STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

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

Decision No. 242

Disciplinary Counsel filed a petition of misconduct against Respondent, Melvin Fink, Esq. Evidence was presented by the parties at a merits hearing held on September 27, 2021. Respondent submitted a pre-hearing memorandum on or about July 26, 2021. Respondent submitted a post-hearing memorandum on October 15, 2021, and Disciplinary Counsel submitted proposed findings of fact and conclusions of law on October 25, 2021.

Based on the admissions in Respondent's Answer to the Petition of Misconduct and the credible evidence presented at the merits hearing, the Hearing Panel finds and concludes that Respondent violated V.R.Pr.C. 4.2, the rule that prohibits a lawyer from communicating directly with a person the lawyer knows to be represented by another lawyer without first having obtained the consent of the other lawyer.

FINDINGS OF FACT

Respondent is a Vermont-licensed attorney who maintains a solo law practice. He has been practicing law for approximately fifty years. He maintains an active general law practice, including family law cases. At this time, he has approximately twenty family law cases that are active.

Beginning in 2019 Respondent began providing legal services to an individual ("Wife") in connection with a divorce matter. Respondent eventually filed a divorce action on Wife's behalf.

Prior to the filing of the divorce action, Husband approached Respondent about the possibility of representing Husband. Respondent had represented Husband's mother in a divorce proceeding many years earlier. Respondent informed Husband that he could not represent Husband because he had already been hired by Wife to represent her.

On May 13, 2020, Respondent sent a settlement proposal to Wife's Husband "to settle all outstanding issues regarding the dissolution of your marriage." Ex. DC-1. The transmittal letter from Respondent further stated: "I represent [Wife] alone. I cannot give you legal advice. If you want legal advice then you should seek the representation of an attorney and deliver this material to him or her." *Id*. In addition, Respondent indicated that he would file a divorce complaint if the proposed settlement agreement was not returned by May 27.

On May 22, Respondent wrote another letter to Husband modifying the earlier proposed settlement agreement to address an issue that Husband had raised with Wife regarding the need to remove his name from an existing mortgage on jointly owned property so that he could secure a bank loan in connection with another property in order to facilitate a property distribution agreement ("the mortgage release issue"). Respondent reminded Husband that "[once] again if you are being represented then you should turn this information over to your attorney." Ex. DC-2. Husband did not respond to either communication from Respondent.

At some point in May, Husband hired a local lawyer experienced in the practice of family law to represent him in connection with the divorce matter and provided to her the correspondence he had received from Respondent. On June 1, Husband's lawyer sent an email to Respondent. The email stated: "I am working with [Husband] on this divorce matter. Accordingly, please send all correspondence to [Husband] to me from now on." Ex. DC-3. The email indicated that Husband had provided the lawyer with the May 13 settlement proposal and

subsequent communication from Respondent and set forth an alternative proposal regarding the procedure by which Wife would release the mortgage. It closed by stating that "I look forward to hearing from you and working with you to help ou[r] clients end their marriage peacefully and with a minimum of court involvement."

On June 3, Respondent sent a letter to Husband's lawyer that reiterated Wife's original proposal regarding the release of the mortgage. The letter also extended the deadline for Husband to sign the proposed agreement from May 27 to the end of that week.

Husband's lawyer responded by email that same day rejecting the proposal regarding the mortgage release procedure, explaining Husband's reasons, and presenting an alternative proposal. With respect to Respondent's statement that he would proceed to file suit if agreement were not reached by the parties, Husband's lawyer stated as follows:

> As for your deadline, the proposed agreement is not acceptable and [Husband] is not going to sign it, no matter the deadline. I will be happy to work with you to come up with an agreement that both parties can sign. Until then, you are free to file whatever appropriate court action you wish. *** This case will not be ripe for a final hearing until fall, and – given the COVID restrictions – it is not likely to be reached for that until some time next year. As an agreement would allow the court to issue a final order without a hearing as soon as the six-month separation has been met, continuing to work toward that goal will likely be the best way to get this divorce concluded for both parties as soon as possible. I look forward to hearing from you.

Ex. DC-5.

