STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: Paul Kulig, Esq.
PRB File Nos. 2020-066

Decision No. 240

Disciplinary Counsel filed a petition of misconduct against Respondent, Paul Kulig, Esq., alleging violations of Vermont Rules of Professional Conduct 1.7(a)(2) and 1.8(c). Evidence was presented by the parties at a remote merits hearing held on June 21, 2021 and July 23, 2021. The parties submitted proposed findings of fact and conclusions of law on or about September 3, 2021.

Based on admissions in the answer to the Petition of Misconduct and the credible evidence presented, the Hearing Panel finds and concludes that Respondent violated a conflict-of-interest rule and a rule that prohibits a lawyer from preparing a legal instrument on behalf of a client that gives the lawyer a substantial gift.

FINDINGS OF FACT

Respondent, Paul Kulig, Esq., is an attorney licensed to practice law in Vermont. He was admitted to practice in Vermont in 1978 and has practiced law continuously since then. Respondent provided legal services to Louise Zygo ("LZ") in connection with estate planning matters for many years, until her death in May 2018.

Respondent lived in the same community as LZ and attended the same church as LZ. Respondent's parents had been friends of LZ and her husband. Respondent considered LZ a family friend. After LZ's husband passed away, Respondent began providing will preparation and other estate planning services for her.

In 2006, Respondent drafted a will for LZ and witnessed her execution of the will ("the 2006 will"). LZ had no children. The beneficiaries of the 2006 will were listed as a niece,

Patricia Wener, Patricia's two children, and three children of LZ's nephew, John Broza. In 2009, Respondent discussed with LZ and drafted a durable power of attorney form and an advanced directive for LZ's consideration.

In February 2011, Respondent prepared a new will in response to a request by LZ and witnessed her execution of the will ("the 2011 will"). The 2011 will left LZ's house and its contents to her nephew John Broza and his wife Michaeline Broza; any remaining bonds to the three children of John Broza; and the remainder of the estate to her sister Helen Potowniak. The will named Helen as executrix of the estate.

At some point in 2014, Respondent met with LZ to discuss estate planning, nursing care, and Medicaid issues in light of LZ's declining health. LZ's sister had recommended that LZ sell her house and move to an assisted living facility. However, she declined to move out of her house. In light of LZ's desire to remain in her house, Respondent advised LZ to utilize a so-called "Lady Bird" or "enhanced life estate" (ELE) deed for estate planning purposes in order to prevent the value of her house from being counted as one of her financial assets in connection with any future application by her for long-term care Medicaid coverage.

Under an ELE deed a grantor of real estate conveys the ownership of real property to a third party, while reserving a life estate interest in the property along with the right to sell or mortgage the property without having to secure the permission of the grantee. An ELE deed is a planning tool that is regularly employed by lawyers engaged in estate planning for the elderly. In addition to possible advantages relating to Medicaid coverage, an ELE deed avoids having to identify the real estate in a probate proceeding subsequent to the death of the grantor of the real estate.[1]

[1] "Such deeds only convey a future interest and are designed to avoid probate, as well as creditors." *Cook v. Coburn*, 2014 VT 45, 196 Vt. 410, 97 A.3d 892 (2014). Effective July 2020, a statute enacted by the Legislature describes these types of deeds as an "enhanced life estate deed" and governs their use in Vermont. *See* 27 V.S.A. § 651 et seq. The enactment of the statute post-dated the deed at issue in this

In addition to recommending use of an ELE deed, Respondent testified that he advised LZ that she could leave any personal and real property that might remain after LZ's final illness to whomever she identified by means of a trust agreement. Under the trust arrangement purportedly discussed by Respondent and LZ, LZ's real property would be conveyed, by means of an ELE deed, to an individual who would agree to serve as trustee of the trust and, upon LZ's death, the trustee would sell the real property and distribute the proceeds to the beneficiaries of the trust. In addition, a new will would be prepared naming the individual who would serve as trustee of the trust as the executor and sole beneficiary of LZ's estate, with the understanding that any additional property of LZ's that might require the filing of a probate estate would go to the trustee, who would then distribute that property, or the proceeds derived from that property, to the beneficiaries of the trust.

Respondent testified that LZ accepted Respondent's advice with respect to the trust arrangement described above. With respect to the choice of an individual or entity that would receive the ownership interest in LZ's real property and serve as trustee of the oral trust, as well as serving as executor and beneficiary under LZ's will, Respondent testified that LZ expressed a desire for Respondent to receive the ownership interest in the real property and to serve as trustee and executor and to administer any other assets that might belong to her in accordance with the trust.

Following his 2014 estate planning discussions with LZ, Respondent proceeded to draft an ELE deed and a new will along the lines he had discussed with LZ. The ELE deed drafted by Respondent provided for the conveyance of LZ's ownership interest in her home to Respondent

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case and, therefore, the statute is not applicable. The statue also provides that "[n]othing in this chapter shall be construed to affect the validity of an enhanced life estate deed, a 'Life Estate Deed with Reserved Powers,' a 'Lady Bird Deed,' a 'Medicaid Deed,' an 'Italian Deed,' or similar deed executed and recorded prior to the effective date of this act." *Id*. § 659.

and his heirs and assigns. The new will drafted by Respondent left "all of [her] estate" to Respondent and appointed him executor of her estate.

Respondent did not draft a trust agreement – either at that time or at any time prior to LZ's death in 2018. Moreover, Respondent did not otherwise memorialize in writing the essential terms of any trust agreement with respect to LZ's property. Prior to LZ's death, no written record was generated by Respondent that sets forth, or otherwise constitutes a contemporaneous memorialization of the corpus of a trust and its scope, the identity of the trustee and his/her powers and duties, or the identity of the beneficiaries of the trust and a formula for distribution to the beneficiaries.

After drafting the ELE deed and new will, Respondent met with one of the partners in his law firm at the time, Attorney Christopher Sullivan, to brief him on his discussions with LZ and to request that Attorney Sullivan take the ELE deed and will to LZ for execution at her home. Attorney Sullivan had concerns about the fact that the deed and will would result in the transfer of property to Respondent but, after conferring with Respondent, he agreed to Respondent's request.

Attorney Sullivan and a secretary from Respondent's office met with LZ at her home on or about June 12, 2014 and, after Attorney Sullivan reviewed the ELE deed and will with her, LZ executed the documents in their presence. Before LZ executed the documents, Attorney Sullivan concluded, based on his conversation with LZ, that she was of sound mind and that she was comfortable conveying her real property to Respondent and leaving her estate to him.[2] The 2014

[2] During the testimony of Attorney Sullivan, Respondent offered into evidence some handwritten notes dated June 10, 2014 – two days before the date of execution on the 2014 deed and will – that reference LZ and appear to relate to Respondent's work on behalf of LZ at the time. Respondent's Ex. E. Portions of the document are written in a lighter colored ink while other portions of the document appear in black. Black ink was used to write the date on the document, to list a social security number and a municipal property identification ("SPAN" number), and to add some words and letters to some of the words written in lighter text. The notes include the following statements:

- Gave smith barney to nephew three boys
- Give property to Paul S. Kulig in her will

ELE deed was never filed on the Land Records and the 2014 will was never filed in the Rutland Probate Court.

