STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

In re: Norman E. Watts, Esq.
PRB File Nos. 102-2019, 011-2020

Decision No. 254

Special Disciplinary Counsel filed a Petition of Misconduct against Respondent Norman E. Watts, Esq., on March 18, 2021. Both parties participated in the merits hearing held on June 7, 8, and 9, 2023. The Hearing Panel gave the parties until July 24, 2023, to file proposed findings of fact and conclusions of law. Per the parties' agreement, the hearing concluded upon their submissions for purposes of, and the Panel is issuing this decision within sixty (60) days thereafter in accordance with, A.O. 9, Rule 13(D)(5)(c).

Respondent's Motion for Dismissal or Alternatively for a New Hearing

On July 24, 2023, in addition to filing proposed findings and fact and conclusions of law, Respondent filed a Motion for Dismissal or Alternatively for a New Hearing ("Motion to Dismiss"). Before turning to Respondent's alleged professional misconduct, the Panel addresses the Motion to Dismiss.

In the Motion to Dismiss, Respondent argued that Special Disciplinary Counsel had a continuing obligation to supplement her responses to his requests for production of documents pursuant to Vermont Rule of Civil Procedure 26(e) ("A party who has responded to a request for discovery with a response is under a duty to supplement or correct the response in a timely manner… if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing."). He argued that she violated her obligation by failing to produce numerous documents, including a text message that complaining witness

G.A. sent her during the final day of the merits hearing. He further argued that the text message showed that G.A. provided false testimony on the first day of the hearing, which she was required to disclose pursuant to Vermont Rule of Professional Conduct 3.3 ("A lawyer shall not knowingly… offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."). He concluded, "The only remedy that can correct the abusive overreach… is dismissal of not only the [G.A.] complaint but also [the J.H. complaint] as there must have been numerous communications that were also not disclosed. Alternatively, the Panel should require a new hearing after the Respondent has been given time to complete the necessary discovery… and can properly prepare his defense." Motion to Dismiss at 9.

On August 22, 2023, Special Disciplinary Counsel filed an Opposition to the Motion to Dismiss. She argued the Hearing Panel should deny the Motion to Dismiss or, in the alternative, strike it entirely because Respondent cited no authority to support dismissal or a new hearing at this stage of a disciplinary proceeding. She argued that she properly supplemented her responses to Respondent's requests for production of documents twice after providing initial responses, including on June 1, 2023. She acknowledged that the June 1, 2023, supplement did not include any text messages, indicating she inadvertently failed to include them, but she appears to argue that G.A.'s text message was protected from disclosure by the work-product doctrine, which she asserted with her discovery responses – an assertion Respondent never questioned or challenged. She further argued that the only withheld document Respondent cited, the G.A. text message, did not demonstrate that G.A. gave false testimony.

On September 6, 2023, Respondent filed a Reply in Support of the Motion to Dismiss. He reiterated his argument that Special Disciplinary Counsel had a continuing duty to disclose all communications she exchanged with the complaining witnesses G.A. and J.H. at any time through the conclusion of the disciplinary proceeding. He denied receiving Special Disciplinary Counsel's supplement on June 1, 2023. He reiterated his argument that Special Disciplinary Counsel had a duty to disclose G.A.'s text message in light of G.A.'s testimony, and her failure to do so promoted G.A.'s false testimony. He argued that dismissal is required because Special Disciplinary Counsel violated Respondent's due process rights.

On September 15, 2023, Special Disciplinary Counsel filed a Motion for Permission to File a Sur-Reply and Sur-Reply to Respondent's Reply in Support of the Motion to Dismiss. She argued that Respondent raised three new arguments in his Reply in Support of the Motion to Dismiss that warrant her response. Shortly thereafter, Respondent filed a Motion to File a Sur-Reply, arguing for an opportunity to respond, should the Panel permit Special Disciplinary Counsel to file a sur-reply. The Panel may allow a sur-reply if it "would assist in clarifying the issues, particularly where the party seeking to file the memorandum is addressing newly raised factual or legal arguments by the opposing party." Vt. R. Civ. P. 7(b)(4). The Panel does not need Special Disciplinary Counsel's assistance in clarifying the issues here and denies her request to file a sur-reply, which renders Respondent's request to file a sur-reply moot.[1]

As an initial matter, the Hearing Panel addresses Special Disciplinary Counsel's argument that procedural defects warrant striking Respondent's Motion to Dismiss rather than ruling on its merits. While the Vermont Rules of Civil Procedure and Administrative Order No. 9

[1] The Hearing Panel previously ordered, "Neither party may file a surreply or additional memoranda." Order on Special Disciplinary Counsel's Motion to Extend Response Time to Respondent's Motion to Dismiss (August 7, 2023).

may not specifically provide for the filing of a motion for dismissal or a new trial at this stage of a disciplinary proceeding (post-hearing but pre-decision), neither do they preclude such a filing. *See e.g.* Vt. R. Civ. P. 7(b) (requiring an application to the court for an order be made by a signed written motion); Vt. R. Civ. P. 41(b)(2) (providing for a defendant to file a motion to dismiss if plaintiff fails "to prosecute or to comply with these rules or any order of court"); Vt. R. Civ. P. 59 (authorizing a court to "open the judgment if one has been entered" "upon a motion for a new trial in an action tried without a jury" "for any of the reasons for which new trials or rehearings have heretofore been granted," so long as it is filed no later than 28 days after entry of judgment). The Panel rejects Special Disciplinary Counsel's request to strike Respondent' Motion to Dismiss pursuant to Vt. R. Civ. P. 12(f), which provides, "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." A decision on the merits of Respondent's Motion to Dismiss at this stage of the proceeding is appropriate.

Respondent's reliance on Vermont Rule of Civil Procedure 26(e) is misplaced. Pursuant to Administrative Order No. 9, the Vermont Rules of Civil Procedure do not apply to the discovery dispute before the Panel. *See* A.O. 9, Rule 19(B)(3) ("Discovery proceedings under these rules are not subject to the Vermont Rules of Civil Procedure regarding discovery except those relating to depositions and subpoenas."). Accordingly, Respondent must show that Special Disciplinary Counsel violated a duty under the Vermont Rules of Civil Procedure, other than Rule 26(e), or a court order to supplement her discovery responses.

Respondent did not cite any authority for such a duty, such as Administrative Order No. 9, an order from the Hearing Panel, or precedential case law. Under Administrative Order No. 9, the scope of discovery is limited; the parties must make initial disclosures of persons with

relevant information and "may take depositions and shall comply with reasonable requests for production of (a) nonprivileged documents and evidence relevant to the charges or to respondent and (b) other material upon good cause shown to the chair of the hearing panel." A.O. 9, Rule 19(B)(1). At no time did Respondent ask the Panel for an order directing the parties to supplement their discovery responses. There is no indication that Respondent himself ever requested that Special Disciplinary Counsel supplement her discovery responses.

Certainly, Special Disciplinary Counsel had a duty, as every licensed attorney does, under the Vermont Rules of Professional Conduct to "take reasonable remedial measures, including, if necessary, disclosure to the tribunal" if she came to know that G.A. offered testimony that was false and material. V.R.Pr.C. 3.3(a)(3). Respondent argued that G.A.'s text message put her on notice that G.A. gave testimony that was false and material at the merits hearing. The Panel disagrees.

Respondent makes much of a text message G.A. sent to Special Disciplinary Counsel during Respondent's testimony, at 1:58 p.m. on June 9, 2023, approximately one hour before the end of the merits hearing. The text message read in its entirety, "I sent Margaux [Respondent's paralegal] a msg [sic] when Watts dismissed count 2? I asked why it was dismissed!!??" Respondent appears to argue that Special Disciplinary Counsel should have but did not produce the message to Respondent's paralegal that G.A. referenced in the text message. To the extent G.A.'s text message showed that he sent a message to his paralegal when the court dismissed Count 2 of his lawsuit, it is unclear why it was Special Disciplinary Counsel's obligation to produce the message and not Respondent's, when the message was presumably in his or his paralegal's possession.