Respondent sent Husband's lawyer an email on June 4 indicating that Wife's settlement proposal would be withdrawn at the close of business on June 5 unless Husband signed Wife's proposal.

On June 12, Husband's lawyer sent an email to Respondent to report that Husband had been approved by the bank for a loan with certain conditions that included the mortgage release

and the release of Husband from a joint loan commitment with Wife related to a camper. Husband's lawyer indicated that, together with other funding, the loan amount would enable Husband to make full payment to Wife under the proposed property distribution agreement. The email included a proposal that would result in Wife releasing Husband from the joint debts and Husband conveying his property interests in the real property and the camper to Wife.

Respondent replied that day rejecting the proposal and extending the prior offer to the close of business on June 17. *See* Ex. DC-8. Husband's lawyer, in turn, replied to "reiterate [that] the proposed agreement is not acceptable and will not be signed," Ex. DC-9, while indicating that she would meet with Husband to try to formulate another proposal.

On June 26, Respondent filed a divorce complaint on behalf of Wife in the Family Division of the Superior Court and arranged for the complaint to be served on Husband. A return of service was filed; however, the summons had not been signed and therefore the service was not effective. On July 20, Husband signed an acceptance of service form for the complaint. On July 29, Husband filled out and dated a Notice of Appearance, Answer to the Complaint and Counterclaim using a Family Division form. The Notice of Appearance form included the following language: "I intend to represent myself and hereby enter my appearance with the Court. No attorney will represent me in this case unless an attorney or I notify the Court otherwise." Ex. DC-10. Husband's lawyer did not enter an appearance on his behalf, although she notarized the filing for Husband. At the time of the filing, Husband was continuing to receive legal advice from the same lawyer he had been consulting and had authorized her to continue representing him in negotiations with Wife's lawyer. Husband's filing was received by the Court on August 3.

On July 31, Respondent wrote to Husband's lawyer to advise her that Wife had received a government stimulus check payable to Husband and Wife and proposing that "[i]f you and your client will agree to equally dividing the payment then I will send it along for endorsement, return, further endorsement and distribution of $1,200.00 to each." Ex. DC-11. Husband's lawyer responded the same day that Husband was amenable to doing so and she proposed a process for Husband to endorse the check and receive his one-half share from Wife.

On July 31, Husband's lawyer sent an email to Respondent to report that Husband had obtained a conditional loan commitment from the bank for the full amount of the payment contemplated in the property distribution framework being discussed by the parties. The bank's conditions were that Husband be released from the mortgage and the camper loan commitment. The lawyer stated her understanding that the parties had agreed that the camper would go to the Wife in the divorce settlement and further stated that "[i]t is my understanding that the parties want this divorce agreement done as soon as possible, which is September 24, given the separation date. Please let me know your client's position regarding [Husband's] settlement proposal." Ex. DC-13.

Respondent did not respond either verbally or in writing to Husband's lawyer's July 31 email. Respondent and Husband's lawyer had no further communications between Husband's lawyer's July 31 emails and August 17.

On August 17, Respondent telephoned Husband and left a voice message. Husband returned the phone call that same day, and he and Respondent spoke for approximately six minutes. During the phone call, Respondent invited Husband to come to Respondent's office to "sit down and talk" and try to reach an agreement with respect to the divorce matter. Husband responded that he "really wanted to move forward to get the matter resolved" and stated "let me

get a hold of my lawyer." Respondent then stated to Husband that "technically she doesn't have to be here" and "I see you filed a pro se appearance."[1] Respondent and Husband proceeded to agree on a date and time for the meeting. Respondent and Husband did not discuss any specific substantive issues concerning the divorce during the conversation.

Respondent's statement that Husband's lawyer did not have to be present for the meeting because Husband was proceeding "pro se" in the lawsuit made Husband feel uncomfortable. Following the conversation, Husband immediately called his lawyer and informed her of his phone conversation with Respondent. Husband's lawyer, in turn, promptly emailed Respondent objecting to Respondent having called her client without permission to do so. Husband's lawyer proposed a settlement conference with the parties and their counsel present. *See* Ex. DC-14.