Respondent did not obtain informed consent from LZ, confirmed in writing, either at the time of LZ's execution of the 2014 deed and 2014 will or at any time thereafter. LZ never signed any document disclosing to her a conflict of interest on Respondent's part and the nature of the risks associated with her conveyance of the house to Respondent and her designation of Respondent as the beneficiary of her estate.

At some point after she executed the 2014 deed and will, LZ moved to a nursing home in New York. Respondent continued to provide legal assistance to LZ. In February 2015, Respondent drafted a durable power of attorney designating himself as LZ's agent, which was duly executed by LZ. During this period of time, various assets of LZ's were utilized for her

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- As long as she lives her[e] she will pay her bills
- Transfer property now + if **I** ha**ve** to go to Consolidated [a nursing home near Rutland] then he'll take care **of** it
- He's a good Catholic.

The Panel notes that the bolded language above was written in black ink. The notes also include cursory references to LZ's nieces and nephews being deceased and to "two boys" "three children" and "2 Daughters."

Attorney Sullivan testified that he believes he generated the notes at his meeting with LZ on June 12th in connection with his determination that her execution of the documents was voluntary. However, he testified that he had no knowledge regarding the placement of the black ink on the document and, with respect to the date discrepancy, could only speculate that he might have misdated the document when he generated his notes. As a result, the Panel has to wonder whether some portion of the notes might have been generated at least in part during Attorney Sullivan's prior briefing meeting with Respondent to prepare him for the meeting with LZ. Attorney Sullivan's recollection of his meeting with both Respondent and LZ was vague and relied heavily on the cursory notes. Given Attorney Sullivan's limited recollection and, to some extent, speculation – not surprising given the passage of significant time – and the cursory nature of the notes in combination with the various unexplained discrepancies in the notes – including the addition of writing in different ink and the difference between the date they were reportedly generated and Attorney Sullivan's later meeting with LZ – the Panel is not able to make any more detailed factual determinations on the basis of the notes.

While the Panel does find that Attorney Sullivan met with LZ and satisfied himself that she was voluntarily conveying her property to Respondent and designating Respondent as her executor and the beneficiary of her will, the Panel is unable to make any additional findings based on Sullivan's testimony and notes.

care and maintenance. As LZ's health declined Respondent met with her periodically to assist her with paying bills.

LZ passed away in May 2018 while residing in the nursing home. At some point after she had moved to the nursing home LZ depleted her savings and applied for long-term care Medicaid coverage. The Medicaid program did not count her house as an asset for purposes of the eligibility determination. LZ's nursing home care was covered by Medicaid for approximately eight months before she passed away. Following LZ's death in 2018 Respondent did not file the 2014 will with the Probate Court or otherwise seek a probate court appointment as executor of LZ's estate. Moreover, Respondent took no steps during the months following LZ's death to advise anyone that he or she had been designated as a beneficiary of a trust set up by LZ or that Respondent was serving as the trustee of any such trust or to advise the beneficiaries of any such trust of his authority and intentions. Nor did he generate and provide any inventory of LZ's personal and real property to any beneficiary or heir at law.[3]

Following LZ's death, Respondent took steps to secure LZ's former residence. Beginning in approximately August 2019 – more than one year after LZ had passed away – he took further steps, as outlined below, to sell the residence and an automobile that belonged to LZ.

[3] In August 2018, Respondent had a conversation with the husband of LZ's deceased sister Patricia, Carl Wener, and asked him to provide the addresses of his sons, indicating that he needed the addresses to "settle the estate." Mr. Wener provided the addresses to Respondent. But, as of the date of the merits hearing, Respondent had not contacted the sons. In addition, Ms. Broza's son Michael called Respondent at some point and, during that conversation, Respondent asked for Michael's brother's address. However, Respondent testified that as of the date of the merits hearing he had not yet informed any of the individuals he identified at the merits hearing as a beneficiary of a trust – which he testified included Michael and his brother – that LZ had set up a trust to benefit them. The fact that Respondent did not notify Michael during the phone call is also noteworthy in light of Respondent's further testimony that the at the time of the call "[Michael] seemed to be under the impression he was going to get the house." Transcript, 7/23/21, at 57.

At some point in 2018 after LZ's death, Michaeline Broza (the widow of LZ's nephew John Broza), who had been listed along with her deceased husband in the 2011 will as having LZ's "house and all its contents" bequeathed to them jointly, telephoned Respondent to ask about the status of LZ's estate. Ms. Broza was aware that Respondent had served as LZ's attorney in the past. Respondent stated to Ms. Broza that "there is no estate." He did not state to her that LZ's remaining assets would be distributed under the terms of a trust agreement and provided no further information to her.[4] She or her son Michael subsequently contacted the probate court to see if a will was on file there and was told that the court did not have a will.

Ms. Broza eventually retained an attorney, Matthew Getty, to assist her. In October 2019 Attorney Getty called Respondent on behalf of Ms. Broza to inquire about LZ's estate. Respondent stated that there remained a few thousand dollars in LZ's bank account; that some money was owed to LZ's nursing home and to Medicaid; that an ELE deed had been executed, with a transfer of the property to Respondent; that Respondent was trying to get the house up to code to sell it and that he had a prospective buyer and that someone was "fronting" money for repairs and that he was hoping to close on the sale of the property in the spring of 2020 and receive approximately $160,000 less approximately $5,000 for "septic repair"; that LZ had left him a vehicle that he sold for $1,000; that the "heirs" were LZ's "sister" and unspecified "nieces and nephews"; and that he would eventually divide the proceeds "per stirpes by siblings." Attorney Getty asked Respondent to provide a copy of the will and the deed to the house.

Following this conversation, Respondent's assistant sent a copy of the 2011 will to Attorney Getty – but not the 2014 will or the 2014 ELE deed. Attorney Getty sent a follow-up

[4] Respondent testified that he stated to Ms. Broza during the call that "there was no probateable [sic] asset." Of course, a lay person unfamiliar with the law could reasonably conclude based on such a statement that she was being told there were no assets to distribute to any heirs. Moreover, Respondent concedes that he did not state to Ms. Broza that LZ's former residence and remaining assets were subject to a trust agreement.

letter to Respondent in November 2019 in which he summarized his prior conversation with Respondent; indicated that the ELE deed had not been provided and had not been filed on the Land Records; and indicated his understanding, based on the 2011 will and the representations made by Respondent that he intended to distribute the net proceeds to the "heirs at law" and that LZ's intent had been to have the house placed in trust for the sole benefit of her nephew's widow Michaeline Broza.[5] He also requested information regarding LZ's bank accounts and personal effects and an accounting with respect to rent based on his understanding that someone was living in LZ's house.