Respondent also appears to argue that, upon receiving this text message, Special Disciplinary Counsel should have disclosed it to the Panel because it showed that G.A.'s testimony denying communicating with Respondent or his paralegal about allowing Count 2 of his lawsuit to be dismissed was false. First, as reflected in the Motion to Dismiss, G.A. testified, "no conversation was ever had about" allowing Count 2 to be dismissed," and "I am 100 percent sure we did not" discuss "the concept of not responding to a motion for judgment on the pleadings at any deposition." A fair reading of G.A.'s testimony shows that he denied speaking with Respondent or his paralegal specifically about the motion for judgment on the pleadings *after* the defendant filed the motion but *before* the court granted the motion, and Respondent did not point to any testimony from G.A. denying that he questioned Respondent or his paralegal about Count 2 being dismissed without opposition *after* it happened. Moreover, G.A. did not make a statement contradicting his testimony in the text message. Indeed, he did not make a statement at all; he posed two questions to Special Disciplinary Counsel while Respondent was testifying at the merits hearing. The Panel is persuaded that the text message did not give her reason to believe that G.A.'s testimony was false. Accordingly, she did not have a professional duty to bring the issue to the Panel's attention.

Even if G.A.'s testimony was false, it was not material. As explained below, the Hearing Panel has concluded that Special Disciplinary Counsel failed to prove by clear and convincing evidence that Respondent violated the Vermont Rules of Professional Conduct by allowing the court to dismiss Count 2 of G.A.'s lawsuit without opposition.

Other than G.A.'s text message, Respondent did not point to any basis for concern over Special Disciplinary Counsel's discovery responses. Rather, he speculated, "there must have been numerous communications that were also not disclosed." Motion to Dismiss, at 9.

Respondent cited no authority standing for the proposition that mere speculation is grounds for dismissal or a new hearing. *See, e.g., Hedges v. Durrance*, 2003 VT 63, ¶ 12, 175 Vt. 588, 834 A.2d 1 ("An injury based on speculation about uncertain future events is no injury at all."); *State v. Dragon*, 135 Vt. 168, 170, 376 A.2d 12 (1977) (granting new trial due to jury prejudice required "demonstrable showing of prejudice" or "existence of circumstances capable of producing prejudice and not mere speculation"). And there appears little reason for Respondent's mere speculation. As he noted, he has been in possession of discovery documents in G.A.'s malpractice lawsuit against him since July 11, 2023 – eight weeks before he filed his Reply in Support of the Motion to Dismiss. He has had ample time to review the discovery documents.

Respondent has not shown that he is entitled to dismissal under Vt. R. Civ. P. 41(b)(2) because Special Disciplinary Counsel failed to comply with the Vermont Rules of Civil Procedure or a Hearing Panel order. He has not shown he is entitled to a new hearing under Vt. R. Civ. P. 59 because of a reason "for which new trials or rehearings have heretofore been granted." There is no dispute that Respondent is entitled to due process in this disciplinary proceeding, but Respondent has simply not shown that Special Disciplinary Counsel – or the Panel itself[2] – violated his due process rights such that a new hearing or dismissal of any of the counts charged in the Petition of Misconduct is warranted.

WHEREFORE, Special Disciplinary Counsel's Motion for Permission to File a Sur-Reply is DENIED; Respondent's Motion to File a Sur-Reply is DENIED as moot; and Respondent's Motion for Dismissal or Alternatively for a New Hearing is DENIED.

[2] It is unnecessary to revisit Respondent's allegations about the Panel's alleged violations of his due process rights, as the Panel fully addressed them in its June 5, 2023, Order Denying Respondent's Renewed Motion for Continuance of Merits Hearing and Request for Removal of Specially-Assigned Disciplinary Counsel. The Panel notes, however, that despite Respondent's repeated complaints about the Panel "disallowing and limiting the evidence he could offer in his defense, all because of discovery issues early in the process," Motion to Dismiss, at 9, to date, Respondent has not pointed to a single document he would have offered in his defense but did not because the Panel disallowed it as a discovery sanction and therefore resulted in prejudice.

* * *

Based upon the admissions in Respondent's Answer to Amended Petition of Misconduct, the pleadings and records on file, and the credible evidence presented at the merits hearing in this matter, the Hearing Panel finds and concludes as follows.

FINDINGS OF FACT

Respondent Norman Watts has been a licensed Vermont attorney since 1987. At all relevant times, he was a sole practitioner with the Watts Law Firm, P.C. ("WLF"). At all relevant times, his practice areas included representing plaintiffs in employment discrimination claims. At all relevant times, Respondent was the only person authorized to issue payments from his law firm operating account and his IOLTA account.[3]

Facts Rated to Respondent's IOLTA Accounting Practices

In 2018, Michelle Kainen, Esq., performed a compliance audit of Respondent's IOLTA account for the period November 1, 2017, through October 31, 2018 ("First Audit"). She found that Respondent's trust accounting practices did not meet the requirements of the Vermont Rules of Professional Conduct. The deficiencies she identified included his failure to track or maintain documentation of each transaction, to maintain documentation for each client showing their transactions and running balance, and to perform a reconciliation of the account at least monthly. She also found that Respondent commingled his law firm operating funds and the funds he held in trust for clients. On February 21, 2019, Respondent signed a Stipulation ("2019 Stipulation") admitting to violations of Vermont Rules of Professional Conduct 1.15 and 1.15A, for which he received a public reprimand.

[3] An IOLTA account is an interest-bearing trust account for pooled client or third-party funds that are not expected to earn significant interest by themselves. The interest on the pooled funds is paid to the Vermont Bar Foundation to "support legal services for the poor or for public education on the legal system." V.R.Pr.C. 1.15B, Reporter's Notes–2009 Amendment.

In 2020, Attorney Kainen audited Respondent for the period December 1, 2007, through July 31, 2020 ("Second Audit"), after he bounced two IOLTA checks in July 2020. She noted that his trust accounting practices had improved since the First Audit; he no longer accepted refundable retainers from clients. She found, however, that he still did not track and maintain documentation of each trust account transaction; nor did he maintain a ledger card for each client, including C.V. and G.A, showing their trust account activity and running balance or reconcile the trust account at least monthly. Respondent believed "there was so little money in there, or few clients involved, that it didn't require a monthly reconciliation." He "thought it was pointless" to perform a monthly reconciliation. Instead, "[he] directly kept it in [his] head." June 8 Tr. at 225:1-13.

Respondent also did not transfer any client retainers that were in his law firm operating account before the First Audit into his IOLTA account after the First Audit, thereby continuing to commingle his law firm operating funds with funds belonging to clients, including $2,500.00 belonging to C.V. and $2,500.00 belonging to G.A. Some clients had a negative balance in Respondent's IOLTA account, which meant that he used one client's funds to pay for another client's matter.

Attorney Kainen concluded that Respondent remained out of compliance with Vermont Rules of Professional Conduct 1.15A(a)(1), (2), and (4).

Facts Related to Respondent's Handling of G.A.'s Retainer

Respondent represented G.A. in G.A.'s lawsuit against a multi-national company for employment discrimination based on age. Respondent filed a three-count complaint in the Rutland Civil Division on G.A.'s behalf. Respondent withdrew as G.A.'s attorney effective March 13, 2019, after G.A.'s lawsuit was dismissed on summary judgment.

G.A. signed a letter retaining Respondent on August 4, 2017. The letter provided that G.A. would give Respondent a $2,500.00 retainer, which Respondent would hold in a client trust account during representation and either return to G.A. or use to pay outstanding fees and expenses at the conclusion of representation. G.A. gave Respondent the $2,500.00 retainer shortly thereafter. Respondent did not place and keep the retainer in his IOLTA account during representation. He deposited the retainer in his law firm operating account. He did not subsequently transfer any portion of the retainer to his IOLTA account.

When representation concluded on March 13, 2019, Respondent held $2,500.00 of G.A.'s retainer funds, and G.A. had outstanding fees and expenses of $954.98. Respondent did not return the unspent portion of the retainer to G.A. for more than 17 months, after repeated reminders by Special Disciplinary Counsel. G.A. and his wife were too afraid of losing the entire retainer to press Respondent for its return. Respondent finally arranged for his bank to issue a check dated August 24, 2020, for $1,545.02, which G.A. received on August 31, 2020.

Facts Related to Respondent's Efforts to Collect Fees and Expenses from G.A.

The letter G.A. signed to retain Respondent provided that G.A. was responsible for fees and expenses, which Respondent would bill on a monthly basis.

Over the course of representing G.A., Respondent did not quite bill Respondent monthly. He billed G.A. in September and October 2017 and February, March, April, May, June, August, October, November, and December 2018. G.A. made payments to Respondent in October and November 2017, March, April, May, June, July, August, September, October, November, and December 2018, and January and February 2019.

