STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

In Re: PRB File No. 021-2022
Theodore Kennedy, Esq., Respondent

PRB Decision No. 253

PROCEDURAL HISTORY

This disciplinary matter comes before Hearing Panel No. 8, Jennifer McDonald, Esq., Jonathan T. Rose, Esq., and Patrick Burke. These proceedings were initiated by a Petition of Misconduct filed by Disciplinary Counsel on June 15, 2022.

After the petition was filed, Disciplinary Counsel and Respondent submitted a proposed stipulation of facts along with jointly proposed conclusions of law. Respondent has knowingly and voluntarily agreed to waive his right to a hearing and has stipulated to the facts and violations contained herein.

The Panel hereby accepts the proposed stipulation of facts and concludes that further evidence is unnecessary.

With the factual record complete, the Panel issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Respondent, Attorney Theodore Kennedy, is an attorney who is admitted to practice law in Vermont. He was admitted to the Vermont Bar in September 2000.

2. This disciplinary matter arises from the Respondent's conduct during a divorce proceeding in which he represented the defendant-husband.

3. On May 6, 2021, the Court scheduled a final contested divorce hearing for June 3, 2021. The hearing notice provided that the parties should file any proposed exhibits "with the Court at least 7 days prior to the hearing and shall send copies to the other parties in sufficient time for that side to have copies of those proposed exhibits by that same time."

4. On June 1, 2021, two days before the hearing, Respondent filed a letter addressed to the Vermont Superior Court Clerk stating:

> Please note that following this Honorable Court's recent decisions: refusing to hear from the minor children; denying a necessary and promised discovery hearing that was properly detailed and pled on the record; ordering sale of the real property to a third party, thereby permanently severing the [husband] and his children's ties to the property that they had wished to retain, while stranding in situ valuable personal property belonging to [husband]; [husband] wrote to me, on the day exhibits were Ordered to have been exchanged in advance of the presently scheduled Dissolution Hearing on 6/3/21: "Please find attached my affidavit. On advice of Indian counsel, I will not participate in the Dissolution Hearing for the reasons outlined in the affidavit. Please file this affidavit in court." As such, please find attached for filing [husband's] 5/28/21 Affidavit, along with a Certificate of Service in the above-referenced matter. Thank you and please contact me should you have any questions or concerns.

5. The letter attached an affidavit signed by Respondent's client, in which he averred that he would not participate in the final divorce hearing in Vermont Superior Court because he did not believe the Court had jurisdiction over the matter.

6. The following day, on June 2, 2021, Respondent sent an email to the Washington Superior Court Clerks reiterating his intentions not to appear for the final hearing. The email stated:

> Good morning. I hope this e-mail finds you each well. Pursuant to my Odyssey filing yesterday on behalf of my client, […], in the above-referenced matter, as noted in my cover letter and by my client in his Affidavit, I want to please make doubly sure that his Honor and this Honorable Court know that I have been recently instructed (on 5/28) by my client, who relied on the advice of his Indian counsel, not to participate in the Dissolution Hearing scheduled for tomorrow starting at 9 am for six hours. I very much regret the short notice and deeply respect that this Honorable Court is very busy and could likely have used these blocked-off hours

tomorrow on other matters. I will nonetheless remain the attorney of record for [husband] for purposes of Court communications/Orders, Ex Parte or otherwise, going forward. Thank you. Sincerely, Theo Kennedy.

7. Later that same day, the Court entered an order stating the following:

> The court understands [husband] does not intend to attend the hearing. As to his attorney, attention should be given to Rule 15(f) [of the] V.R.F.P. Leave to withdraw has not been given, nor sought.

8. Respondent understood the Entry Order to direct that, if Respondent intended to withdraw, he should follow the procedure set forth in V.R.F.P. 15(f).

9. Respondent did not attend the final divorce hearing on June 6, 2021.

10. Respondent did not move to withdraw from his representation of husband at any point before the hearing or thereafter.

11. On June 17, 2021, following the final hearing, wife filed her Proposed Findings of Fact and Conclusions of Law and Requests for Relief ("Plaintiff's Proposed Findings").

12. On June 21, 2021, Respondent filed a response to wife's Proposed Findings, titled "Reply to the Plaintiff's Proposed Findings of Fact and Conclusions of Law and Requests for Relief."