In December 2019, Respondent replied to this letter. He provided copies of the 2014 will and 2014 ELE deed with this letter. He stated that various assets LZ had intended to convey to her sister and "other relatives" had been used up paying for long-term care for LZ until the point when LZ became eligible for long-term care Medicaid; that rental payments had been used to cover various expenses associated with the house, including taxes and insurance and repairs. He further stated that once the house was sold the proceeds would be distributed to "those she had intended to benefit before her declining health required her to use her assets for her end-of-life care." Respondent did not state that a trust had been put in place; nor did he identify any beneficiaries by name. He did not advise Attorney Getty that Michaeline Broza was not an intended beneficiary. In addition, Respondent did not provide any accounting to Attorney Getty.

Attorney Getty sent an email to Respondent a few days later requesting further clarification with respect to the beneficiaries of LZ's estate. Getty stated that "I am assuming from the second paragraph [of your letter] that you were the draftsman and that she instructed you about who she intended to benefit"; Getty asked Respondent "who [the beneficiary] is or how that is to be determined" and "if you, in fact, are intended to be one of the ultimate

[5] The beneficiaries of the 2011 will were Getty's client, Ms. Broza, her husband John, their three sons, and LZ's sister Helen Potowniak. The will left the house and its contents to John and Michaeline.

beneficiaries." He also asked whether Respondent had disposed of any of LZ's personal effects, including LZ's photographs and jewelry. Getty wrote this email because he was concerned as a result of Respondent's reference to unnamed beneficiaries who LZ "intended to benefit" that Respondent might be "walking back" his prior statement that the money in the estate would go to the heirs of LZ – who Getty understood to include the three children of John and Michaeline Broza. Respondent never answered this email from Attorney Getty.

Respondent's Management and Disposition of LZ's property

At the time of her death in May 2018, LZ owned a car and had a bank account containing approximately $8,000. Most if not all of the funds in the bank account were subject to outstanding bills from the nursing home and miscellaneous medical expenses and other bills.

Around the summer of 2019 Respondent sold LZ's car (a 2000 Toyota) to an acquaintance, JF, for $1,000. Respondent served as a board member of a regional organization that employed JF as its chief executive officer. In addition, Respondent had previously done legal work for JF and considered him a friend.

Following LZ's death in 2018, Respondent maintained LZ's former residence. He paid for utilities, property taxes and homeowner's insurance, as well as for a repair to the water system, using his own personal funds because LZ's remaining bank account was already fully committed to paying her outstanding bills. The house was vacant at the time of LZ's death but contained her furniture and personal possessions. Respondent eventually took LZ's photographs and jewelry into his possession. He had the jewelry appraised for a value of approximately $2,000 but did not take any further steps to sell it or make it available to any beneficiary for viewing. He donated LZ's clothing to the nursing home. He still has LZ's jewelry and photographs in his possession.

In the summer of 2019 Respondent advised JF that he was planning to sell LZ's house in connection with LZ's estate. At the time, JF and his wife, MF, were in the process of negotiating

a divorce agreement.[6] Respondent was aware through his acquaintance with JF that MF was looking to acquire a house in connection with the divorce. Respondent told JF that the proceeds from the sale were going to be distributed to the nieces and nephews of his deceased client, LZ. JF and MF subsequently advised Respondent that MF would be interested in acquiring the property. In the fall of 2019, Respondent entered into a "rent-to-own" agreement with MF.

Under the terms of the rent-to-own agreement, MF made a down payment of $10,000 on the purchase price that would be applied retroactively to rent charges if MF opted not to purchase the house. In addition, MF was entitled under the agreement to receive credits against the purchase price for certain direct payments she made to vendors for purposes of repairing and improving the house. At the time of the agreement, the house was structurally sound but needed major repairs to the furnace and septic system, and the interior of the house was dated. MF moved into LZ's former residence around December 2019.

Respondent deposited the $10,000 down payment – along with the $1,000 he received for the sale of LZ's automobile – into his personal bank account (not his law firm's IOLTA account). He testified that he did so in order to reimburse himself for the various expenses he had been incurring to maintain the house.[7]

Prior to entering into the rent-to-own agreement Respondent did not have the property assessed, although he consulted with an acquaintance who is in the business of buying and selling properties; nor did he retain a real estate agent for purposes of securing an additional opinion regarding an appropriate listing price. He agreed to a selling price based primarily on

[6] Another attorney in Respondent's law office was involved, either at that time or eventually, with drafting a stipulated divorce settlement agreement for JF and MF but did not represent either party in the divorce.

[7] Although a list of expenses incurred by Respondent was introduced into evidence, no definitive accounting concerning Respondent's reimbursement of himself, or any other evidence concerning the precise amount of expenses claimed and the current location of the remaining balance of the $11,000 in funds, was provided to the Panel during the hearing.

the property's assessed value on the municipality's grand list of taxable properties and his own opinion.

The sale of LZ's former residence closed in May 2020. The seller was listed on the closing documents simply as Paul Kulig; there was no indication that he was acting in the capacity of a trustee. MF received credits at the closing of approximately $43,000 for various improvements she made to the property, including substantial repairs of the septic system and furnace and a substantial remodeling of the kitchen, including replacement of cabinets, counters and appliances. As a result of MF's purchase of the property, it appears that MF lived in the house rent-free from approximately December to May – a period of six months.

Respondent received payment of approximately $143,000 from the buyer at the closing. Combined with the buyer's deposit payment, Respondent received a total of approximately $153,000 for the sale of the house – an amount, as a result of the credits given to the purchaser, that was significantly lower than the listed value of the property – $ 197,000. Respondent had previously concluded that the fair market value, without the improvements made by MF, was approximately this lower amount received at closing. Respondent contends that the improvements were necessary to satisfy a lender that the property would have a sufficient value to justify a bank loan for the purchase of the property. Because Respondent sold the house without a real estate broker's involvement there was no commission that had to be paid to a broker from the sale proceeds.

Respondent did not provide any notice of the sale of the property to anyone as a beneficiary either prior to or subsequent to the closing. He never afforded anyone as a beneficiary an opportunity to view the contents of the house before the sale. After attempting unsuccessfully to secure some value for the furniture and other contents of the house (other than the photographs and jewelry) Respondent concluded that the contents of the house had no value

and left them in the house at the time of the closing. It is unknown if any of the contents still exist.