Each of Respondent's bills to G.A. stated that the full balance was due in 10 days, although nothing in the retainer agreement or any other agreement established this time frame for

payments. G.A. paid Respondent on a monthly basis, except when Respondent did not bill G.A., but he often did not pay the full balance within 10 days. G.A. advised Respondent that making the payments caused his family significant financial stress but assured him he would make the payments, noting that he was working every weekend and selling cattle to do so. Respondent repeatedly pressured G.A. to immediately pay off the full balance due. For example:

- In an email dated March 27, 2018, Respondent told G.A. that he stopped scheduling depositions and would begin the process to withdraw from representation if G.A. did not pay off his March 2018 bill in full by April 10, 2018. He refused G.A.'s request to use his retainer to pay any of the balance due.
- In an email dated May 30, 2018, Respondent told G.A. that he would cancel any scheduled depositions and resign from representation if G.A. did not immediately pay off his April 2018 bill in full. He accused G.A. of breaching their contract and thereby negating it, implying he was therefore no longer obligated to continue working on G.A.'s case.
- On October 15, 2018, Respondent emailed G.A. two dispositive defense motions, a motion for judgment on the pleadings and a motion for summary judgment. The deadline to respond to the motion for judgment on the pleadings was November 1, 2018, and the deadline to respond to the motion for summary judgment was November 19, 2018. Respondent told G.A. he would not work on responding to the motions until he paid $5,021.73, warning that the court would dismiss his case if he did not respond to the motions. In fact, G.A. did not have a balance due of $5,021,73 – Respondent had neglected to apply an August 2018 payment of $2,500 from G.A. toward his balance due.

- On October 23, 2018, Margaux Reckard, Respondent's paralegal, emailed G.A. She advised him that Respondent would not work on responding to the motions until G.A. paid off his $2,580.98 balance due in full.
- On October 26, 2018, Respondent emailed G.A. that he would not work on his case unless and until he made another payment. He did not, in fact, work on G.A.'s case until October 31, 2018, after G.A. made another payment, as billing records reflect.

Respondent repeatedly threatened to immediately stop representing G.A. to get him to pay off his balance immediately, falsely accusing G.A. of breaching the retainer letter he signed by not doing so. The threats caused G.A. and his wife significant financial and emotional stress. They felt Respondent was callous. They lost trust in Respondent. Respondent, on the other hand, "[didn't] think it hurts" to leave G.A. with the impression "for one day" that his case would be dismissed if he did not pay Respondent immediately. Jun. 9 Tr. at 44:5-8.

Respondent knew that the Vermont Rules of Professional Conduct prohibited him from immediately withdrawing from representing G.A. in an ongoing court case. Respondent did not inform G.A. that he would have to file a motion to withdraw with the court, which G.A. could oppose; that unless and until the court granted his motion to withdraw, he remained G.A.'s attorney; or that he would have to ensure his withdrawal did not prejudice G.A.'s case.

Facts Related to Dismissal of G.A.'s Good Faith and Fair Dealing Claim

On October 15, 2018, the multi-national company G.A. was suing for age discrimination filed a motion for judgment on the pleadings seeking dismissal of his claim for breach of the implied covenant of good faith and fair dealing ("good faith and fair dealing claim") and a motion for summary judgment seeking dismissal of his two other claims. That day, Respondent

emailed G.A. the motions, noting that his claims would be dismissed if no opposition was filed, so they should prepare responses immediately. That day, Respondent's paralegal also emailed G.A. the motions. She asked him to put together rebuttals and notes for the motions by October 24, 2018.

On October 23, 2018, she again asked G.A. to prepare his rebuttals to the two motions. On October 26, 2018, Respondent advised G.A. that if he wanted to oppose the motions, they would need to begin work immediately. Shortly thereafter, Respondent began work, but he did not file a response to the motion for judgment on the pleadings, deciding it would be futile and therefore waste G.A.'s money. The court therefore dismissed G.A.'s good faith and fair dealing claim on November 27, 2018. Although Respondent discussed the weaknesses of the good faith and fair dealing claim with G.A. during breaks taken during depositions earlier in litigation and emailed him a copy of the motion for judgment on the pleadings, G.A. did not appear to appreciate that his lawsuit was made up of three distinct claims until the court dismissed the good faith and fair dealing claim but allowed the other two claims to proceed to summary judgment.

Facts Related to Respondent's Estimates to Represent J.H. in Litigation

Respondent represented J.H. in a lawsuit against an educational institution for employment discrimination based on race and national origin. Respondent filed a complaint on J.H.'s behalf in the U.S. District Court for the District of Vermont on July 3, 2014.

Before retaining Respondent, J.H. asked for an estimate of the attorney fees and expenses she would incur if she retained him. On April 28, 2014, Respondent emailed J.H. that he had pursued discrimination cases for $12,000.00 to $15,000.00 in attorney fees and did not expect expenses to exceed $1,000.00, including filing fees and deposition transcripts. He warned that

how much she ultimately spent would depend in large part on the defendant's conduct during discovery, though. On May 5, 2014, Respondent emailed J.H. an estimate of $17,900.00 in fees and expenses to take her case through summary judgment and $28,150.00 in fees and expenses to take her case through trial, including $1,800.00 in fees and expenses for the first "documentary discovery" phase of her case. The next day, he emailed her that fees and costs likely would not exceed the estimate. J.H. was aware that the cost of litigating her employment discrimination claims could vary widely, having received estimates from several other attorneys.

J.H. signed a letter retaining Respondent on May 13, 2014. The letter provided that J.H. would pay $250/hour for attorney services and $60/hour for law clerk services, as well as reasonable litigation expenses.

By February 9, 2015, J.H. had incurred $22,574.41 in attorney fees and expenses. She questioned Respondent, and he gave her a revised estimate reflecting that it would cost an additional $17,500.00 to take her case through summary judgment and an additional $26,850.00 to take her case through trial, including an additional $3,000.00 for the documentary discovery phase of her case. He acknowledged that the scope of discovery was broader than he had initially anticipated.

On September 18, 2015, J.H. questioned Respondent's February 2015 estimate, noting she had already spent $71,000.00 on fees and expenses. The next day, Respondent emailed her an estimate reflecting that it would cost $26,000.00 in additional attorney fees and expenses for the trial alone.

On April 22, 2016, J.H.'s case was dismissed on summary judgment. As of this date, she had incurred approximately $90,000 in fees and expenses. Respondent appealed the dismissal on

J.H.'s behalf and represented her in the appeal until May 9, 2017. She incurred approximately $20,000 in additional in fees and expenses for the appeal.

Facts Related to Certain Fees and Expenses Respondent Charged to J.H.

The letter J.H. signed to retain Respondent provided that J.H. would pay for "reasonable litigation expenses."

On February 25, 2015, Respondent emailed J.H. that he would not charge her attorney fees for time spent on the road traveling for her case. Respondent charged J.H. attorney fees for two hours traveling to and from a meeting with an expert in Concord, Hew Hampshire, on May 29, 2015; three hours traveling to and from a mediation session in Burlington, Vermont, on June 1, 2015; and six hours traveling to and from depositions in Montpelier, Vermont, on June 2, 3, and 4, 2015. On July 7, 2015, J.H. emailed Respondent about the charges. Respondent responded that he would remove charges for six hours of travel time. He ended up charging J.H. $1,250.00 in attorney fees for five hours of travel time that he had agreed not to charge.

On February 21, 2016, at J.H.'s request, Respondent agreed not to charge her $650.00 in attorney fees for time he had to spend on her case between August and November 2015 solely because he missed a discovery deadline. On June 6, 2016, she reminded him that about the agreement. The next day, he refused to honor the agreement.

Respondent charged J.H. for staying three nights, August 11, 12, and 13, 2015, at a $452.08/night (including tax) hotel in Boston, Massachusetts, to take depositions on August 12 and 13, 2015. The deposition on August 13, 2015, concluded no later than 5:30 p.m. Respondent traveled to Boston on the Dartmouth Coach bus. A return Dartmouth Coach bus left Boston as late as 9:30 p.m. that day. J.H.'s billing file does not include documentation showing it was necessary or reasonable for Respondent to stay in Boston the night of August 13, 2015, for

purposes of representing J.H. Respondent charged J.H. for staying one night at a $259.00/night hotel in Rochester, New York, to take a deposition on August 4, 2015. He charged her $311.16 for one night's stay plus meals at a hotel in Amherst, Massachusetts, to take a deposition on September 18, 2015.

Respondent charged J.H. $100.00/day for three days of meals in Boston, for a total charge of $300.00. J.H.'s billing file only includes documentation showing that Respondent spent $179.25 on August 11, 2015, for dinner at the Taj Boston, $4.38 on August 12, 2015, for a food item from the honor bar at the Taj Boston, and $19.05 on August 13, 2015, for an alcoholic beverage from the bar at the Taj Boston. J.H. did not agree to pay Respondent $100.00/day for meals. J.H.'s billing file does not include documentation showing these expenses were necessary or reasonable for his representation of J.H.