On August 21, Respondent replied to the email, stating as follows: "Don't pontificate to me. [Husband] filed a pro se appearance. He represents himself, period." Ex. DC-14. Respondent did not indicate that he would henceforth cease direct contact with Husband.

On August 24, Husband's lawyer replied to Respondent's email, stating as follows:

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

Id.

Respondent did not answer this August 24 email message from Husband's lawyer. Following his phone call with Respondent on August 17 and the email exchange with Husband's lawyer, Respondent has not made any further attempts to communicate with Husband directly.

[1] The quoted language in this paragraph was alleged in the Petition of Misconduct and admitted by Respondent in his Answer.

Husband's lawyer did not at any point in time advise Respondent that she was no longer representing Husband or give Respondent permission to communicate directly with Husband about the divorce matter. Prior to telephoning Husband on August 17, Respondent did not attempt to contact Husband's lawyer to inquire as to whether she was still representing Husband.

On October 6, Husband's lawyer filed a notice of appearance on behalf of Husband in the divorce proceeding pending in the Windsor Family Division.

CONCLUSIONS OF LAW

Disciplinary Counsel alleges that Respondent's conduct violated Rule 4.2 of the Vermont Rules of Professional Conduct. Disciplinary Counsel bears the burden of proof, see A.O. 9, Rule 20(D), and must prove a violation by the standard of "clear and convincing" evidence. *Id*., 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 4.2, sometimes referred to as the "no-contact" rule, provides as follows:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

V.R.Pr.C. 4.2.

The comments to the rule explain that "[t]his rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference

by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation." *Id.*, Comment [1]. Moreover, the represented person with whom a lawyer is communicating cannot waive Rule 4.2: "This rule applies even though the represented person initiates or consents to the communication. *A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule.*" *Id.*, Comment [3] (emphasis added). Rule 4.2 includes a state-of-mind requirement: "The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f)." *Id.*, Comment [8].

The dispute between the parties centers on the August 17 phone call between Respondent and Husband. Respondent maintains that there is insufficient evidence on which to conclude that Respondent had actual knowledge that Husband was still being represented at the time he placed the phone call to Husband. Respondent argues that Husband's filing of a "pro se" notice of appearance and the lack of communication from Husband's lawyer between the date Husband's notice of appearance was filed (August 3) and the date of the phone call (August 17) suggested that Husband was not still being represented by a lawyer. He cites to the language in the notice of appearance form expressly stating that Husband was not going to be represented by a lawyer in the divorce proceeding.

Disciplinary Counsel maintains that Respondent was well aware that Husband had hired a lawyer to negotiate with Respondent, even though the lawyer had not entered an appearance for

Husband in the court case at that point in time; and that the two lawyers had exchanged multiple settlement communications, including a settlement proposal from Husband's lawyer on July 17.

Respondent's argument focuses on one point in time – when the call "was placed." Supplemental Mem., 10/15/21, at 1. After reviewing the totality of the evidence, the Hearing Panel agrees that there was not clear and convincing evidence that Respondent had actual knowledge of the representation *at the point in time when he initiated the phone call to Husband*. Rather, the evidence presented to the Panel concerning Respondent's knowledge at that point in time was conflicting.

On the one hand, there was evidence presented from which it might be inferred that Respondent did, in fact, have knowledge that an attorney-client relationship was in place at the time the call was initiated. *See* V.R.Pr.C. 1.0(f) ("A person's knowledge may be inferred from circumstances."). The long history of negotiations between the two lawyers suggested ongoing representation. Multiple proposals had been exchanged. Husband's lawyer also indicated in one communication that if Wife proceeded to file the divorce action Husband would remain committed to trying to reach an agreement that would avoid the need for a final hearing. Moreover, the last communication between Husband's lawyer and Respondent – the email sent by Husband's lawyer on July 31 – was a settlement proposal that included an explicit request to "[p]lease let me know your client's position regarding [Husband's] settlement proposal," Ex. DC-13, further suggesting ongoing representation. Against that background, the fact that there was no subsequent notice from Husband's lawyer indicating that she was no longer representing Husband is also significant.