Respondent deposited the payment he received at the closing ($143,000) into his law office IOLTA account. To date he has not provided to any heir or beneficiary an accounting of the various expenditures and receipts related to the sale of the house.

* * *

Respondent conceded in his testimony that the type of trust arrangement he claims to have set up was "a little unusual," although he maintains that he believed and continues to believe it was a legal and appropriate means of addressing LZ's estate planning goal of avoiding Medicaid capture. Respondent had not previously structured any estate with conveyances of property to himself and an oral trust agreement. He claims to have done so based on LZ's insistence that he was the only person she could trust to effectuate her wishes for the distribution of her property following her death. He also claims that he advised her to utilize someone else as a trustee/grantee under the will and beneficiary of her estate and suggested that she consult with another lawyer but that she adamantly declined to do so.

Respondent maintains that LZ's desire was to distribute her property to her sister, Helen Potowniak, who was alive at the time of the 2014 deed and will, and to her various great-nephews, or to their descendants. Respondent maintains that LZ's intent was to effect the same distribution that would have occurred under the applicable law if LZ had died without a will – i.e. under the intestacy laws.

Helen died in 2020. Respondent testified that he now intends to distribute the property to the son of Helen (Peter), the three sons of John and Michaeline Broza, the two sons of Patricia Wener and two other nephews (identified as the Karps, the descendants of another sister named

Mary).[8] Respondent indicated that the formula by which he intends to divide the proceeds among these individuals would give one-third to Helen's son; divide one-third between the three Broza great-nephews and two Wener great-nephews (as the descendants of LZ's sister Stella); and divide one-third between the two Karp nephews.

Respondent concedes that the automobile was subject to the terms of the will but maintains that there was no point opening an estate because creditors' claims, in particular a likely Medicaid lien, were far greater than the value of the automobile. It appears that Respondent was able to sell the automobile without a title because of its age.

Respondent testified that he decided not to proceed with any distribution of property because the professional responsibility complaint that was filed against him and, later, the petition of misconduct in this proceeding have raised issues concerning the purported trust agreement that require resolution. Respondent was contacted by Bar Counsel in January 2020, Respondent's Ex. I – before the May 2020 closing of the sale of LZ's real property – in connection with Bar Counsel's screening of a complaint against Respondent. Respondent testified that at some unspecified point in time he intends to provide 30-days notice "by statute" of a proposed distribution of the proceeds from the sale of the house, along with an accounting of expenses and receipts. As of the date of the hearing he had not prepared any comprehensive accounting.

As he confirmed in his testimony, Respondent was well aware of the danger inherent in utilizing a ELE deed for estate planning:

> Well, obviously, in the -- in the Lady Bird Johnson deed, the person named there can -- upon the death of the grantor, will have the -- will have the property. You know, if that person doesn't want to fulfill your wishes and just says, I -- I'm just going to take the money for myself and put it in my pocket, you know, that's -- that's the danger in these Lady Bird Johnson type deeds.

[8] The Panel is not in a position to determine whether these individuals are in fact the heirs at law under the intestacy laws.

Transcript, 7/23/21, at 44.

* * *

Respondent is an active member of his community. Over the years he has volunteered many hours of community service for his church, the local schools, and numerous non-profit organizations in the region.

CONCLUSIONS OF LAW

Disciplinary Counsel bears the burden of proof in this proceeding. The applicable standard of proof is the heightened standard of "clear-and-convincing evidence." A.O. 9, Rule 20(C). "[T]he clear-and-convincing-evidence standard represents a very demanding measure of proof. Although something less than proof beyond a reasonable doubt, it is substantially more rigorous than the mere preponderance standard usually applied in the civil context, and is generally said to require proof that the existence of the contested fact is 'highly probable' rather than merely more probable than not." *In re N.H.*, 168 Vt. 508, 512, 724 A.2d 467, 469-70 (1998).

Rule 1.7 of the Vermont Rules of Professional Conduct provides, in pertinent parts, as follows:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. *A concurrent conflict of interest exists if*:
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> (1) the representation of one client will be directly adverse to another client; or
>
> *(2) there is a significant risk that the representation of one or more clients will be materially limited* by the lawyer's responsibilities to another client, a former client or a third person or *by a personal interest of the lawyer*.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
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> (1) the lawyer reasonably believes that the lawyer will be able to

provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; *and*

(4) *each affected client gives informed consent, confirmed in writing*.

V.R.Pr.C. 1.7 (emphasis added).

"Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's . . . interests." *Id*., Comment [8].

Respondent's representation of LZ that resulted in the 2014 ELE deed and the 2014 will gave rise to a concurrent conflict of interest on his part. He was the drafter of documents that advanced his personal interests. The ELE deed conferred on him an interest in LZ's real estate and the will named him as the sole beneficiary of LZ's estate. *Cf*. Conn. Informal Ethics Op. 00-8, 2000 WL 1370787, at *1 (no conflict of interest where testatrix names the attorney who drafted [her] will to serve as executor of her estate and that attorney acts as both the executor of the estate and the attorney for the estate; no conflict where same attorney who drafted the will also drafted [a] revocable trust and was named a co-trustee).

Respondent's duty to his client was to provide completely independent advice. But he placed himself in a position where he was advising her to convey her property to him and to make him the sole beneficiary of her estate under a will.[9]

[9] In his testimony, Respondent went to great lengths to try to dismiss other options as ineffective to accomplish LZ's goals of preventing the Medicaid Program from counting her home as an asset or from having a lien against the home after her death. But whether or not various options were viable or not is not the issue. The issue is whether he recommended and went along with an option that gave rise to a conflict of interest on his part without obtaining informed consent in writing from LZ.

There was necessarily a significant risk under the circumstances that Respondent's advice to LZ would be colored by his personal interests. LZ's home was a significant asset. Moreover, as Respondent himself conceded during the hearing, there is always a significant risk associated with using an ELE deed for estate planning purposes: "[I]f that person [to whom the ownership of the property is granted under the deed] doesn't want to fulfill your wishes and just says, I – I'm just going to take the money for myself and put it in my pocket, you know, that's – that's the danger in these Lady Bird Johnson type deeds." Transcript, 7/23/21, at 44. Even assuming Respondent never intended to "take the money and put it in [his] pocket", Respondent placed himself in the position where he could do so.

Respondent has testified and argued that he did not favor the ELE deed approach as a first option; that he advised LZ to sell her home and go to assisted living with the proceeds; that LZ declined to leave her home and that she wanted her home to be left for her heirs; that she insisted that she could not trust anyone other than Respondent; and that he only went forward with naming himself in the ELE deed and accompanying will (in combination with the purported oral trust) because he feared that LZ would lose her property to Medicaid and that there would be nothing left for her heirs if he did not agree to the arrangement. There is no meaningful way to test Respondent's account now that his client is deceased. Moreover, a lawyer is not permitted to blame a transgression of the rules on his or her client. Respondent's obligation was to inform LZ that she would have to obtain legal representation from a disinterested attorney and that he could not represent her in making those decisions and in drafting documents that conveyed property to him and made him the sole beneficiary of her estate.[10]

[10] Respondent's assertion that but for Respondent's agreeing to these arrangements, LZ would have lost her property to Medicaid amounts to speculation and a look-back in time. It is not clear what would have happened if Respondent had insisted that LZ obtain representation from a disinterested lawyer. Moreover, there is no exception along these lines in Rule 1.7.