Respondent's representation of J.H. concluded on May 9, 2017. As of that date, J.H. had a balance due of $1,080.00, which she subsequently paid. On June 27, 2017, Respondent billed J.H. an additional $2,280.00 in attorney fees for the period December 20, 2016, through June 20, 2017. J.H. disputed the charges. They did not resolve the dispute, but J.H. subsequently paid them from her $5,000.00 retainer.

Facts Related to Respondent's Handling of J.H.'s Retainer

The letter J.H. signed to retain Respondent provided that she would give Respondent a $5,000.00 retainer that Respondent would maintain as a credit on her account during the representation and return to her at the end of the representation, less outstanding fees and expenses.

On May 9, 2017, J.H. emailed Respondent asking for a final billing statement. On May 23, 2017, J.H. emailed Respondent about paying her last bill and getting her retainer back. On

May 30, 2017, Respondent emailed J.H. after Bar Counsel contacted him on her behalf for "an accounting," asking what she wanted, given that he already told her that she did not have an outstanding balance with him. She reiterated her request for a bill, the return of her retainer, and a refund of certain fees and expenses. On June 2, 2017, J.H. emailed Respondent to tell him that she took out a loan to finance her lawsuit and needed the retainer back to pay off the loan. On June 14, 2017, she again emailed him about her retainer. On June 19, 2017, she emailed him again, noting that she was paying interest on a loan she could pay off if he would only return her retainer.

On June 28, 2017, Respondent's paralegal emailed J.H. a bill for $2,280.00 in attorney fees and $194.75 in expenses. That day, J.H. emailed Respondent, questioning the charges. On July 3, 2017, he responded that the charges were warranted. They exchanged emails about the charges for several weeks, but Respondent repeatedly refused to adjust or arbitrate his fees. Finally, on August 7, 2017, concerned about losing her entire retainer, J.H. authorized Respondent to deduct the full balance due from her retainer and return the remainder to her. Respondent did not return $2,720.00 of J.H.'s retainer to her until September 19, 2017.

Facts Related to Respondent's Conduct During the Disciplinary Proceeding

In a letter dated July 24, 2020, Respondent noted that, on July 14, 2020, Special Disciplinary Counsel reminded him that he had not returned G.A.'s retainer. He stated in the letter that he returned $1,545.02 of G.A.'s retainer after receiving the reminder. He also indicated that he transferred $954.98 of G.A.'s retainer from his IOLTA account to his law firm operating account as earned fees and expenses at some point after the conclusion of representation.

On August 6, 2020, Special Disciplinary Counsel asked Respondent for documentation showing that he had returned $1,545.02 to G.A. Respondent emailed her on August 14, 2020,

with documentation showing that he did not ask his bank to issue G.A. a check until August 6, 2020. The bank did not issue G.A. a check until August 24, 2020. G.A. did not receive the check until August 31, 2020.

Respondent also failed to cooperate with Special Disciplinary Counsel's discovery requests or the Hearing Panel's orders. On July 16, 2021, Special Disciplinary Counsel requested the Hearing Panel address and sanction Respondent's failure to fully respond to her May 28, 2021, discovery requests. On August 9, 2021, the Panel ordered that Special Disciplinary Counsel modify her requests, that Respondent to respond to the modified requests, and that the parties to meet and confer about any remaining disputes, after which Special Disciplinary Counsel could renew her request. She did so, as Respondent did not comply with the Panel's order, even after he received an extension from the Panel. Special Disciplinary Counsel further requested discovery sanctions. On September 28, 2021, the Hearing Panel ordered in part:

> In light of Respondent's non-compliance with the August 9, 2021 Order, Respondent will be precluded from offering into evidence any document that has not already been provided… In the event that it is ultimately determined that Respondent committed one or more violations of the Code of Professional Conduct, Respondent's non-compliance with the August 9, 2021 Order will [be] considered, in connection with the Panel's sanctions determination, to be some evidence supporting the aggravating factor of "bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency." *Any continuing non-compliance by Respondent will increase the weight assigned to that evidence by the Panel.*

Order Regarding Discovery Dispute, Request for Sanctions, and Request to Extend Scheduling Order (September 28, 2021) at 6 (emphasis added).

Respondent's non-compliance continued. Special Disciplinary Counsel renewed her request for discovery sanctions on October 15, 2021. On January 26, 2023, the Hearing Panel ordered in part:

> Respondent is ORDERED to produce all documents stored electronically in the "Cloud" or "Google Drive" with respect to this matter and all documents identified on page 14 and 15 of Disciplinary Counsel's Reply in Support of Motion for Sanctions no later than fourteen (14) days after entry of this Order. Respondent remains precluded from offering into evidence any document that was not already provided… Should Respondent be found to have violated any of the Vermont Rules of Professional Conduct, his non-compliance with discovery obligations will be considered in determining sanctions.

Order Granting Respondent's Motion to Compel Expert Deposition, Denying Special Disciplinary Counsel's Motion for Sanctions and Supplemental Memorandum of Law on Discovery Sanctions, Granting Special Disciplinary Counsel's Motion in Limine to Exclude Testimony about G.A.'s Alleged Behavior toward Respondent's Paralegal, and Granting Special Disciplinary Counsel's Motion to Amend Petition of Misconduct (January 26, 2023) ("January 26, 2023, Order"), at 6-7.

Respondent did not comply with the Panel's January 26, 2023, Order, which also granted his request to depose Special Disciplinary Counsel's expert witness after the discovery deadline. Instead, he canceled the scheduled deposition and sought another extension from the Hearing Panel on April 10, 2023. The Panel denied Respondent another extension on May 3, 2023. On May 5, 2023, more than two years after Special Disciplinary Counsel filed the Petition of Misconduct and a mere five weeks before the merits hearing, Respondent advised the Panel of his decision to retain Kaveh S. Shahi, Esq., to represent him for the balance of the disciplinary proceeding, noting that Attorney Shahi would need additional time to prepare for the merits hearing and, in any event, had a conflict on June 7, 2023, the first day of the merits hearing.

On May 9, 2023, Attorney Shahi filed a notice that he was representing Respondent for the limited purpose of seeking a continuance of the merits hearing. He also filed a motion to continue the merits hearing to the latter part of June 2023. In that motion, Attorney Shahi asked the Panel to disqualify Special Disciplinary Counsel. The Hearing Panel denied both requests on

May 30, 2023. He filed a motion for reconsideration on June 5, 2023, in which he also argued that, by considering and ruling on the motion to disqualify Special Disciplinary Counsel for alleged professional misconduct in a disciplinary proceeding, the Panel could no longer preside fairly over Respondent's disciplinary proceeding. The Panel denied the motion for reconsideration on June 5, 2023.

CONCLUSIONS OF LAW

The purpose of the Vermont Rules of Professional Conduct is to "protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar." *In re 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)). Disciplinary Counsel bears the burden of proving each element of misconduct by clear and convincing evidence. A.O. 9, Rule 20(C), (D); *see also In re PRB Docket No. 2016-042*, 216 VT 94, ¶¶ 7-8, 203 Vt. 635, 154 A.3d 949 (2016). "[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 (1998).

Count I: Violation of Rule 1.2 (Scope of Representation and Allocation of Authority Between Lawyer and Client) and Rule 1.4 (Communication)

A lawyer must abide by a client's decisions about the objectives of representation and to reasonably consult with the client about the means to achieve those objectives but may take any action to carry out the representation that is "impliedly authorized." V.R.Pr.C. 1.2(a), 1.4(a)(2). "The scope of the lawyer's implied authority is to be determined by reference to the law of agency… [T]his formulation strikes the right balance… by allowing the lawyer to exercise

professional discretion on behalf of the client, subject to consultation with the client as required by Rule 1.4(a)(2).” V.R.Pr.C. 1.2, Reporter’s Notes–2009 Amendments. The lawyer must also keep the client reasonably informed about the status of a matter and explain the matter to the client as reasonably necessary to permit the client to make an informed decision about the representation. V.R.Pr.C. 1.4(a)(3), (b).

Special Disciplinary Counsel charged that Respondent allowed G.A.’s good faith and fair dealing claim to be dismissed without first consulting with G.A. and getting his informed consent for the dismissal without opposition. G.A. testified that neither Respondent nor his paralegal discussed the merits of the claim with him. He further testified that he did not know Respondent planned to let the claim be dismissed without opposition. He testified that he only understood the claim was dismissed ***after*** the court entered the dismissal order. Respondent argued that he had implied authorization to “effectively drop” the good faith and fair dealing claim rather than charge G.A. fees in a futile effort to oppose dismissal. He further argued that he discussed the merits of the claim with G.A. during breaks taken in the course of depositions that took place earlier in litigation. Respondent also noted that he gave G.A. a copy of the motion itself, arguing that G.A. was therefore kept informed.