Respondent attempts to rely on the date the notice of appearance was received by the court for filing (August 3), as opposed to the date when the notice was signed by Husband (July

29), as evidence that Husband's lawyer had stopped communicating with Respondent after the pro se notice of appearance was filed. *See* Supp. Mem., 10/15/21, at 4. This argument fails to address the fact that the July 31 settlement proposal was sent two days *after* the notice of appearance was signed and dated by Husband, and that the July 31 email requested a response to the proposal – a response that Respondent never gave. Respondent fails to explain why the filing date should be considered more relevant on this issue than the date the notice was signed. In any event, the transmission of Husband's lawyer's July 31 proposal suggested that the lawyer was in fact continuing her representation.

On the other hand, there was conflicting evidence regarding Respondent's state of mind at the point in time when the phone call was placed. The express language of the notice of appearance stated unequivocally that no lawyer would represent Husband in the divorce proceeding. This language arguably injected some uncertainty into the situation. In addition, although she was not required to do so, the fact remains that Husband's lawyer did not affirmatively advise Respondent that she would still be representing Husband notwithstanding the filing of the pro se notice of appearance. Although Husband's lawyer may not have been required to provide such a notification,[2] an email or phone call to Respondent would have eliminated any uncertainty.

It also bears noting that while "a lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious," Rule 4.2, Comment [8], the rule does not

[2] Respondent argues that Husband's lawyer could not complain about Respondent contacting her client directly because she did not file a limited notice of appearance in the Family Division proceeding pursuant to V.R.F.P. 15(h)(1). Rule 15(h)(1) allows a lawyer to enter a limited appearance on behalf of a client who is proceeding pro se for purposes of handling certain specified activities in the litigation. The rule governs a lawyer's participation in litigation; it is not a prerequisite to providing legal services to a client who is attempting to control costs by handling related litigation pro se.

include a requirement to affirmatively inquire whether a person is represented. *See id*. (the prohibition "only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed.").[3] While the factual circumstances, including Respondent's failure to respond to the July 31 settlement proposal, suggest a possibility that Respondent actually believed Husband was still being represented and was intentionally using the pro se notice of appearance to go around Husband's lawyer, the pro se notice of appearance could plausibly have been a basis for Respondent to believe that Husband had decided to go forward without representation. Under the factual circumstances presented, the Panel cannot find by the exacting clear and convincing evidence standard that Respondent had actual knowledge of the representation *at the outset of the phone call*.[4]

[3] Notwithstanding Rule 4.2's lack of an affirmative requirement to inquire, ABA Formal Opinion 472 ("Communication with Person Receiving Limited-Scope Legal Services") (2015), recommends "in the circumstances where it appears that a person on the opposing side has received limited-scope legal services, [that] the lawyer *begin the communication* by asking whether the person is represented by counsel for any portion of the matter so that the lawyer knows whether to proceed under ABA Model Rule 4.2 or 4.3. This may assist a lawyer in avoiding potential disciplinary complaints." *Id*. at 6. This is a recommendation only.

[4] Citing *In re Smith*, 169 Vt. 617, 739 A.2d 1191 (1999), Disciplinary Counsel argues that Respondent had a duty under Rule 4.2 to call Husband's lawyer *before* he placed the phone call to Husband and that Respondent therefore violated the rule by failing to contact Husband's lawyer to confirm that she was no longer involved. In *Smith*, respondent had represented a husband in an action in which the husband sought a guardianship over husband's wife. The action, in which wife was represented by counsel, was eventually dismissed voluntarily. Approximately five months later, after respondent's client reported to respondent that his wife had discharged her lawyer – which turned out to be inaccurate – respondent made direct contact with the wife and arranged for her to sign documents that assigned various interests to her husband. The Court concluded that respondent could not rely on his client's assertion that the wife's lawyer had been discharged and that the parties were no longer adverse. It concluded that under the circumstances respondent had a duty to contact the wife's lawyer to confirm that she had been discharged. 739 A.2d at 1193. But *Smith* is distinguishable because it did not involve an intervening filing of a pro se notice of appearance affirmatively indicating that the party would not be represented by an attorney in the action. In addition, the current case does not involve a lawyer making direct contact with an adverse party on the basis of representations made by the lawyer's own client. Accordingly, *Smith* is not controlling.