13. Respondent asserted that the pleading was filed "[w]ithout submitting to this jurisdiction of this Court and without participating in the above proceedings . . . ." The pleading further stated that "[husband] is constrained to file this response" because [wife's] filing "is replete with false statements at [husband's] assets and the value thereof [and wife] has also made totally untrue statements about her own financial status and assets."

14. The brief disputed many of the facts set forth by wife in her Proposed Findings. For example, the brief asserted:

- "The Steinway piano was not purchased in 2019. [Wife] broke into [husband's] house in Vermont which contained valuable personal affects and laboratory

equipment and samples, and [husband] is unaware of their present location. In all probability they have been siphoned away by [wife]."

- "There is no rental property worth 10M in Mumbai. [Husband] puts [wife] to the strict proof thereof."
- "The Jersey Account has not appreciated much since [husband] inherited the same. However, since the pandemic the funds in the investments have depreciated significantly in value."
- "This court's order is completely perverse, bad in law and [husband] has obtained protection from enforcement thereof from the Hon'ble Bombay High Court since it is against the children's interest."

15. Neither Respondent nor his client had attended the final divorce hearing or offered any evidence at that hearing.

16. There was no admitted evidence to support the facts set forth in the post-hearing pleadings filed by Respondent, because his client did not submit any evidence at, or even attend, the final hearing.

CONCLUSIONS OF LAW

A. Violation Of Vermont Rule of Professional Conduct 3.4

Rule 3.4 of the Vermont Rules of Professional Conduct provides "[a] lawyer shall not: . . . (c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists." As set forth *infra* ¶¶ 3-10, by failing to attend the final divorce hearing, or withdrawing from his representation prior to hearing, Respondent violated Rule 3.4(c) because he disobeyed an obligation under the rules of the tribunal.

B. Violation Of Vermont Rule of Professional Conduct 3.1

Rule 3.1 of the Vermont Rules of Professional Conduct provides "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in

law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

As set forth *infra* ¶¶ 11-16, Respondent filed a post-hearing brief on behalf of his client which set forth detailed factual allegations regarding the parties' assets and their divorce. However, neither Respondent nor his client had attended the final hearing. Accordingly, there was no admitted evidence to support the factual allegations set forth in the brief. As the Court noted in its final decision in the divorce, any challenges to the facts presented at the hearing were "intentionally waived." Accordingly, by filing a post-hearing submission asserting facts without any supporting evidence, Respondent violated Rule 3.1 because he filed a pleading without any basis in law or fact.

SANCTIONS DETERMINATION

When sanctioning attorney misconduct, the Supreme Court has "adopted the ABA Standards for Imposing Lawyer Discipline" which require the Board 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; *see also* ABA Standard 3.0.

"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.

A. Duty Violated

Based on agreement by the parties, and findings by the Panel, a public reprimand shall be imposed on Respondent for: (1) violating Rule 3.4(c) by failing to attend the final divorce

hearing, or alternatively, to withdraw from his representation prior to the hearing; and (2) violating Rule 3.1 by filing post-hearing submissions asserting facts without any supporting evidence. In this case, Respondent owed a duty not to abuse the legal process by abiding by the Court's orders and not presenting any filings not supported by law or fact that may cause interference with a legal proceeding and injury to other parties.

B. 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.*; s*ee also id.*, at 19 (definitions of "intent," "knowledge," and "negligence"). "[A]pplication of these definitions is fact-dependent" and "[t]he line between negligent acts and acts with knowledge can be fine and difficult to discern . . . ." *In re Fink*, 2011 VT 42, ¶ 38.

Respondent's mental state with respect to these two violations was at least negligence and potentially knowledge. Respondent should have known that failing to attend the final divorce hearing was a violation of his professional responsibilities. After Respondent sent a letter to the Court explaining that neither he nor his client would be attending the final hearing, the Court entered an order later that same day which stated:

> The court understands [husband] does not intend to attend the hearing. As to his attorney, attention should be given to Rule 15(f) [of the] V.R.F.P. Leave to withdraw has not been given, nor sought.

This order made it clear that, whether or not his client attended, Respondent was expected to attend the hearing, and Respondent ignored that instruction. Respondent was obligated to attend the hearing based on the Notice of Hearing that he received on May 6, 2021, setting the final contested divorce hearing.