The Panel credits Respondent’s testimony that he discussed the merits of the good faith and fair dealing claim with G.A. during deposition breaks and decided not to oppose the defense motion for judgment on the pleadings for prudential reasons. As G.A.’s testimony showed, his objective was to prevail in his employment discrimination lawsuit, not to prevail on a particular count of his employment discrimination lawsuit. To the extent Respondent considered one of G.A.’s three claims futile, it was within his professional discretion not to oppose its dismissal. Respondent failed to obtain G.A.’s informed consent to not oppose its dismissal, but he was not

required to do so – He had implied authorization to let one of G.A.'s three claims be dismissed without opposition and reasonably consulted with him. While a better practice would have included documenting the decision to let the motion stand unopposed, Respondent's failure to do so is not a violation of any professional conduct rule.

The Hearing Panel concludes that Special Disciplinary Counsel has not proven by clear and convincing evidence that Respondent violated V.R.Pr.C. 1.2 or V.R.Pr. C. 1.4.

Count II: Violation of Rule 1.15(d) (Safekeeping Property)

A lawyer must "promptly deliver" any funds to which a client is entitled. V.R.Pr.C. 1.15(d). To the extent the lawyer reasonably believes they are entitled to receive a portion of the funds, the lawyer must nonetheless promptly deliver any funds the client is undisputedly entitled to receive. The lawyer must keep the disputed funds in a trust account and may not hold them to coerce the client into accepting the lawyer's position. Rather, the lawyer should suggest a means to promptly resolve the dispute, such as arbitration. V.R.Pr.C. 1.15, cmt. 3; *see also* V.R.Pr.C. 1.15(e).

Special Disciplinary Counsel charged that Respondent failed to promptly return the undisputed portion of G.A.'s retainer, $1,545.02, upon the conclusion of representation; he held the funds for more than 17 months. She further charged that Respondent failed to promptly return the undisputed portion of J.H.'s retainer, $2,720.00, upon the conclusion of representation; he held the funds for approximately four months while she tried to negotiate some of his fees. He also failed to promptly give J.H. a full accounting of the funds upon her request and upon the request of Bar Counsel. Respondent conceded that he violated V.R.Pr.C. 1.15(d) by failing to promptly return the undisputed portion of G.A.'s and J.H.'s retainers – which he did not hold in a trust account.

The Hearing Panel concludes that Special Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated V.R.Pr.C. 1.15(d).

Count III: Violation of Rule 1.15 (Safekeeping Property) and Rule 1.15A(a) (Trust Accounting System)

A lawyer who holds a client's funds in connection with representation must keep the funds separate from the lawyer's own funds in an IOLTA trust account for which there is an accounting system that complies with Vermont Rules of Professional Conduct 1.15A and 1.15B. V.R.Pr.C. 1.15(a)(1). The trust accounting system must include records showing receipts, disbursements, and a running balance for each client and records showing the at-least-monthly reconciliation of the account. V.R.Pr.C. 1.15A(a).

Special Disciplinary Counsel charged that Respondent failed to keep client retainers, including those of G.A. and C.V., in a trust account separate from his law firm operating funds, failed to maintain a "ledger card" showing receipts, disbursements, and a running balance for each client, and failed to reconcile his trust account at least once a month. Respondent generally concedes these failures but argues that the Hearing Panel is collaterally estopped from sanctioning him for the failures because he has already been sanctioned for the same failures pursuant to a 2019 Stipulation, which addressed his IOLTA accounting practices for the period November 1, 2017, through October 31, 2018.

Respondent represented G.A. until March 13, 2019. He held G.A.'s retainer until August 24, 2020. He did not hold G.A.'s retainer in a trust account through August 24, 2020; he kept it in his law firm operating account. He did not have a physical or electronic ledger card for G.A.'s retainer through August 24, 2020. He did not reconcile the trust account at least once a month through August 24, 2020. The 2019 Stipulation did not address Respondent's IOLTA accounting practices between November 1, 2018 and August 24, 2020. Similarly, Respondent did not have a

ledger card for C.V. or keep C.V.'s retainer in his trust account after November 1, 2018. Collateral estoppel does not apply to Respondent's trust accounting practices on or after November 1, 2018.

The Hearing Panel concludes that Special Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated V.R.Pr.C. 1.15 and V.R.Pr.C. 1.15A(a).

Count IV: Violation of Rule 1.4 (Communication) and Rule 8.4(c) (Misconduct)

A lawyer must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." V.R.Pr.C. 1.4(b). It is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." V.R.Pr.C 8.4(c). Deceit includes the failure to disclose a material fact when the lawyer has an affirmative disclosure duty. *In re Strouse*, 2011 VT 77, ¶¶ 14-16, 190 Vt. 170, 34 A.3d 329.

Special Disciplinary Counsel charged that, from March 2018 through February 2019, Respondent repeatedly threatened to stop working on G.A.'s case until he paid off his balance in full, without explaining the withdrawal process required by the Vermont Rules of Civil Procedure or the Vermont Rules of Professional Conduct. Respondent conceded that he threatened to withdraw from representation without explaining the withdrawal process in order to get G.A. to pay off his bills, noting that he did not, in fact, take steps with the court to withdraw from representation.[4] He argued, though, that his conduct did not violate V.R.Pr.C. 1.4 or V.R.Pr.C. 8.4, as those rules only apply to conduct akin to serious criminal behavior.

[4] Respondent misses the point. It is precisely his failure to inform G.A. that he intended to file a motion to withdraw from representation and had to continue representing him until the court granted the motion – instead threatening to immediately cease work and withdraw – that violated the Vermont Rules of Professional Conduct.

Respondent could not withdraw from representation until the court granted him leave to do so, which would require him to file a motion and give G.A. an opportunity to oppose it. *See* Vt. R. Civ. P. 79.1(f). Respondent could not adversely affect G.A.'s interests in withdrawing from representation and had to give him a reasonable opportunity to get substitute counsel. *See* V.R.Pr.C. 1.16(b), (d). Because G.A. needed this information to make an informed decision about Respondent's continued representation, Respondent had a duty to disclose it pursuant to V.R.Pr.C. 1.4(b). Respondent was well aware of his professional obligation to follow a process to withdraw and chose not to inform G.A. of this obligation to pressure him into paying off his bills more quickly. This course of action violated V.R.Pr.C. 1.4(b).

As Respondent notes, it is professional misconduct for a lawyer to engage in a serious crime that adversely reflects on the lawyer's honesty, trustworthiness, or fitness as a lawyer. V.R.Pr.C. 8.4(a). It is also professional misconduct, however, for a lawyer to engage in any conduct – criminal or not – involving dishonesty, fraud, deceit, or misrepresentation to the extent the conduct calls the lawyer's fitness to practice law into question. V.R.Pr.C 8.4(c), ann. 1; *In re PRB Docket No. 2007-046*, 2009 VT 115, ¶¶ 9-10, 187 Vt. 35, 989 A.2d 523. Deceit includes the failure to disclose a material fact when the lawyer has an affirmative disclosure duty. *In re Strouse*, 2011 VT 77, ¶¶ 14-16. As explained above, Respondent had an affirmative duty to disclose information about the withdrawal process to G.A. His failure to do so constitutes a violation of V.R.Pr.C. 8.4(a).

The Hearing Panel concludes that Special Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated V.R.Pr.C. 1.4 and V.R.Pr.C. 8.4(c).

Count V: Violation of Rule 1.5 (Fees)

A lawyer may not charge a client "an unreasonable fee or an unreasonable amount for expenses" under the circumstances. V.R.Pr.C 1.5(a); *see also* V.R.Pr.C. 1.5, cmt. 1. The lawyer must communicate the "basis or rate of the fee and expenses for which the client will be responsible," as well as any changes to the basis or rate, to the client. V.R.Pr.C. 1.5(b). The lawyer should establish "whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation." V.R.Pr.C. 1.5, cmt. 2.

Special Disciplinary Counsel charged that Respondent charged J.H. $1,900.00 in attorney fees he had agreed not to charge and $1,215.09 in expenses that were not reasonable or not supported by documentation. Respondent conceded that he miscalculated the fees and expenses he agreed not to charge J.H., although he did not specify the amount he owes her. Respondent also conceded that "[t]here was no specific agreement between Respondent and JH concerning expenses." He otherwise argued the fees and expenses he charged were reasonable under the circumstances.

