the tentative offer to resolve that resulted. The email specifically named BA by first and last name and stated that BA admitted to some of the charged conduct and described the conduct admitted to with some specificity. DC-19.

78. At the time of the disclosure, Respondent was covering BA's matter for a scheduled weight of the evidence hearing set for February 3, 2020, while BA's primary assigned counsel was out of the country for much of January and February. Oct. 15 Tr. at 84; Answer ¶ 41.

79. At the time, BA's only entered plea was not guilty and he was being held without

bail awaiting further proceedings. Answer ¶ 42; Oct. 15 Tr. at 84.

80. BA was neither aware of nor consented to the disclosure at the time it was made. Answer ¶ 43; Oct. 15 Tr. at 84-85.

81. The disclosure caused BA to feel shocked and upset because of his expectation that his client confidences would only be shared among his own two attorneys. Oct. 15 Tr. at 87-88.

82. In the same counsel transition email written by Respondent also referred to Respondent's ability to potentially "cherry pick" which county to transfer MK's matter to because of his position as a part time probate court judge in Caledonia if he stayed on to assist new counsel. A public reprimand with a mentorship requirement already issued for that conduct on December 23, 2020 in Judicial Conduct Board Dkt. 20-005. DC-19a; DC-20.

83. In the course of the disciplinary investigation into the conduct related to the MK matter, Respondent produced a written response, through counsel, dated May 29, 2020. One of the issues he was responding to related to a complaint by MK that he had not received much for the $8,000 in fees paid over the course of eight months from MK's arraignment in June 2019 through January 2020 when MK decided to hire different counsel. Answer ¶ 44.

84. The written response material included Respondent's "contemporaneous" notes of work performed in descriptive entries in dated billing records using a software called freshbooks. Answer ¶ 45; DC-15.

85. The dated billing entries described work purportedly performed and tracked time

in tenths of an hour on specific dates for MK's matter. DC-15.

86. When asked specific questions about when Respondent opened the matter in freshbooks to track his time, he conceded that "some" of the entries might have been entered later, using his calendar and notes from MK's file in response to the disciplinary inquiry and there might be some mistakes. Answer ¶ 46.

87. In reality, many of Respondent's time and date entries never actually occurred at all and appear to have been invented. For example, Respondent documented multiple calls and conversations with Alan Franklin in October 2019 which Franklin had no memory of. DC-15 at 4-5; Oct. 15 Tr. at 115-21, 163. Respondent documented in-person meetings with Heidi Remick on June 20, 2019, July 8, 2019, August 19, 2019, and November 11, 2019, which Remick testified never occurred. Respondent himself testified he could not say for sure whether they occurred. Oct. 15 Tr. at 181-82, 185; 93-99; 104-05; DC-15 at 2-5.

88. Other time entries by Respondent were inflated. For example, Respondent documented a meeting with Thomas Paul, the Caledonia Deputy State's attorney as lasting one hour, whereas Paul described the meeting as "very brief" and mostly talking about sports. Oct. 15 Tr. at 73, 97-98; DC-15 at 5.

89. Respondent documented several client phone calls as lasting more than twice as long as his phone records reflected. DC-15; DC-10; Oct. 15 Tr. at 127-29.

90. In one time entry, Respondent documented 10.5 hours to research a specific juror pool and 9.5 hours for a juror questionnaire when he did not yet have a jury draw date and was aware that the pool of jurors would turn over the following month,

so the information would not be of any use. DC-15 at 3-4; Oct. 15 Tr. at 100-02, 110-11.

91. Respondent documented on January 11, 2020 that he spent 6.5 hours "preparing for trial" for MK's matter, but also conceded in his testimony that he had not done any further juror research for the different juror pool, had not obtained or reviewed recorded interviews, and had not scheduled or done any depositions. DC-15 at 5; Oct. 15 Tr. at 123-24.

92. Respondent suggested in his testimony that he would have asked for and surely been granted a continuance; however his level of certainty about that was inconsistent with testimony from MK's new counsel and the deputy State's Attorney, and there was no evidence in MK's transition material and client file that a motion to continue the February jury draw was contemplated as of January 28, 2020.

93. Respondent's sworn Answer and testimony that he did not intend to mislead or engage in dishonesty in providing documentation of his time spent on a flat fee matter is not credible.