However, Respondent's argument fails to address the knowledge that Respondent acquired *during the phone call*. The Hearing Panel concludes that Respondent violated Rule 4.2, not when he placed the call, but when he stated to Husband during the phone conversation that Husband's lawyer did not have to be present at a meeting that Respondent was attempting to schedule to discuss settlement of the divorce action. Immediately before making that statement to Husband, Respondent had been told by Husband that he wanted to "get a hold" of his lawyer for purposes of the meeting that Respondent was proposing. There is no question but that Respondent had actual knowledge at that point in time that Husband was being represented by a lawyer in connection with the matter. Yet Respondent proceeded to state to Husband that the lawyer did not have to be present at the meeting – a statement amounting to a suggestion that Husband meet without his lawyer present.

Upon being informed that a lawyer was still involved on Husband's behalf, Respondent was required to end the phone conversation immediately: "A lawyer must *immediately terminate communication* with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule." *Id*., Comment [3] (emphasis added). Respondent's failure to do so resulted in a violation.

Respondent argues that he cannot be found in violation of Rule 4.2 because the conversation was limited to discussing the scheduling of a meeting and there was no "substantive discussion of [the] divorce related issues" during the phone conversation. As an initial observation, Rule 4.2 does not draw any distinction between "substantive" and "non-substantive" issues or between "substantive" and "procedural" issues. It broadly captures communications "about the subject of the representation." Respondent's suggestion to Husband that he could

meet without his lawyer present was related to the divorce dispute and Respondent had just been told that a lawyer was assisting Husband in connection with the divorce dispute.

Moreover, Respondent's argument cannot be squared with the underlying purpose of the rule – to protect persons who have chosen to be represented against "possible overreaching by other lawyers," "interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation" and in so doing to protect the integrity of the legal system." V.R.Pr.C. 4.2, Comment [1]. The rule utilizes a broad communication prohibition to achieve that end. To illustrate why Respondent's argument fails one need only consider the following question: What if Husband had gone along with Respondent's suggestion and proceeded to meet with Respondent without his lawyer present? [5]

Respondent's argument amounts to asking for a "no harm" exception to the rule. But, even assuming for the sake of argument that there was no harm, there is no such exception. The purpose of the rule is to nip in the bud even potential harm by prohibiting communication once a lawyer knows that a party is represented. Respondent was obligated to cease all communication once he learned that Husband was using a lawyer. He did not do so and therefore violated the rule.

While the question of harm is one of the considerations in selecting an appropriate sanction, it is not relevant to whether a violation occurred under Rule 4.2. *See, e.g.*, *In re Wool*,

[5] Disciplinary Counsel argues that if the phone call is viewed as not meeting the "subject of the representation" element of Rule 4.2 because it only addressed the scheduling of a future meeting, the conduct should nevertheless be considered an attempt to violate Rule 4.2, which by itself constitutes misconduct under Rule 8.4(a). Mem., 10/25/21, at 9. The Panel concludes that the conduct in question was a fully consummated violation of Rule 4.2. However, if Rule 4.2 was not violated, then respondent's phone exchange with Husband should be considered an attempt to obtain a meeting without counsel present and, therefore, a violation of Rule 8.4(a). *Id.* ("It is professional misconduct for a lawyer to . . . attempt to violate the Rules of Professional Conduct . . . .").

169 Vt. 579, 733 A.2d 747, 750 (1999) (finding a violation of the predecessor no-contact rule where respondent sent copies of motions directly to the opposing party while observing that "[f]ortunately, [the opposing party] was nonplused by this direct communication and no injury resulted. In any event, the misconduct violated DR 7–104(A)(1)"); *see also In re Fink*, 2011 VT 42, 189 Vt. 470, 22 A.3d 461, ¶ 24 ("The extent of harm caused is a factor to be considered at the sanctions phase of our analysis but cannot excuse respondent's actions.").