Finally, the Panel concludes that Respondent did not obtain informed consent from LZ, "confirmed in writing," Rule 1.7(b)(4), and therefore could not meet the requirements of the exception set forth in Rule 1.7(b) that can potentially allow a lawyer to proceed with representation notwithstanding a conflict of interest involving a current client. "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rule 1.0(e).

"Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. The information required depends on the nature of the conflict and the nature of the risks involved." *Id*., Comment [18].

"Informed consent in writing" may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. *** If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b)." *Id*., Comment [20]. "[T]he writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing." *Id*. Respondent did not secure informed consent in writing from LZ in connection with the ELE deed and will.

In sum, Respondent violated Rule 1.7(a)(2) by providing legal advice to LZ that included the drafting and presentation of legal documents that gave him interests in his client's real property and her estate.

* * *

Rule 1.8(c) of the Vermont Rules of Professional Conduct provides as follows:

> A lawyer shall not *solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer* or a person related to the lawyer *any substantial gift unless the lawyer or other recipient of the gift is related to the client*. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

V.R.Pr.C. 1.8(c) (emphasis added).

Comment [7] states that:

> If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this rule is where the client is a relative of the donee.

Id., Comment [7].

Count 1 of the petition of misconduct alleges that Respondent violated this rule by "solicit[ing] a substantial testamentary gift . . . by recommending that [LZ] bequeath and devise her personal and real property to him." Count 2 alleges that Respondent violated the rule by preparing the 2014 ELE deed and will.

The Panel concludes that Disciplinary Counsel has not demonstrated, by clear and convincing evidence, that Respondent solicited a gift from LZ. The evidence presented to the Panel was conflicting.

On one hand, the 2014 will and deed constitute some evidence that Respondent solicited substantial gifts from LZ. The will made Respondent the sole beneficiary of her estate and the deed conveyed to him a future interest in LZ's home.[11] These legal instruments clearly resulted from Respondent's interactions with LZ.

[11] Respondent does not contest that these instruments, on their face, conveyed "substantial" property interests to Respondent.

In addition, the absence of any written trust agreement or any contemporaneous memorialization of an oral trust agreement, including any memorialization of who constituted the beneficiaries and how property was to be distributed to beneficiaries, constitutes some evidence that Respondent in fact sought to obtain gifts from LZ through these legal instruments.[12] Likewise, Respondent's sale of the house using his name, without indicating that he was acting as a trustee, and his placement of the proceeds from the sale of LZ's automobile and the $10,000 deposit for the purchase of the house into his personal bank account and failure to set up a free-standing trust account for the proceeds from the sale of both the automobile and the house were not consistent with his claim that he was proceeding on the basis of an oral trust agreement.[13] The Panel also notes that Respondent's repeated failure to notify any beneficiary that he was serving as a trustee and his failure to provide any reports or accountings of his undertakings in connection with the home and automobile and LZ's personal possessions can be viewed as conduct consistent with an attempt to conceal an intention to keep the property for himself.

On the other hand, there was evidence suggesting that Respondent, in his interactions with LZ and in preparing and presenting the documents to LZ, was not soliciting a gift for himself but, rather, attempting to accommodate LZ's desire to stay in her home while at the same time creating a legal framework that would keep LZ's home from being counted as an asset by the Medicaid Program, or ultimately being taken by Medicaid, if long-term care was required for LZ at some point in time. There was Respondent's own testimony to this effect as to his

[12] As noted in the findings of fact, the handwritten notes generated by Attorney Sullivan were cursory and ambiguous. They did not constitute a memorialization of the terms of an oral trust.

[13] While Respondent did place the proceeds from the sale of the house into his law firm IOLTA account, he did so only after Ms. Broza and Attorney Getty had inquired and, therefore, could be viewed as part of a decision on Respondent's part to change course and distribute the assets as a result of the inquiries he had received. In any event, if in fact he was intending to proceed as a trustee (not as an attorney) he should logically have set up a free-standing trust account for those funds.

interactions with LZ.[14] There was also testimony presented that Respondent asked Carl Wener for the address of his sons, which Mr. Wener understood to mean that a distribution would be made to his sons, and that Respondent also asked Ms. Broza's son, Michael, for his brother's address. And JF testified that he was told by Respondent, in connection with discussions concerning the sale of the house in the summer of 2019 that the proceeds were going to be distributed to LZ's heirs.[15]

The Panel has considered the fact that the deposit into Respondent's personal bank account of the $1,000 received from the sale of the automobile and the home buyer's $10,000 deposit, although certainly not an ideal course of action for a trustee, can be plausibly explained in light of the fact that following LZ's death the only funds available to carry the house expenses and prepare the house for sale were Respondent's personal funds. It is significant, in this regard, that a very substantial amount of expenses had already been incurred by Respondent from his personal bank account prior to receipt and deposit of the $11,000 in that account. And, finally, while Respondent's ongoing failure to provide information to the individuals he claims are the beneficiaries of an oral trust might not be consistent with the fiduciary obligations of a trustee, that failure does not necessarily demonstrate an intent to keep the proceeds for himself.

In sum, after weighing the totality of the evidence, the Panel concludes that while Disciplinary Counsel presented some evidence in support of the charge of solicitation, the Panel cannot conclude that it was "highly probable" that Respondent solicited gifts from LZ.

[14] Of course, one major limitation on Respondent's testimony is that there was no way to test his account of his interactions with LZ with LZ being deceased and no written informed consent document or other explicit memorialization of their discussions available.

[15] Respondent argues that later conversations he had with Attorney Getty in the fall of 2019 and with Bar Counsel in January 2020 also corroborated his testimony. However, these later conversations carry little if any weight. Attorney Getty was, in effect, investigating Respondent's conduct and representing someone who might conceivably have filed suit against Respondent if he had declared the property to be his own. Bar Counsel was obviously inquiring about potential violations of the Code of Professional Responsibility. Therefore, these later statements carry no significant weight.