94. The freshbooks "invoice autobiography" for the MK matter showed log-in history only on the following dates: May 20, 2020 and May 21, 2020. These dates are nearly four months after the representation had ended, showing the records were created in response to the disciplinary inquiry days before responding to the complaint, and not the contemporaneous entries they were represented to be. Answer ¶ 48; DC-16.

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 no prior disciplinary history.

b. *Dishonest or selfish motive*: This factor applies. Respondent's motive in submitting the fictional time-keeping records was an attempt to avoid potential disciplinary action.

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

d. *multiple offenses*: This factor applies. Respondent's conduct occurred in three separate client matters, involved several rule violations and affected multiple individuals.

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 applies. Respondent's submission of Freshbooks records in response the disciplinary counsel's request was dishonest and deceptive.

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

h. *vulnerability of victim*: This factor applies. MK relied on Respondent to represent him in serious pending criminal charges. BA was incarcerated also facing serious charges when Respondent disclosed his confidential client information. The juveniles who were parties to the juvenile division matter had sensitive information about their abusive childhoods disclosed in publicly-filed civil court documents.

i. *substantial experience in the practice of law*: Respondent has practiced for more than 10 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 applies because the mishandling of juvenile court documents is unlawful and proscribed by statute.

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 applies.

b. absence of a dishonest or selfish motive: This factor does not apply.

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 does not apply.

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 applies. Respondent already received a sanction from the judicial conduct board for related conduct.

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

m. remoteness of prior offenses: This factor does not apply.

Vermont Rule of Professional Conduct 8.4(d) (mishandling and unlawful disclosure of confidential juvenile court information in a civil matter)

Under Rule 8.4(d), "[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice." 33 V.S.A. § 5117 sets forth specific stringent rules for the inspection and dissemination of juvenile court records. The purpose of the statute is to safeguard the privacy of families and in particular the privacy of children who encounter incredibly challenging life circumstances through no fault of their own.

It is well-settled that a Vermont lawyer's ethical duty under Rule 8.4(d) includes handling of juvenile court material in accordance with the statute. In PRB Decision No. 91 (2006), a respondent was in possession of a confidential DCF report and sought to use the contents of the report to impeach a witness who was testifying at a hearing on his client's violation of probation charge. The respondent began a line of cross examination where he referred to the juvenile by name and substance in the report. The opposing party objected based upon the confidentiality of the report by statute. The respondent apologized to the court and withdrew the question. He was found by a hearing panel to be in violation of Rule 8.4(d) as a result of his handling of the confidential juvenile material.

More specific to Respondent's circumstances here, 33 VSA § 5517 sets forth the basis for requesting access to the records and the permissible uses for the records and strictly prohibits further dissemination. Respondent disregarded the procedure for requesting access and then proceeded to use and disseminate the records however he believed would benefit his client's position in a civil matter without regard to any of the statutory prohibitions. The result was the publication of the full name, date of birth, and details of a juvenile (AC)'s involvement with DCF and the further dissemination of the primary source documents without Family Division

permission.

Comment 6 to the model rule states that a "lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists." While Respondent might logically raise this defense, the evidence does not support that he had a good faith belief that his handling of the confidential material was allowable or appropriate. Respondent knew enough to at least attempt to seek permission of the Family Division to inspect the records before using them to further KH's legal position. Then, he received a court order expressly denying the access. The proper legal remedy and steps demonstrating a good faith belief would be either to appeal the order or to renew the request. Disregarding or ignoring the order or stating a belief that he was not in violation of the order because he filed the material before the order issued is not the type of conduct that fits the good-faith exemption.

Vermont Rule of Professional Conduct 1.1 (failure to obtain or review criminal discovery material for client MK)

Rule 1.1 requires that a lawyer provide competent representation to a client. "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Vt. R. Pr. C. 1.1. The comments specify that "[c]ompetent handling of a particular matter includes . . . use of methods and procedures meeting the standards of competent practitioners." Vt. R. Pr. C. 1.1, cmt. 5.

Here, the basis for the charges against MK arises from the statements of the alleged victims themselves. Respondent was aware of this from having been automatically provided the law enforcement reports of the interviews in the initial discovery provided at arraignment. Failure to timely request, obtain and review the actual interviews, the key evidence against his client, lacks the thoroughness and preparation any competent criminal attorney would undertake.

Whether Respondent would need to depose these witnesses, examine them at trial, or simply provide accurate, well thought-out advice to his client on a decision to accept or reject a plea offer, there was no way for him to do any of these tasks competently without having reviewed the available discovery.