In sum, Respondent violated Rule 4.2.[6]

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

[6] Respondent has not argued that his offending communication falls under the "authorized by law" exception in Rule 4.2. Moreover, it is clear that the exception would not be applicable to Respondent's invitation to Husband to meet without his counsel present. *See ABA Annotated Model Rules of Professional Conduct* (9th Ed. 2019) at 468 ("[T]he exception permitting communication authorized by law is satisfied by a constitutional provision, statute or court rule, having the force and effect of law, that expressly allows a particular communication to occur in the absence of counsel.") (quotation omitted).

> 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 (internal citation omitted).[7]

The Duty Violated

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

Respondent's violation of the no-contact rule breached a duty owed to the legal system. *Cf*. V.R.Pr.C. 4.2, Comment [1] ("This rule contributes to the proper functioning of the legal system . . . ."). The underlying purpose of Rule 4.2 is to maintain the public's confidence in the integrity of the legal profession and legal system.

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

[7] This 2011 Supreme Court decision involved the same respondent who is named in the current petition of misconduct.

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. It has explained 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. The Court has reasoned that [i]f the definition [of the term "knowledge"] extended to constructive knowledge, then no misconduct would be negligent because rather than failing to heed a substantial risk we would always assume the lawyer should have known the substantial risk." *Id*. ¶ 41. Thus, "while a lawyer's good faith, but unreasonable, belief that his actions are not misconduct is not a defense to a violation, such an error can be a factor in imposing discipline." *Id*.

In *Fink*, the issue was respondent's state of mind in connection with his violation of the prohibition in Rule 1.5(a) against "charg[ing] an unreasonable fee . . . ." The Court concluded that the respondent's mental state, for purposes of the sanction analysis, was that of negligence because "however erroneously, [respondent] *believed* that he would contribute to a greater degree to [his client's] case. *Id*., ¶ 40 (emphasis added). In other words, he believed that his fee would turn out to be reasonable. That belief did not avoid the violation but supported, for

purposes of the sanction analysis, a determination that respondent's state of mind was that of negligence.

In this proceeding, Respondent has argued in essence that he did not knowingly violate Rule 4.2 because he believed that Husband's pro se notice of appearance entitled him to communicate directly with Husband. The problem with this argument, however, is that there is no basis whatsoever in the language of Rule 4.2 for Respondent to maintain such a belief once Husband stated to Respondent that Husband wanted to inform his lawyer of the planned meeting. The no-contact requirement in Rule 4.2 is clear and Respondent had learned that Husband was still being represented by counsel.

Recently, in *In re Bowen*, 2021 VT 7, __ Vt. __, 252 A.3d 300, a respondent argued that his state of mind was that of negligence in connection with his disclosure of a former client's confidential information to a third party, in violation of Rule 1.9(c)(2), because he believed – albeit erroneously – that the disclosure of that information in the records of a prior court proceeding had stripped the information of its confidentiality. *Id*. ¶ 32. The Court rejected that argument, reasoning that it amounted to nothing more than pleading ignorance of the straightforward prohibition in Rule 1.9(c)(2) and observing that "the maxim that mere ignorance of the law constitutes no defense to its enforcement . . . applies with particular force to lawyers, who are charged with notice of the rules and the standards of ethical and professional conduct prescribed by the Court." *Id*. ¶ 35 (quotations omitted). In *Bowen*, "[respondent's] mistaken belief that the disclosure was appropriate under the rules does nothing to change the fact that he knowingly disclosed the information." Similarly, in the current case, Respondent's argument amounts to an attempt to excuse Respondent from the clear-cut requirement of Rule 4.2. The panel concludes, therefore, that Respondent's state of mind was that of knowledge.

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.

Here, there was no actual injury from Respondent's conduct. It turned out that Husband did contact his lawyer immediately after his phone call with Respondent, and his lawyer immediately instructed Respondent not to have any further communications with Husband.[8] However, there was significant potential for injury. If Husband had accepted Respondent's suggestion that Husband meet without his lawyer present, he would have proceeded without the benefit of legal counsel.