* * *

However, the Panel concludes that Respondent violated Rule 1.8(c) by *preparing* the 2014 ELE deed and will. Violations of the prohibition against preparing an instrument that gives a substantial gift to a lawyer or a person related to the lawyer have been routinely found when a lawyer drafts a will that confers beneficiary status on the lawyer or a person related to the lawyer. *See, e.g., In re Disciplinary Matter Involving Stepovich*, 386 P.3d 1205, 1206 (Aka. 2016) (finding a violation where lawyer drafted a will naming himself the sole contingent beneficiary of the client's estate); *In re Schenk*, 194 P.3d 804, 814 (Or. 2008) (finding a violation where lawyer drafted will that bequeathed antiques and furniture to his wife worth $1,000 and that made her a residuary beneficiary); *In re Devaney*, 870 A.2d 53, (D.C. 2005) (finding a violation where lawyer drafted a will that left $10,000 and items of personal property to his wife); *In re Grevemberg*, 838 So.2d 1283, 1287 (La. 2003) (finding a violation where lawyer "prepar[ed] a will making a testamentary bequest to himself and, alternatively, to his wife."); *cf. In re Polevoy*, 980 P.2d 985, 987 (Colo. 1999) ("Preparation of a will in which the lawyer will be a beneficiary is conduct for which a lawyer will be disciplined.").

Respondent's assertion that he did not understand the documents as conferring a gift on him, but rather that he viewed the deed and will to be in furtherance of an oral trust agreement whereby he would serve as trustee for the benefit of LZ's heirs does not constitute a defense. The prohibition in Rule 1.8(c) is plainly worded and without exception. Indeed, similar arguments have been rejected in other jurisdictions. *See, e.g.*, *In re Gildea*, 325 Or. 281, 292, 936 P.2d 975, 981 (1997) ("[W]we are mindful that the accused does not appear consciously to have considered the transaction a gift. Indeed, after the gift was made, the accused placed the funds that he received on the trust deed into [his client's] trust account, once he was sure that Medicaid would not take those funds. But the accused's subsequent acts, while perhaps relevant to the question of sanction, cannot change the legal effect of the preparation of the assignment.").

Moreover, Respondent fails to address the fact that even assuming he did not intend, at the time he prepared the ELE deed and will, to keep LZ's real property or to claim LZ's property under the will following her death he, nevertheless, placed himself in a position where he could do so. Respondent himself acknowledged that risk in his testimony. Under Rule 1.8(c) what appears on the face of the documents prepared by Respondent is controlling.

In sum, Respondent's preparation of the 2014 ELE deed and will violated Rule 1.8(c).[16]

* * *

The Panel emphasizes that it is not making any factual or legal determination as to whether an oral trust was created; and, if so, who are the beneficiaries of that trust; and, if not, whether a trust should be imposed at this time on the proceeds of the sale of LZ's car and house and her remaining personal property and in whose favor. This Hearing Panel is an administrative body of limited jurisdiction. It has a narrow charge: to determine whether violations of the Rules of Professional Conduct have been committed. It is not a court of law. It was not necessary for the Panel to decide these issues in order to adjudicate the charges before it.

Moreover, persons that could have an interest in these issues and who could conceivably claim standing to litigate such issues, and to assert any related claims, are not parties in this proceeding and have not been able to present evidence or challenge any evidence. Respondent's testimony that as of the date of the merits hearing he had still not notified any of the individuals who he identified in his testimony (for the first time) as beneficiaries of the purported oral trust, as well as the fact that none of the purported beneficiaries testified at the hearing, further support the Panel's decision not to adjudicate these issues.

[16] The fact that Attorney Sullivan brought the deed and will to LZ and handled the execution does not relieve Respondent of the violation. Respondent was the person who drafted the instruments. In addition, the prohibition in Rule 1.8(c) extended to Attorney Sullivan because he was in the same firm as Respondent at the time. *See* V.R.Pr.C. 1.8(k) ("While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.").

Likewise, the Panel does not reach any determination regarding whether Respondent's conduct either complied with or violated any Medicaid law or regulation. Such an adjudication was not necessary to the Panel's decision. Moreover, Medicaid laws and regulations are complicated and there was no evidence presented directly from the agency of state government that enforces those laws and regulations. Accordingly, the Panel is not making any determination regarding the applicability of the Medicaid laws and regulations to the 2014 will and deed and Respondent's claim of an oral trust agreement.

SANCTIONS DETERMINATION

The Vermont Rules of Professional Conduct "are 'intended to protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar.'" *In re PRB Docket No. 2006-167*, 2007 VT 50, ¶ 9, 181 Vt. 625, 925 A.2d 1026 (quoting *In re Berk*, 157 Vt. 524, 532, 602 A.2d 946, 950 (1991)). The purpose of sanctions is not "to punish attorneys, but rather to protect the public from harm and to maintain confidence in our legal institutions by deterring future misconduct." *In re Obregon*, 2016 VT 32, ¶ 19, 201 Vt. 463, 145 A.3d 226 (quoting *In re Hunter*, 167 Vt. 219, 226, 704 A.2d 1154, 1158 (1997)).

Applicability of the ABA Standards for Imposing Lawyer Sanctions

Hearing panels are guided by the ABA Standards when determining appropriate sanctions for violation of the Vermont Rules of Professional Conduct:

> When sanctioning attorney misconduct, we have adopted the *ABA Standards for Imposing Lawyer Discipline* which requires us to weigh the duty violated, the attorney's mental state, the actual or potential injury caused by the misconduct, and the existence of aggravating or mitigating factors.

In re Andres, 2004 VT 71, ¶ 14, 177 Vt. 511, 857 A.2d 803. "Depending on the importance of the duty violated, the level of the attorney's culpability, and the extent of the harm caused, the standards provide a presumptive sanction. **** This presumptive sanction can then be altered

depending on the existence of aggravating or mitigating factors." *In re Fink*, 2011 VT 42, ¶ 35, 189 Vt. 470, 22 A.3d 461.

The Duty Violated

The ABA Standards recognize a number of duties that are owed by a lawyer to his or her client. *See Standards for Imposing Lawyer Sanctions* (ABA 1986, amended 1992) (*"ABA Standards"*), Theoretical Framework, at 5. "The standards assume that the most important ethical duties are those obligations which a lawyer owes to clients." *Id*. Other duties are owed to the general public, the legal system, and the legal profession. *Id*.

Respondent's violations of Rule 1.7(a)(2) and Rule 1.8(c) violated a duty of loyalty to his client. The duty of loyalty includes a duty to "avoid conflicts of interest." *Id*.

Mental State

"The lawyer's mental state may be one of intent, knowledge, or negligence." *ABA Standards*, § 3.0, Commentary, at 27. For purposes of the sanctions inquiry, "[a lawyer's] mental state is [one] of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result." *Id.*, Theoretical Framework, at 6. The mental state of "knowledge" is present "when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct [but] without the conscious objective or purpose to accomplish a particular result." *Id*. The mental state of "negligence" is present "when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." *Id*.; *see also id.*, at 19 (definitions of "intent," "knowledge," and "negligence").