Respondent charged J.H. $1,900.00 in attorney fees he agreed in writing not to charge, including $1,250.00 for travel time and $650.00 for time spent because he missed a discovery deadline. Respondent communicated a change to his attorney fees to J.H. when he told her via email that he would not charge her these fees. His efforts to charge J.H. more than he communicated constitute a violation of V.R.Pr.C 1.5(b).

Special Disciplinary Counsel has not established by clear and convincing evidence that Respondent stayed at unreasonably expensive hotels when he traveled for depositions. The fact that Respondent paid more for the hotels than the federal government would is immaterial, as

Respondent was not traveling for the federal government. The record is devoid of other comparator evidence.

It was unreasonable for Respondent to charge J.H. $452.08 to stay at a hotel in Boston on August 13, 2015, when the last deposition in Boston ended hours before the last return bus departed that evening. It was also unreasonable for Respondent to charge $300.00 for meals in Boston, when there was no documentation in J.H.'s billing file that Respondent actually incurred $300.00 in meal expenses, and there was no communication to J.H. that she would be responsible for paying Respondent $100.00/day of travel for meals.[5]

The Hearing Panel concludes that Special Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated V.R.Pr.C. 1.5.

Count VI: Violation of Rule 1.4 (Communication), Rule 1.5 (Fees), and Rule 8.4(c) (Misconduct)

Again, a lawyer must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation," must communicate the "basis or rate of the fee and expenses for which the client will be responsible," and must not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." V.R.Pr.C. 1.4(b), 1.5(b), 8.4(c).

Special Disciplinary Counsel charged that Respondent gave J.H. four inherently unreasonable and misleading estimates for his fees and expenses that did not allow her to make an informed decision as to whether to retain him – or continue to retain him – to help her pursue a discrimination lawsuit. Respondent countered that violation of V.R.Pr.C 8.4(c) requires

[5] Respondent issued an $850.00 credit to J.H. in a bill dated June 6, 2016. There is no documentation in J.H.'s billing file showing why he issued the credit. J.H. testified vaguely that the credit was related to fees and expenses for the depositions in Boston. Respondent did not offer testimony explaining the credit. The evidence is insufficient to find that Respondent already reimbursed J.H. for the unreasonable fees and expenses that are at issue in this matter.

intentional misrepresentation; that he did not violate V.R.Pr.C 1.4(a)(1), which provides that a lawyer has a duty to inform a client "of any decision or circumstance with respect to which the client's informed consent… is required," or V.R.Pr.C 1.4(a)(2), which provides that a lawyer has a duty to "reasonably consult with the client about the means by which the client's objectives are to be accomplished," and there is no evidence that the attorney fees themselves were unreasonable or that Respondent failed to keep J.H. reasonably informed about the status of her case, so he did not violate V.R.Pr.C. 1.5.

Special Disciplinary Counsel has not proven by clear and convincing evidence that Respondent knew or should have known his estimates were inaccurate at the time he gave them to J.H. In hindsight, it is clear that Respondent substantially underestimated how much J.H. would spend litigating her employment discrimination claims with his assistance. The fact that the estimates turned out to be inaccurate does not necessarily mean that Respondent violated the Vermont Rules of Professional Conduct, though.

First, the evidence clearly shows that Respondent communicated the rate ($250) and basis (hourly) for his attorney fees to J.H. in their retainer agreement. Respondent therefore did not violate V.R.Pr.C. 1.5(b).

Second, the evidence shows that Respondent explained to J.H. how he arrived at each of his estimates, even responding to her follow-up questions. He cautioned her that how much she ultimately spent would depend in large part on the defendant's conduct during discovery. J.H. was aware that the cost of litigating her employment discrimination claims could vary widely, having received estimates from several other attorneys. The evidence in the record is inadequate to find that, under the circumstances, Respondent failed to give J.H. adequate information for her

to make an informed decision about retaining or continuing to retain Respondent. Respondent therefore did not violate V.R.Pr.C 1.4(b).

Finally, Special Disciplinary Counsel has not proven that, by giving J.H. estimates that turned out to be inaccurate, Respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation that calls his fitness to practice law into question. V.R.Pr.C 8.4(c), ann. 1; *In re PRB Docket No. 2007-046*, 2009 VT 115, ¶¶ 9-10 (Rule prohibits "conduct so egregious that it indicates that the lawyer charged lacks the moral character to practice law.") (quotation and citation omitted). Respondent expressed opinions, not facts, about how much it might cost J.H. in attorney fees and expenses to litigate her employment discrimination claims with his assistance. The evidence does not establish that Respondent knew the estimates he gave J.H. were unreasonable given the circumstances at the time. Rather, the evidence tends to show that Respondent was sloppy in putting the estimates together. For example, the revised estimate dated February 2015 reflects fees and expenses totaling $4,800.00 for the documentary discovery phase of her case, even though J.H. had already incurred $22,574.41 in fees and expenses related to this first phase of her case by February 2015. Respondent's negligence, however, does not call his moral character into question. The Hearing Panel concludes that Special Disciplinary Counsel has not proven by clear and convincing evidence that Respondent violated V.R.Pr.C. 1.4, 1.5, or 8.4(c).

Count VII: Violation of Rule 8.1 (Bar Admission and Disciplinary Matters)

A lawyer may not "knowingly make a false statement of material fact" or "fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen" in connection with a disciplinary matter. V.R.Pr.C. 8.1.

Special Disciplinary Counsel charged that Respondent knowingly made two false statements to her in connection with this disciplinary matter – He falsely stated that G.A.'s retainer was in his IOLTA account until he transferred a portion to his operating account in 2019 after the conclusion of representation, and he falsely stated that he issued G.A. a check for his portion of the retainer shortly before July 24, 2020. Respondent conceded the statements he made were false but argued that he did not know they were false when he made them because he relied solely on his faulty memory in making the statements.

Respondent's argument that he falsely told Special Disciplinary Counsel that he kept G.A.'s entire retainer in his trust account until he transferred earned fees and expenses to his law firm operating account after the conclusion of representation because of a faulty memory is plausible. He made the false representation in July 2020; G.A. gave him the retainer in August 2017; the representation concluded in March 2019. He admitted that he did not review records before making the representation to Special Disciplinary Counsel. Respondent's decision to give her information based solely on his memory was negligent under the circumstances, but V.R.Pr.C. 8.1 requires knowledge.

On the other hand, Respondent's argument that he falsely told Special Disciplinary Counsel that he returned G.A.'s retainer because of a faulty memory is not credible. On July 24, 2020, Respondent told Special Disciplinary Counsel that he returned G.A.'s retainer after she reminded him to do so on July 14, 2020. Respondent provided no explanation for this false statement other than a faulty memory; it is simply not plausible that Respondent recalled issuing a check he did not, in fact, issue during those 10 days. Given that Special Disciplinary Counsel was specifically investigating Respondent's handling of G.A.'s retainer, whether or not he

returned the retainer was clearly material. The evidence shows that Respondent knowingly made a false statement of material fact in connection with a disciplinary matter.

The Hearing Panel concludes that Special Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated V.R.Pr.C. 8.1.

DETERMINATION OF SANCTIONS

I. Legal Standards for Imposing Sanctions

Sanctions for violations of the Vermont Rules of Professional Conduct are not meant "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 Hunter*, 167 Vt. 219, 226, 704 A.2d 1154, 1158 (1997); *see also In re Warren*, 167 Vt. 259, 263, 704 A.2d 789 (1997) ("Sanctions are intended to protect the public from lawyers who have not properly discharged their professional duties and to maintain public confidence in the bar.").

The American Bar Association Standards for Imposing Lawyer Discipline ("ABA Standards") call for the Hearing Panel "to weigh the duty violated, the attorney's mental state, the actual or potential injury caused by the misconduct, and existence of aggravating or mitigating factors" in determining sanctions for Respondent's violations of the Vermont Rules of Professional Conduct. *See In re Andres*, 2004 VT 71, ¶ 14, 177 Vt. 511, 857 A.2d 803; *see also* American Bar Association Standards for Imposing Lawyer Discipline ("ABA Standards") (ABA 1986, amended 1992), Part III, § 3.0, at 10. "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. "Suspension is generally appropriate when a lawyer knowingly fails to serve a client's

interests causing real or potential injury or when a lawyer has been reprimanded previously for the same or similar conduct." *In re Andres*, 2004 VT 71, ¶ 14.