Certainly, there could be circumstances where a failure to carefully review all of the State's evidence in the first seven months of a representation might not be a violation of Rule 1.1. Here, however, the specific facts and circumstances surrounding respondent's representation of MK establish that not obtaining or reviewing the recorded victim interviews fell below the standard of competence MK deserved.

Vermont Rule of Professional Conduct 1.3 (failure to file a motion to amend conditions of release for client MK)

Under Rule 1.3, a lawyer shall act with reasonable diligence and promptness in representing a client. The official comments to this rule show that Respondent's conduct fell short of this standard in several respects. First, the comments state that "[a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer." Rule 1.3, cmt. 1. Second, "[a] lawyer must also act with commitment and dedication to the interests of the client." Rule 1.3, cmt. 2.

Here, MK and his family repeatedly requested that Respondent seek amendment to MK's conditions of release to allow him to see his daughters. DC-9. In October 2019, Respondent asked the deputy state's attorney in Caledonia whether he would consent to an amended condition and the deputy indicated he would not. Respondent did not pursue the request any further. He did not inquire with the Windsor deputy state's attorney and did not attempt to collaborate with MK's other attorney on the issue. Respondent's client was subject to 24-hour

supervision by his sister and had not seen his daughters since his arrest. The client repeatedly told Respondent that it was a priority for him to try to get that condition changed.

At his disciplinary hearing, Respondent attempted to explain why he never pursued a change of conditions further. Certainly, there could be valid reasons not to seek to amend a client's conditions of release. In many or perhaps most cases, failure to file a motion to amend conditions of release would not be a violation of any rule of professional conduct. Here, however, the facts and circumstances support that Respondent's inaction was due to a lack of diligence. The client and his spouse gave credible testimony that Respondent never told them that he would not be filing a motion to amend conditions or pursuing the issue further. Their testimony is supported by the text message evidence (DC-9) which shows they continued to ask about the status of a change of conditions throughout November, December, and January and did not receive any explanation or response. Respondent's after-the-fact explanations and justifications do not cure the non-responsiveness and lack of explanation to the client. The evidence therefore supports that here, lack of diligence is the true reason the client's objective was not pursued.

At his hearing, Respondent stated he generally thought it was bad for a client's potential to favorably resolve a case to bother the State by filing motions. This statement is not consistent with the general approach of how resolving criminal matters works as testified to by the Windsor deputy assigned to the matter. Moreover, an offer to resolve in Windsor county had already been received by August 2019. As such, the evidence supports that Respondent simply failed to pursue or follow through with a task that was extremely important to his client. In January 2020, MK's new counsel filed a motion immediately and was able to get the conditions amended

following a hearing.

Vermont Rule of Professional Conduct 1.6 (disclosure of BA's confidential client information)

Lawyers must keep client information confidential. "A fundamental principle in the client-lawyer relationship is that . . . the lawyer must not reveal information relating to the representation. . . . This contributes to the trust that is the hallmark of the client-lawyer relationship." Vt. R. of Prof C. 1.6, cmt. 2. While the Rule contains some exceptions where lawyers must or may disclose confidential information, none of the exceptions have any applicability here.

In this case, Respondent sent an email to another lawyer about an unrelated case. In that email, he attempted to illustrate a particular point and used BA's matter as an example:

> [BA] admitted to sexually assaulting his 14-year-old daughter over a number of years. I was only assigned for the weight of the evidence hearing. I advised him not to go forward with it since the evidence was strong and he had admitted to the police that the allegations were all true. However, I told [BA] that I would meet with [the State's Attorney] first to get some idea of where he thought the case could end up. [the State's Attorney] said that if he would plead early he could envision a probation sentence with 5 years to serve. I thought that was pretty favorable all things considered.

DC-19a.

Note that Respondent's original email used BA's first and last name and provided information about the county where the case was brought when he named the State's Attorney. At the time of the disclosure, BA was being held without bail and had entered a plea of not guilty. As stated in his testimony, BA was unaware of the disclosure and did not consent to it, and was understandably distressed when he learned of it.

There does not appear to be any rational reason why Respondent believed it would be

acceptable to disclose confidential information about BA and his criminal matter. Respondent's email represents a straightforward, clear violation of the rule and the interests the rule was designed to serve. The specific harm to BA could have been very great had he decided to exercise his right to a jury trial or had any persons in custody or members of his family learned of his admissions to his attorney.