The Supreme Court has observed that "[t]he line between negligent acts and acts with knowledge can be fine and difficult to discern . . . ." *In re Fink*, 2011 VT 42, ¶ 38. In addition, the Court has concluded that while a lawyer's constructive knowledge, in contrast to a lawyer's subjective belief, may support a determination that an ethics violation has occurred, "[i]n the

context of sanctions . . . knowing conduct does not encompass both knew or should have known." *Id*. ¶ 38. In reaching this conclusion, the Court has reasoned that "[i]f the definition [of the term 'knowledge'] extended to constructive knowledge, then no misconduct would be negligent because rather than failing to heed a substantial risk we would always assume the lawyer should have known the substantial risk." *Id*. ¶ 41.

Based on the evidence presented, the Panel concludes that Respondent's state of mind under the circumstances is properly characterized as that of "knowledge." Respondent had full knowledge of his conduct – he drafted the documents in question. And the conflict of interest was apparent in the documents that he generated.

Respondent maintains that he believed he was acting pursuant to a trust agreement and not receiving gifts from LZ through the legal instruments he drafted; and that, therefore his state of mind was negligent. But the Panel declines to so find. As noted above, there was a substantial amount of evidence presented to the Panel that would suggest that Respondent was in fact soliciting a gift from LZ – even though the Panel has concluded that there was conflicting evidence to an extent that Disciplinary Counsel did not prove solicitation by clear and convincing evidence. Moreover, the fact that there was no written trust agreement and that Respondent never memorialized in writing the terms of an oral trust agreement or obtained informed consent in writing from his client casts doubt on his assertion. And, finally, the Panel takes into consideration the fact that LZ is not available as a check on Respondent's account. Under all these circumstances, the Panel concludes that Respondent has not demonstrated – even by the lower preponderance of the evidence standard – that his intent when he drafted the documents in 2014 was to serve as a trustee for the benefit of others.

The fact that Respondent sent another attorney to deliver the documents and witness their execution also supports a knowing state of mind. Although Attorney Sullivan went along with the request by Respondent he did so only after initially expressing concern about the thrust of the

documents. Finally, Respondent testified that he advised LZ to designate someone else under the will and deed and to consult with another lawyer but that she rejected that advice. All of these considerations together justify a conclusion that Respondent acted knowingly. *See, e.g.*, *Stepovich*, 386 P.3d at 1209-10 (lawyer's state of mind was knowing because he knew the will he drafted made him a contingent beneficiary and because "he testified that he counseled his client against naming him as beneficiary and told the client he could have another attorney advise him").

Injury and Potential Injury

The ABA Standards consider "the actual or potential injury caused by the lawyer's misconduct." *ABA Standards*, § 3.0(c), at 26. The term "injury" is defined as "harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. The level of injury can range from 'serious' injury to 'little or no' injury." *Id*., Definitions, at 9. The term "potential injury" refers to harm that is "reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct." *Id*. Under the ABA Standards, "[t]he extent of the injury is defined by the type of duty violated and the extent of actual or potential harm." *Id*. at 6.

Respondent's conduct caused harm to his client because it resulted in the absence of independent advice. *See, e.g.*, *Stepovich*, 386 P.3d at 1210 ("The injury we address here is the frustration of the client's right to 'detached advice,' which in turn raises questions of undue influence and the will's validity."). The court in *Stepovich* discussed a number of problematic consequences that typically flow from such misconduct:

> [S]ome of the dangers created when an attorney prepares a will in which the attorney is named as beneficiary, include the attorney's incompetency to testify, . . . the attorney's ability to influence the testator, . . . jeopardy to probate of the entire will if its admission is contested, . . . harm to other beneficiaries, and the undermining of the public trust and confidence in the legal profession. *** Once deceased, of course, the client will have no

> opportunity to protect himself from the attorney's negligent or infamous misconduct.

Id. at 1210-11 (quotations omitted) (further observing that "[s]eldom is the client's dependence upon, and trust in, his attorney greater than when, contemplating his own mortality, he seeks the attorney's advice . . . in the preparation of a will."); s*ee also, e.g., In re Grevemberg*, 838 So.2d at 1288 (concluding that respondent's drafting of will that included bequests to himself and his wife caused "*de facto* harm" to the client "[b]y depriving his client of the opportunity for . . . independent advice."); *Schenck*, 194 P.3d at 816 (recognizing that potential injury was sufficient to support sanction where will drafted by lawyer was delivered but never executed).

There was actual harm and potential harm along these lines in this case. As a result of Respondent's misconduct, the ELE deed and 2014 will could conceivably be challenged by one or more heirs. Moreover, because LZ is deceased, she cannot take issue with Respondent's claim of a trust agreement or contest the distribution that Respondent proposes to make. Moreover, LZ's heirs have no way to determine with confidence that LZ was not the subject of undue influence, and they have no way of knowing whether Respondent's identification of intended beneficiaries and the proposed formula of distribution – the beneficiaries and terms of distribution of which deviate substantially from the 2011 will – are actually what LZ intended. Finally, in the absence of any written memorialization of a trust agreement, the intended beneficiaries (whoever they might be) could conceivably have been deprived of their inheritance if Respondent had died before the various inquiries caused him to declare that he was administering a trust. In sum, serious harm to the client and to potential beneficiaries and to the legal profession resulted from Respondent's conduct.

On the other hand, it is necessary to temper this assessment of harm somewhat by recognizing that Respondent secured the house and paid related expenses necessary to maintain it; that he completed a sale of the house; that the proceeds from the sale of LZ's house and

automobile have been collected for eventual distribution and have not been dissipated by Respondent; and that Respondent eventually disclaimed any claim to LZ's property through the 2014 will and ELE deed.

Presumptive Standard under the ABA Standards

The Panel concludes that § 4.32 of the ABA Standards is applicable in this case. It states as follows:

> Suspension is generally appropriate when a lawyer *knows* of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

ABA Standards, § 4.32 (emphasis added).

As previously discussed in this decision, Respondent's state of mind is appropriately considered to be that of knowledge under the circumstances. Accordingly, the Panel concludes that the "knowing" standard is applicable and that the negligence standard calling for a public reprimand, § 4.33, is not appropriate.

The Panel also concludes that § 4.31, which provides for disbarment, is not appropriate in this case. The pertinent language provides for disbarment "when a lawyer, without the informed consent of client(s), engages in representation of a client knowing that the lawyer's interests are adverse to the client's *with the intent to benefit the lawyer or another* . . . ." (emphasis added). There was not clear and convincing evidence presented to the Panel that Respondent intended to benefit himself or a third person.

Aggravating and Mitigating Factors Analysis

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

Id. § 9.31, at 50-51. Following this analysis, the Panel must decide on the ultimate sanction that will be imposed in this proceeding.