In addition to disbarment, suspension, public reprimand, and private admonition, the Hearing Panel may also order probation and reimbursement of funds to clients. A.O. 9, Rule 15(A).

A. The Duty Violated

"In determining the nature of the ethical duty violated, the [ABA Standards] assume that the most important ethical duties are those obligations which a lawyer owes to clients." ABA Standards, Theoretical Framework, at 5. Among the duties a lawyer owes to clients are the duty of loyalty, including the duty to preserve client property, and the duty of candor. *Id.* A lawyer has a duty to the general public not to engage in dishonest conduct because the general public "expects lawyers to exhibit the highest standards of honesty and integrity." *Id.* A lawyer has a duty to the legal system to abide by court rules and not to use false evidence or engage in other improper conduct. *Id.* Finally, a lawyer has duties to the legal profession concerning fees, accepting and terminating representation, and maintaining the integrity of the profession. *Id.*

B. Respondent's Mental State

A lawyer's mental state may be one of intent, knowledge, or negligence. Intent, the most culpable mental state, means "the conscious objective or purpose to accomplish a particular result." ABA Standards, Part III, Definitions, at 7. Knowledge means "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." *Id*. Negligence, the least culpable mental state, means "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would

exercise in the situation." *Id*. "[T]he distinguishing factor between negligent and knowing conduct is whether a lawyer had a conscious awareness of the conduct underlying the violation or whether he failed to heed a substantial risk that a violation would result from his conduct." *In re Fink*, 2011 VT 42, ¶ 38. "Application of these definitions is fact-dependent." *Id.*

C. Injury and Potential Injury

"The extent of the injury is defined by the type of duty violated and the extent of actual or potential harm." ABA Standards, Part II, Theoretical Framework, at 6. Injury means "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.*, Part III, Definitions, at 7. Potential injury means "harm to a client, the public, the legal system or the profession 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.*

D. Aggravating and Mitigating Factors

Aggravating factors are those that "may justify an increase in the degree of discipline to be imposed." ABA Standards, Part III, § 9.21, at 17. Mitigating factors are those that "may justify a reduction in the degree of discipline to be imposed." *Id*., § 9.31, at 18.

Where, as here, there are multiple counts of misconduct, the sanction "should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious misconduct." ABA Standards, Part II, Theoretical Framework, at 7. And suspension is generally appropriate where, as here, the lawyer has been reprimanded for similar misconduct and

"engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession." ABA Standards, Part III, § 8.2, at 16-17.

II. Presumptive Sanctions

Count II: Violation of Rule 1.15(d) (Safekeeping Property)

Respondent owed clients, the general public, and the legal profession a duty to promptly return the undisputed portion of G.A.'s and J.H.'s respective retainers upon the conclusion of representation and to promptly give J.H. a full accounting for her retainer. *See* ABA Standards, Part II, Theoretical Framework, at 5; *In re Anderson*, 171 Vt. 632, 634, 769 A.2d 1282, 1285 (2000) ("[L]awyer misconduct in handling and protecting client trust accounts does injure both the public at large and the profession by increasing public suspicion and distrust of lawyers.").

Having received multiple requests to return the client funds, Respondent's failure to return them was knowing, not merely negligent. There is, however, insufficient evidence of intent on Respondent's part to misappropriate or misuse client funds.

Respondent's failure to promptly return G.A. and J.H.'s retainers caused actual injury. Respondent caused G.A. and his wife and J.H. a great deal of stress by withholding their funds. He caused G.A. to lose use of $1,545.02 for more than 17 months and J.H. to lose use of $2,720 for more than four months. J.H. paid more than four months' interest on a loan she would not have paid if Respondent had promptly returned her funds.

The presumptive sanction for Respondent's failure to preserve client property is suspension because he knew that he was dealing improperly with client property and caused actual injury. *See* ABA Standards, Part III, § 4.12, at 10.

Count III: Violation of Rule 1.15 (Safekeeping Property) and Rule 1.15A(a) (Trust Accounting System)

Respondent owed clients, including C.V. and G.A., the general public, and the legal profession a duty to keep client funds separate from his law firm operating funds and maintain a proper trust accounting system. *See* ABA Standards, Part II, Theoretical Framework, at 5; *In re Anderson*, 171 Vt. at 634.

Respondent received a public reprimand in 2019 for commingling his law firm operating funds with client funds and for failing to maintain a proper trust accounting system. Yet he continued commingling funds, including those of C.V. and G.A. He changed his practice of getting refundable retainers from clients but not other practices because he believed that, having reduced the number of clients for whom held funds, it was pointless to have a robust trust accounting system that included monthly reconciliation of his IOLTA account. Instead, he knowingly relied on his memory instead of a proper trust accounting system to manage client funds. As noted, however, there is insufficient evidence of intent on Respondent's part to misappropriate or misuse client funds.

To the extent Respondent's faulty memory was responsible for his failure to return G.A.'s retainer for more than 17 months after the conclusion of representation, he caused actual injury. Certainly, he caused potential injury by jeopardizing the security of all of the client funds he held. *See In re PRB No. 2013-145*, 2017 VT 8, ¶ 17, 2014 Vt. at 621-622, 165 A.3d 130 ("When a lawyer's IOLTA account is not in compliance with the Rules, properly maintained, and regularly reconciled there is the potential for injury."). Moreover, "lawyer misconduct in handling and protecting client trust accounts does injure both the public at large and the profession by increasing public suspicion and distrust of lawyers." *In re Anderson*, 171 Vt. at

635. Respondent's lack of any appropriate trust accounting system endangered the security of all client funds.

The presumptive sanction is suspension when the lawyer "knows or should know that he is dealing improperly with client property and causes injury or potential injury." *See* ABA Standards, Part III, § 4.12, at 10.

Count IV: Violation of Rule 1.4 (Communication) and Rule 8.4(c) (Misconduct)

Respondent owed a duty to G.A. and the legal profession to explain the withdrawal process and to not engage in deceitful conduct. *See* ABA Standards, Part II, Theoretical Framework, at 5-6; *see also In re Hongisto*, 2010 VT 51, ¶ 11, 188 Vt. 553, 998 A.2d 1065.

Respondent knowingly deceived G.A. about the withdrawal process. He knew the Vermont Rules of Civil Procedure and the Vermont Rules of Professional Conduct required him to continue working on G.A.'s case and prohibited him from withdrawing from G.A.'s case until the court granted him leave to do so, yet he repeatedly told G.A. that he would not work on his case unless he paid off his bills.

Respondent's failure to explain the withdrawal process such that G.A. could make an informed decision about the representation caused actual injury. G.A. worked weekends and sold off property to accelerate payments to Respondent. G.A. and his wife experienced a great deal of financial and emotional stress during a difficult time because of Respondent's threats. They lost trust in Respondent, yet his deceit deprived G.A. of an opportunity to get substitute counsel.

The presumptive sanction for engaging in fraud, deceit, or misrepresentation toward a client is suspension when the lawyer "knowingly deceives a client, and causes injury or potential injury." ABA Standards, Part III, § 4.6, at 12.

Count V: Violation of Rule 1.5 (Fees)

Respondent owed a duty to the legal profession to not charge J.H. unreasonable fees and expenses. *See* ABA Standards, Part III, § 7.0, at 16.

Respondent negligently overcharged J.H. $1,900 in attorney fees, as he essentially acknowledged by agreeing to reimburse J.H. for miscalculating discounted fees. In some of his communications with J.H., he acknowledged forgetting about some of the agreements he made with her regarding fees and authorized her to not pay some of the fees. In others, he refused to honor prior agreements. Respondent also negligently charged J.H. $752.08 in improper hotel and meal expenses for travel to Boston, Massachusetts. The evidence in the record is insufficient to show that Respondent knew the expenses were unreasonable when he charged J.H.; rather, the evidence tends to show that Respondent was sloppy.

Respondent's sloppiness created a substantial risk of overcharging clients. In fact, his sloppiness cause J.H. actual injury. She suffered a financial loss of $2,652.08.

The presumptive sanction for a lawyer who "negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system" is a reprimand. ABA Standards, Part III, § 7.3.

Count VII: Violation of Rule 8.1 (Bar Admission and Disciplinary Matters)

Respondent owed a duty to maintain the integrity of the legal profession to the general public and the profession by not knowingly making a false statement of material fact in connection with a disciplinary matter. *See* ABA Standards, Part II, Theoretical Framework, at 5-6.

Respondent acted negligently when he falsely told Special Disciplinary Counsel that he had placed G.A.'s retainer in his trust account without reviewing records to determine whether

this was true. Respondent acted knowingly when he falsely told Special Disciplinary Counsel that he had recently returned G.A.'s retainer.