Vermont Rule of Professional Conduct 8.4(c) (dishonest representations in timekeeping records for client MK)

Under Rule 8.4(c), a lawyer is prohibited from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. It well-settled in Vermont that dishonesty and misrepresentation by lawyers relating to their legal practice violates Rule 8.4(c). *See In re Wysolmerski*, 2020 VT 54; *In re Adamski*, 2020 VT 7; *In re Sherer*, PRB Decision No. 228 (2019). "The term dishonesty means, among other things, conduct evincing a lack of honesty, probity or integrity in principle and a lack of fairness and straightforwardness." *In re Adamski*, 2020 VT 7 ¶ 24 (quotation omitted).

Here, Respondent provided eight months' worth of timekeeping records in response to a disciplinary inquiry. He represented that those records were contemporaneously logged and that the records showed work actually performed for client MK. There was no indication or notation on the records when initially produced that they were very rough approximations or after-the-fact entries. Looking at the document on its face, it presents as though it was a log kept during the time of the representation. DC-15.

Following the testimony of Alan Franklin, Heidi Remick, Thomas Paul, and Respondent himself, it is obvious that Respondent's entries were at least partially invented. He entered many

hours' worth of travel and meetings on a variety of dates that never actually occurred and inflated time for other calls and meetings that did occur. Respondent testified he made the entries based upon his records and calendar. Thus, in order to credit his testimony that the entries were not intentionally dishonest, the panel would also have to conclude that Respondent's own calendar and notes were terribly inaccurate. Respondent conceded, when confronted, that some of the entries were entered later. But even his concession appeared to be a misrepresentation when compared to the software log-in history, which shows he entered the entire record on two separate dates just before he produced them to disciplinary counsel. DC-16. Respondent's conduct evinces a lack of honesty and an intent to deceive.

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. Rules 1.1 and 1.3 involved Respondent's duty to client MK to represent him in his criminal matter with competence and diligence. Rule 1.6 involved Respondent's duty to client BA to keep his client information confidential. Rule 8.4(d) involved Respondent's duty to the legal system and to the profession to carefully handle juvenile court material. Rule 8.4(c) involved Respondent's duty to the legal system and to the profession conduct himself honestly in the course of a disciplinary investigation.

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, "intent" is "the conscious objective or purpose to accomplish a particular result." ABA Standards at xxi. "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's lack of diligence and competence with respect to MK's matter was knowing. He knew that coordination with co-counsel was important but he did not do it. He knew there was video interview evidence related to the charges, but never obtained or reviewed it. He knew his client wanted conditions amended, but never pursued it and never explained why. The evidence supports that Respondent's disclosure of BA's client information was also knowing. Respondent knew what he was writing about and to whom he sent it and knew that he did not have BA's consent. With respect to Respondent's mishandling of juvenile court information, the evidence supports that he again acted knowingly. He knew that juvenile court material was subject to statutory protections but handled it in whichever way he perceived best served his own client's objectives, although without any specific purpose or objective to harm the juveniles. Respondent's conduct surrounding his purported time records for the MK matter was intentional. He intentionally falsified records and attempted to pass them off as actual accurate logs of his activity between June 2019 and January 2020. In doing so he acted with the conscious objective of avoiding potential disciplinary action.

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, there was actual harm to the juveniles by having their involvement with DCF and information about their difficult family lives publicly disclosed in civil filings. There was harm to the integrity of the juvenile court system, which is charged with the duty to keep the juvenile records confidential. There was actual harm to BA, who expressed concern that he did not know if the disclosure about the scope of what he admitted to his attorney in confidence could adversely impact his still-pending criminal matter.

There was actual harm to MK, who was unable to see his daughters in person for seven months. There was potential harm to MK, who was relying on Respondent for advice in his criminal matter when Respondent had not obtained or reviewed the State's evidence. The harm to MK was averted by MK's decision to hire different counsel, and not by any action taken by Respondent. There was harm to the integrity of the profession by Respondent's misrepresentations and dishonesty in the course of a disciplinary investigation.

Whether or not actual injury was caused by Respondent's conduct, there can be no doubt that Respondent's conduct caused great potential harm to MK, BA, and the juveniles.