With respect to the filing of the post-hearing brief, Respondent acted negligently, if not knowingly. Respondent should have known that the post-hearing submissions he filed on behalf of his client would not result in the introduction of admissible evidence, given that his client had not attended the final hearing or presented any evidence or exhibits (and had, indeed, consistently disavowed any involvement in the process notwithstanding the Court's orders regarding its own jurisdiction). Respondent stated in his answer that the filing "referenced factual information and legal arguments, some of which was contained in the Docket, including information from [husband's] affidavits." (Answer to ¶ 17.) Even assuming those affidavits would have been admissible at the final divorce hearing (despite the fact that they were hearsay), there were virtually no citations to any "information from [husband's] affidavits" in the post-hearing briefs, leaving the Court to guess as to the supposed evidentiary basis for those allegations.

Factual assertions in post-hearing briefs must be supported by citations to admissible evidence. Respondent should have known that making these filings was a violation of his professional responsibilities as the briefs had no support in law and were without citation to any admissible evidence. Indeed, there was no admissible evidence that could have supported the factual assertions because Respondent and his client did not attend the evidentiary hearing.

C. 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, it is clear from wife's complaint that she was extremely distressed and anxious about the improper filings. Wife presumably paid legal fees for her attorneys to review the filings, consider whether to respond, and discuss the filings with her. There was also potential interference with Court proceedings, because the Court incurred time to respond to Respondent's post-hearing filings which were without factual or legal support given his failure to attend the hearing.

D. Presumptive Sanction under the ABA Standards

ABA standard 6.23 applies in this case. It provides that: "[A] [r]eprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding." As discussed above, Respondent was, at a minimum, negligent and there was actual or potential injury caused to another party. Thus, Standard 4.13 is the proper standard, and the presumptive sanction is a reprimand.

E. Aggravating and Mitigating Factors

Next, the Panel considers any aggravating and mitigating factors and whether they call for increasing or reducing the presumptive sanction of a public reprimand.

The Panel concludes that the following mitigating factors under ABA Standards are present:

> § 9.32(a): absence of a prior disciplinary record. Respondent has no prior disciplinary record.
>
> § 9.32(e): cooperative attitude toward proceedings. Respondent has been cooperative throughout the disciplinary proceedings.

The Panel also considers whether there are any aggravating factors. The Panel concludes that the following aggravating favors under ABA Standards are present:

> § 9.22(c): a pattern of misconduct.
>
> § 9.22(i): substantial experience in the practice of law.

Accordingly, the mitigating factors and aggravating factors do not weigh in either direction.

Taking into account the mental state, injury, and aggravating/mitigating factors, the Panel concludes that the appropriate discipline for these violations under ABA Standards 6.2 is a public reprimand.

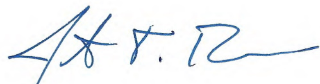
This sanction is not inconsistent with past disciplinary decisions involving a public reprimand in which there was actual injury or the potential risk for injury. *See In re Gregory Vigue*, PRB No. 2018-034, at *20 (issuing a public reprimand where respondent failed to attend a hearing on behalf of his client and follow procedural requirements, resulting in the issuance of a deportation order, and noting that the fact that the deportation order was ultimately vacated did not mitigate the fact of potential injury to the client); *In re Andres*, 170 Vt. 599 (2000)

(approving a public reprimand where, in one case, the respondent had neglected the filing requirements associated with a client's appeal resulting in dismissal of the appeal and, in another case, the respondent's conduct had resulted in delays in a family law proceeding); *In re Blais*, File No. 2015-084 (issuing a public reprimand where respondent failed to respond to initial discovery requests and a subsequent motion to compel discovery and for sanctions and failed to comply with the Court's discovery orders, resulting in preclusion of an expert witness); *In re Farrar*, File No. 2005-203 (issuing a public reprimand where respondent failed to attend a contempt hearing that resulted in a ruling against his client and the imposition of a financial penalty which, though it was ultimately lifted, caused the client anxiety, stress, and frustration).

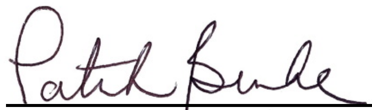
Based on the Panel's findings of fact and conclusions of law, Respondent is hereby publicly reprimanded for having violated Rules 3.4 and 3.1 of the Vermont Rules of Professional Conduct.

Hearing Panel No. 8 Date: August 22, 2023

Jennifer E. McDonald, Esq.



Jonathan T. Rose, Esq.



Patrick Burke