Respondent caused injury or potential injury by giving Special Disciplinary Counsel false information about G.A.'s retainer. At minimum, at public expense, Special Disciplinary Counsel spent unnecessary time trying to determine the status of G.A.'s retainer. And as with misconduct in handling client funds, misconduct in making false statements in disciplinary matters injures the public and the profession "by increasing public suspicion and distrust of lawyers." *See In re Anderson*, 171 Vt. at 634.

Suspension is the presumptive sanction "when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system." ABA Standards, Part III, § 7.2.

III. Aggravating and Mitigating Factors

The ABA Standards identify the following aggravating factors that may warrant increasing the presumptive sanction: prior disciplinary offenses, dishonest or selfish motive, pattern of misconduct, multiple offenses, bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with the rules or orders of the disciplinary agency, submission of false evidence, false statements, or other deceptive practices during the disciplinary process, refusal to acknowledge wrongful nature of conduct, substantial experience in the practice of law, indifference to making restitution, and illegal conduct, including that involving the use of controlled substances. ABA Standards, Part III, §§ 9.0-9.3, at 17-18.

The following aggravating factors apply here:

- Prior disciplinary offenses: Respondent was publicly reprimanded in April 2019 for violations of Vermont Rules of Professional Conduct 1.15 and 1.15A.

- Pattern of misconduct: Respondent committed multiple violations involving multiple clients over multiple years of Vermont Rules of Professional Conduct 1.15 and 1.15A.
- Multiple offenses: Respondent violated Vermont Rules of Professional Conduct 1.4, 1.5, 1.15, 1.15A, 8.1, and 8.4. The violations involved three clients, G.A., J.H., and C.V.
- Bad faith obstruction of the disciplinary proceeding: Respondent intentionally failed to respond fully to Special Disciplinary Counsel's discovery requests. Respondent intentionally failed to comply with the Hearing Panel's discovery orders. Respondent repeatedly sought to delay the merits hearing in the weeks leading up to the hearing.
- Submission of false evidence, false statements, or other deceptive practices during the disciplinary process: Respondent gave false information to Special Disciplinary Counsel during her investigation.
- Refusal to acknowledge wrongful nature of conduct: Respondent has not acknowledged the wrongful nature of his conduct during disciplinary proceedings, although he has admitted to some of the conduct.
- Substantial experience in the practice of law: Respondent has more than 30 years of experience as a licensed Vermont attorney.

None of the mitigating factors identified in the ABA Standards (absence of a prior disciplinary record, absence of a dishonest or selfish motive, personal or emotional problems, timely good faith effort to make restitution or to rectify consequences of misconduct, full and free disclosure to disciplinary board or cooperative attitude toward proceedings, inexperience in

the practice of law, character or reputation, physical disability, mental disability or chemical dependency under certain circumstances, delay in disciplinary proceedings, imposition of other penalties or sanctions, remorse, and remoteness of prior offenses) applies. *See* ABA Standards, Part III, § 9.3, at 18.

The aggravating factors clearly outweigh the mitigating factors here. An increase in the length of Respondent's suspension is warranted.

IV. Sanctions

Respondent violated his professional duties to clients, the general public, and the legal profession – and not for the first time. A number of aggravating factors apply. In particular, Respondent's multiple and repeated violations of his trust account duties warrant a significant period of suspension. *See* A.O. 9, Rule 15(B) ("Prior findings of misconduct, including admonitions, may be considered in imposing sanctions."). Respondent's bad faith obstruction of this disciplinary proceeding also warrants a significant period of suspension.

Respondent has demonstrated a disregard for meeting his duties to clients, the public, the legal system, and the attorney disciplinary process. He "poses a serious risk to potential future clients and public trust in the legal profession." *See In re Manby*, 2023 VT 45, ¶ 65. "The appropriate sanction must be weighty enough to counter this serious risk." *In re Bowen*, 2021 VT 7, ¶ 50. The Hearing Panel concludes that, in order to protect client interests and maintain public confidence in the legal profession, Respondent is suspended for one (1) year.

Generally, a "suspension should be for period of time equal to or greater than six months." ABA Standards, Part III, § 2.3, at 8. Generally, "short-term suspensions with automatic reinstatement are not an effective means of protecting the public because rehabilitation cannot be shown in less than six months and a six-month duration is needed to protect client interests." *In*

re Blais, 174 Vt. 628, 631, 817 A.2d 1266 (2002) (quotations and citations omitted); *see also* A.O. 9, Rule 26(B), (D) (A lawyer who is suspended for at least six months must apply for reinstatement and prove they meet reinstatement requirements.). However, "periods of suspension of less than six months are appropriate in some circumstances." *In re McCarty*, 164 Vt. 604, 605, 665 A.2d 885 (1995).

The Panel endeavors to impose a sanction that is consistent with prior disciplinary determinations, although "meaningful comparisons of attorney sanction cases are difficult as the behavior that leads to sanction varies so widely between cases." *In re Robinson*, 2019 VT 8, ¶ 74, 209 Vt. 557, 209 A.3d 570 (quoting *In re Strouse*, 2011 VT 77, ¶ 43 (Dooley, J., dissenting)).

This sanction is not inconsistent with prior disciplinary determinations, although no Vermont case addresses the unique constellation of facts here. *See e.g. In re Manby*, 2023 VT 45 (suspending lawyer for 12 months for violating three ethical rules in handling estate planning matters for an elderly client); *In re Bowen*, 2021 VT 7, ¶ 49 (suspending lawyer for three months given his knowing mental state, dishonest and selfish motivation, and "the fact that he violated the most important ethical duty owed by an attorney – his duty to his clients"); *In re Pope*, 2014 VT 94, 101 A.3d 1284 (suspending lawyer for two years for committing an identity theft crime because she engaged in deceptive conduct that seriously adversely reflected on her fitness to practice law); *In re Neisner*, 2010 VT 102, 16 A.3d 587 (suspending lawyer for two years for giving false information to and impeding a police officer because his conduct reflected adversely on his honesty and trustworthiness); *In re Harwood*, 2006 VT 15, 95 A.2d 192 (disbarring lawyer for commingling and misappropriating client funds over a seven-year period). Notably, in a case that involved a lawyer who failed to account for and return five clients' retainers and violated his duty of diligence to two clients, the hearing panel suspended the lawyer for one year,

taking into account that he was previously reprimanded for failing to account for and pay funds to clients. *In re Wool*, PRB Nos. 2000-164, 2000-171, 2000-196, 2000-209, Decision No. 176.

* * *

Based upon the submissions of the parties and the findings of fact, conclusions of law, and sanctions analysis set forth above, the Hearing Panel ORDERS, JUDGES, and DECREES as follows:

1. Special Disciplinary Counsel's Motion for Permission to File a Sur-Reply is DENIED.
2. Respondent's Motion to File a Sur-Reply is DENIED as moot.
3. Respondent's Motion for Dismissal or Alternatively for a New Hearing is DENIED.
4. Respondent has violated Vermont Rules of Professional Conduct 1.15(d), 1.15, 1.15A(a), 1.4, 8.4(c), 1.5, and 8.1.
5. Respondent is SUSPENDED from the practice of law for one (1) year. The suspension shall take effect forty-five (45) days from the date of this Decision to allow Respondent an opportunity to appeal, should he so choose, or comply with the requirements of A.O. 9, Rule 27.
6. Respondent shall REIMBURSE J.H. $2,652.08 in overpaid fees and expenses within forty-five (45) days from the date of this Decision.
7. Respondent shall serve at least one (1) year on PROBATION after the date of his reinstatement pending: (a) completion of two separate compliance examinations of Respondent's trust account(s), to be undertaken at successive six-month intervals by an auditor chosen by Disciplinary Counsel and at Respondent's expense, in order to assess Respondent's compliance with Vermont Rules of Professional Conduct 1.15 and 1.15A. The auditor shall produce a report following each compliance examination and submit the

report to both Respondent and Disciplinary Counsel; and (b) Disciplinary Counsel's submission of an affidavit, pursuant to Administrative Order No. 9, Rule 8(A)(6)(b), stating that probation is no longer necessary and summarizing the basis for that conclusion. Upon submission of a sufficient affidavit by Disciplinary Counsel, Respondent's probation shall be terminated.

Dated September 22, 2023.

Hearing Panel No. 9

By: _____
Karl C. Anderson, Esq., Chair

By: _____
Eric A. Johnson, Esq.

By: _____
Thomas J. Sabotka, Public Member