(a) Aggravating Factors

The following aggravating factors under the ABA Standards are present:

§ 9.22(g) (refusal to acknowledge wrongful nature of conduct) – Of course, Respondent had a right to dispute the allegations of misconduct against him and his defense of the charges cannot be held against him. But his effort to place blame on his elderly client for his misconduct rises to the level of an aggravating factor.

Respondent attempted to shift the blame for his conduct to LZ by claiming that he only acceded to being named executor and beneficiary under the will and grantee under the ELE deed because she had insisted he was the only person she could trust and that she had declined to consult with another attorney. But there was no basis to interpret the rules in question as allowing such a defense. The prohibitions and requirements of the rules in question are plain on their face and intended to ensure that clients receive independent legal advice. Moreover, Respondent's assertion was untenable in light of the fact that there was no informed consent in writing from LZ and no memorialization of any trust agreement. Under these circumstances, the Panel concludes that Respondent refused to acknowledge the wrongfulness of his conduct.

§ 9.22(h) (vulnerability of victim) – LZ was elderly and in declining health at the time that Respondent provided legal services to her in connection with 2014 will and ELE deed. She was making "end of life" decisions at an advanced age and at a time when her health was declining. Accordingly, she is appropriately considered to have been a vulnerable individual at the time in question.

§ 9.22(i) (substantial experience in the practice of law) – The courts recognize experience exceeding ten years to be substantial. *See In re Wysolmerski*, 2020 VT 54, ¶ 47

(citing cases applying substantial experience aggravator to experience of approximately twenty years). Respondent has practiced law for over forty (40) years.[17]

(b) Mitigating Factors

Section 9.32 of the ABA Standards sets forth a list of mitigating factors. *ABA Standards*, § 9.32, at 51. The Panel concludes that the following mitigating factor applies:

§ 9.32(a) (absence of prior disciplinary record) – Disciplinary Counsel has represented to the Panel that Respondent has no prior disciplinary record.

§ 9.32(e) (full and free disclosure to disciplinary board or cooperative attitude toward proceedings) – Respondent was cooperative throughout the investigative process and disciplinary proceeding.

(c) Weighing the Aggravating Mitigating Factors

The aggravating factors slightly outnumber the mitigating factors and merit considerable weight. However, the Panel also gives significant mitigating weight to the absence of any prior disciplinary record over the course of more than forty years of practice in Vermont. Moreover, although not listed as one of the mitigating factors under the *ABA Standards*, the Panel has considered the fact that Respondent has contributed to his community over the years in many ways on a volunteer basis. Taking into account all of these considerations, the Panel concludes that the balance of the aggravating and mitigating factors does not justify either an increase or decrease of the presumptive sanction of suspension.

* * *

[17] Disciplinary Counsel has requested that the Panel find the additional aggravating factor of "indifference to making restitution," § 9.22(j), based on the fact that Respondent has not made any distribution of proceeds to those individuals he considers to be LZ's beneficiaries. Respondent testified that he has held off distributing the proceeds for the time being in light of the dispute between the parties in this proceeding concerning his claim of an oral trust. That position is not unreasonable given that he was contacted initially by Bar Counsel in January 2020, before the house was sold. The Panel therefore declines to apply this factor.

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." *ABA Standards*, Part IV, Standards for Imposing Sanctions, at 20. The recommendation of a minimum length of suspension is persuasive but not binding on the Panel. *See, e.g.*, *In re McCarty*, 164 Vt. 604, 605, 665 A.2d 885, 887 (1995) ("periods of suspension of less than six months are appropriate in some circumstances"); *In re Blais*, 174 Vt. 628, 631, 817 A.2d 1266, 1270 (2002) (five-month suspension plus probation imposed).

The Panel must ultimately determine the length of the suspension that will be imposed based on all the considerations presented. 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 case under consideration bears some compelling similarities to *In re Bowen*, 2021 VT 7, __ Vt. __, 252 A.3d 300.

In *Bowen*, the respondent was found to have violated the conflict-of-interest provision in Rule 1.8 prohibiting a lawyer from "us[ing] information relating to representation of a client to the disadvantage of the client unless the client gives informed consent," V.R.Pr.C. 1.8(b), and the provision in Rule 1.9(c)(2) prohibiting a lawyer from revealing information relating to the representation of a former client. The Supreme Court affirmed the hearing panel's conclusion that respondent acted knowingly – rejecting respondent's assertion that his conduct was negligent – and that the presumptive sanction of suspension under ABA Standard 4.32 was applicable. The following aggravating factors were recognized: a dishonest and selfish motivation; substantial experience in the practice of law; and respondent's refusal to acknowledge the wrongful nature of his conduct. *Id.* ¶ 44. The following mitigating factors

were found: no prior disciplinary history "despite [respondent's] long career" and respondent's cooperative attitude toward the disciplinary proceeding. *Id*. ¶ 45.

The Court ultimately concluded that a three-month suspension was necessary, "not as punishment, but in order to maintain public confidence in our legal institutions." *Id*. ¶ 50. It reasoned as follows:

> Given respondent's knowing mental state with respect to both violations, his dishonest and selfish motivation, and the fact that he violated the most important ethical duty owned by an attorney – his duty to his clients – an admonition or public reprimand would be insufficient to maintain confidence in our legal system. *** Trust and confidence form the foundation of the attorney-client relationship.

Id. ¶ 49.

The mitigating factors in this case are essentially the same factors present in *Bowen*. Like the respondent in *Bowen*, Respondent in this case has no prior disciplinary record and has been cooperative throughout the proceeding. The *Bowen* decision's emphasis on an aggravating factor not present in the current case – respondent's dishonest and selfish motivation – suggests one possible distinction. But the current case includes an aggravating factor not present in *Bowen* – the fact that LZ was a vulnerable individual.

In the final analysis, the Panel concludes that the *Bowen* case involves a comparable violation of a core duty to the client – a conflict of interest arising from a lawyer's self-interest – and that the sanctions analysis is comparable. Accordingly, the Panel concludes that a 3-month suspension is the appropriate sanction for Respondent's misconduct in this case.

ORDER

It is hereby ORDERED, ADJUDGED and DECREED as follows:

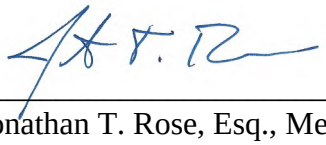
1. Respondent, Paul Kulig, Esq., has violated V.R.Pr.C. Rule 1.7(a)(2) and Rule 1.8(c), as set forth above;

2. Respondent is suspended from the office of attorney and counselor at law for a period of three (3) months, to commence fourteen (14) days following the date of this decision.

Dated: September 27, 2021

Hearing Panel No. 8

Jennifer E. McDonald, Esq., Chair



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