Presumptive Standard under the ABA Standards

The Panel concludes that § 6.32 of the ABA Standards is applicable in this case. It states as follows: "Suspension is generally appropriate when a lawyer engages in communication with

[8] Prior to learning that Husband wanted to notify his lawyer about the meeting so that she could attend, Respondent learned that Husband "really wanted" to get the matter resolved – information that a lawyer representing a client would typically try to keep confidential in order to avoid undermining his or her client's position in settlement negotiations. But aside from the fact that this statement was made before Husband's statement about wanting to contact his lawyer, both Husband (prior to hiring his lawyer) and Husband's lawyer had previously indicated to Respondent that they were eager to reach a settlement agreement. Therefore, to the extent that the "really wanted" statement was useful to Respondent's client as a more recent window on Husband's overall negotiating posture, any harm to Husband from the statement was negligible at most.

an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding." Respondent knowingly communicated with Husband after Husband advised Respondent that he continued to be represented by another lawyer, and his statement to Husband that his lawyer did not need to be at the scheduled meeting caused potential injury to Husband.

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(a) (prior disciplinary offenses) – Respondent has a record of two prior disciplinary offenses. In 2011 he received a public reprimand for failing to put a contingent fee agreement in writing and for attempting to charge an unreasonable fee. *In re Fink*, 2011 VT 42. The decision in that case cites to an earlier unspecified record of "prior discipline for charging an excessive fee." *Id*. ¶ 44.

§ 9.22(g) (refusal to acknowledge wrongful nature of the conduct) – After being contacted by Husband's lawyer on August 17 and told not to communicate with Husband,

Respondent responded defiantly and failed to assure Husband's lawyer that he would not once again attempt to communicate directly with Husband, prompting the need for another communication from Husband's lawyer. While it is understandable that Respondent might have felt under attack and wanting to defend himself by referring to the notice of appearance, he could have proceeded to explain his conduct while, at the same time providing assurance that he would not directly contact Husband going forward. He chose to assume a defiant position and not provide any assurance to Husband's lawyer. *Cf. In re Bowen*, 2011 VT 7, ¶ 44 (finding refusal to acknowledge wrongful nature of conduct where respondent disregarded warning from another attorney).

§ 9.22(i) (substantial experience in the practice of law) – Respondent has been practicing law for approximately fifty years. This aggravating factor therefore applies. *See In re Wysolmerski*, 2020 VT 54, ¶ 47 (citing cases applying substantial experience aggravator to experience of approximately twenty years).

(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(b) (absence of dishonest or selfish motive) – There is no evidence that Respondent acted to advance any personal interest or that any dishonesty was involved.

§ 9.32(e) (full and free disclosure to disciplinary board or cooperative attitude toward proceedings) – Disciplinary Counsel represents that Respondent was cooperative throughout the investigative process and disciplinary proceeding. However, this factor is entitled to relatively little weight. *See Bowen*, 2021 VT 7, ¶ 45 ("[B]ecause attorneys have an

independent professional duty to cooperate with disciplinary investigations under Rule 8.1(b), this factor is afforded little weight.").

§ 9.32(m) (remoteness of prior offenses) – Respondent's prior disciplinary offenses occurred more than ten years ago.

(c) Weighing the Aggravating Mitigating Factors

The aggravating and mitigating factors offset each other numerically. Although the Panel assigns greater relative weight to the aggravating factors than to the mitigating factors, the disparity is not great enough to warrant adjusting upward the presumptive sanction in this case. The Panel concludes that suspension is warranted in this case.

* * *

The Panel must now consider an appropriate length of suspension. "Under Administrative Order 9, the Supreme Court promulgated rules which allow for two types of suspensions: suspension for six months or more and suspension for less than six months. The difference is critical because a suspension of less than six months ends with automatic reinstatement. A lawyer suspended for more than six months, however, is not readmitted unless and until he has proven by clear and convincing evidence that he has been rehabilitated." *In re McCarty*, 164 Vt. 604, 605, 665 A.2d 885, 886 (1995). "[P]eriods of suspension of less than six months are appropriate in some circumstances." *Id*.; *see, e.g.*, *In re Doherty,* 162 Vt. 631, 650 A.2d 522 (1994) (two-month suspension imposed); *In re Blais*, 174 Vt. 628, 631, 817 A.2d 1266, 1270 (2002) (five-month suspension plus probation imposed); *In re McCarty*, 2013 VT 47, 194 Vt. 109, 75 A.3d 589 (1995) (three-month suspension); *In re Adamski*, 2020 VT 7, 211 Vt. 423, 228 A.3d 72 (15-day suspension).