4. Presumptive sanction

In sum, Respondent violated multiple duties, acted knowingly and intentionally and there was significant actual or potential injury. Several Standards apply to the conduct and most or all support a presumptive sanction of suspension. First, Standard 4.22 provides that "[s]uspension is generally appropriate when a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes injury or potential injury to a client." This is the Standard that applies to the charged violation of Rule 1.6, disclosure of client BA's information. Second, Standard 4.42 provides that suspension is generally appropriate when "(a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or (b) a lawyer engages in a pattern of neglect [which] causes injury or potential injury to a client. This is the Standard that applies to the charged violations of Rules 1.1 and 1.3, lack of diligence and competence in handling MK's criminal matter. Third, Standard 5.12 provides that suspension is generally appropriate "when a lawyer knowingly engages in criminal conduct . . . that seriously adversely reflects on the

lawyer's fitness to practice." This is the Standard that applies to the charged violation of Rule 8.4(d), mishandling of juvenile court information, because by statute, unauthorized dissemination of juvenile court material is a crime. Fourth, although not a perfect fit, Standard 6.12 logically provides guidance on the appropriate sanction of suspension for the charged violation of Rule 8.4(c): "Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding." Standard 6.22 also provides some guidance for the Rule 8.4(c) charge: "Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding." Respondent's dishonest time keeping records, produced in response to a disciplinary inquiry, violated his obligation as a licensed lawyer to conduct himself honestly in response to inquiry by disciplinary authority.

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 deceptive practices, multiple violations, refusal to acknowledge wrongful nature of the conduct,

vulnerability of the victims, and illegal conduct. Aggravating factors outweigh mitigating factors. But, there is no clear support under current law for asserting that the presumptive sanction of suspension should be adjusted upward to disbarment for this conduct.

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 different types of cases present some helpful comparisons.

First, there is a body of cases involving illegal conduct which is appropriate to consider in the proportionality analysis in light of the language in 33 V.S.A. § 5117 (2019) which makes mishandling of juvenile court records a crime. In *In re Pope*, the Court imposed a two-year suspension where the respondent was convicted of identity theft involving an elderly non-client friend. *Pope*, 2014 VT 94, ¶ 14. In *In re Neisner*, the respondent was convicted of making a false report to a police officer and impeding a police officer and also received a two-year suspension. *In re Neisner*, 2010 VT 102, ¶¶ 19-24. Each of these cases involved convictions for illegal conduct, which did not occur here. On the other hand, in contrast to Respondent's charged misconduct, neither *Pope* nor *Neisner* involved misuse of the law license and did not bring about the same damage to the public's perception of the legal profession. *See In Robinson*, 2019 VT 8, ¶¶ 68, 75 (discussing criminal and illegal conduct as aggravating factors in sanctions analysis).

A look at a handful of criminal conviction cases resulting in disbarment tends to suggest that this matter, although it involves serious misconduct, does not fall in line with those cases. *See e.g.*, *In re Aaron Smith*, PRB Decision No. 162 (Vt. 2014) (disbarment for criminal conviction of possession of child pornography); *In re Pellenz*, 2012 VT 39 (reciprocal disbarment for conviction of hindering apprehension or prosecution for attempting to induce a witness to withhold testimony in a criminal prosecution); *In re Harwood*, PRB Decision No. 83 (Vt. 2005) (disbarment for commingling and misappropriating client funds and making false statements).

The second group of comparative cases are recent cases where aggravating factors greatly outweigh mitigating ones (as is the case here). In *Robinson*, 2019 VT 8, ¶ 78, the Court increased the panel's sanction to disbarment in part because of the great weight of aggravating factors including a pattern of misconduct and vulnerability of the victims. In *In re Wysolmerski*, 2020 VT 54, ¶¶ 45-52, the Court also increased the panel's sanction to disbarment in light of aggravating factors such as a pattern of misconduct and prior similar disciplinary history. Ultimately, two distinguishing factors in this case tend to support that disbarment would not be an appropriate sanction. First, there is no real pattern of misconduct, rather these are unrelated groups of violations arising from three separate client matters. Second, Respondent has no prior disciplinary history. Yet, the aggravating factors cases support that a significant period of suspension is warranted here.

Finally, a look at a recent "short suspension" cases shows that Respondent's conduct here is not on par with a sanction of a short suspension by comparison. *In re Bowen*, 2021 VT 7; *In re Adamski*; 2020 VT 7; *In re Kulig*, PRB Decision No. 240 (2021). 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, but the number of violations and scope of their impact is significantly broader than each of these three "short suspension" cases. As such, the comparison tends to support a longer period of suspension is warranted.

In sum, the ABA Standards indicate suspension is warranted. And, proportionality analysis also indicates a two-year suspension is appropriate. A two-year 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.

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Respectfully submitted,

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