Having in mind that "[i]n general, meaningful comparisons of attorney sanction cases are difficult as the behavior that leads to sanction varies so widely between cases," *In re Strouse*, 2011 VT 77, ¶ 43, 190 Vt. 170, 34 A.3d 329 (Dooley, J., dissenting), the Panel has considered several cases in arriving at a length of suspension and relied heavily upon *In re Illuzzi*, 160 Vt 474, 632 A.2d 346 (1993). In *Illuzzi*, the respondent was suspended for six months for multiple instances, in two separate cases, of communicating directly with a party who was represented by counsel without the consent of counsel. *Id.* The Court upheld the sanction even though there was no actual injury to the parties involved, who were "relatively sophisticated insurance adjusters rather than vulnerable litigants who might be more susceptible to manipulation." *Id*. at 489. The Court gave considerable weight to the fact that the respondent had "purposely bypassed opposing counsel, despite requests by the insurer and its counsel that negotiations be through counsel only." *Id*. at 488. While observing that "most courts impose reprimands on lawyers who negligently, but unknowingly, engage in improper communications," *id*. at 490, it rejected the respondent's assertion that his violation was "unknowing."

In addition, the Court gave considerable weight to the fact that the respondent had received prior public reprimands – including one reprimand for having communicated with a party known to be represented by counsel. *Id*. at 490-91. It concluded that "[the respondent's] cumulative disciplinary record demonstrates a cavalier attitude towards the profession's ethical practices and warrants suspension from the practice of law." *Id*. at 491.

A comparison to *Illuzzi* provides some useful guidance. Respondent's conduct here was also "knowing" – not negligent – because Respondent was fully aware that Husband had a lawyer when he invited Husband to meet without his lawyer present. It also bears noting that Respondent's was **not** communicating with a relatively sophisticated client, but rather with an

individual "who might [have been] more susceptible to manipulation," *id*. at 489, suggesting that in this respect his conduct had relatively great potential for causing harm. Finally, Respondent has two prior disciplinary offenses on his record. The latest violation suggests to this Panel that Respondent is taking "a cavalier attitude towards the profession's ethical practices." *Id*. at 491.

On the other hand, there is a single violation of the no-contact rule in this case, as compared to the multiple violations in *Illuzzi*. Moreover, the prior disciplinary record in *Illuzzi* was more extensive and involved a similar violation in the respondent's past. These distinctions suggest that while a suspension is appropriate it should be of shorter duration.

The Panel concludes that a 30-day suspension is necessary and appropriate under the factual circumstance of this case. It is significantly shorter than the suspension in *Illuzzi* but long enough to have a meaningful impact and encourage Respondent to take his ethical obligations more seriously.

The Panel concludes that a shorter suspension would not be appropriate in light of two factors: first, the potential injury that might have resulted if Husband had not called his lawyer; and, secondly, Respondent's defiant email to Husband's lawyer, after receiving an email from her, in which he suggested that he could continue to communicate with Husband due to his pro se notice of appearance. A 30-day suspension is appropriate under these circumstances to ensure that Respondent pays greater attention to the ethical rules going forward.

ORDER

It is hereby ORDERED, ADJUDGED and DECREED as follows:

1. Respondent, Melvin Fink, Esq., has violated Rule 4.2 of the Vermont Rules of Professional Conduct, as set forth above;

2. Respondent is suspended from the office of attorney and counselor at law for a period of thirty (30) days, with the suspension to commence on March 1, 2022.

3. Respondent shall comply with Rule 27 of Administrative Order 9.

Dated: January 6, 2022.

Hearing Panel No. 3

Gary F. Karnedy, Esq., Chair

Ashley W. Taylor, Esq., Member

Peter Zuk, Public Member