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2020 VT 54

No. 2019-247

In re Sigismund Wysolmerski, Esq.
(Office of Disciplinary Counsel, Appellant)

Original Jurisdiction

Professional Responsibility Board

February Term, 2020

Caryn E. Waxman, Chair

Sarah Katz, Disciplinary Counsel, Burlington, for Petitioner-Appellant.

Sigismund J. Wysolmerski, Pro Se, Rutland, Respondent-Appellee.

PRESENT: Robinson, Eaton and Carroll, JJ., and Grearson and Tomasi, Supr. JJ., Specially Assigned

¶ 1. **EATON, J.** This appeal concerns review of a determination by a hearing panel of the Professional Responsibility Board that respondent, Sigismund Wysolmerski, committed several violations of the Vermont Rules of Professional Conduct in his practice as an attorney. As a result, the hearing panel suspended respondent from the practice of law for twelve months. This Court ordered review of the hearing panel's determination on its own motion pursuant to Administrative Order 9, Rule 11.E and designated the Office of Disciplinary Counsel as appellant. Disciplinary counsel argues the sanction imposed by the hearing panel should be increased to an eighteen-month suspension because of respondent's repeated dishonesty. Respondent seeks a decreased sanction to a reprimand or suspension for less than six months because he believes a longer suspension is unnecessary and would serve no purpose in preserving public confidence in

the legal profession. We disagree with both recommendations and order respondent disbarred from the practice of law.

¶ 2. The hearing panel's extensive factual findings—which, with two exceptions, are not in dispute—are summarized as follows. Respondent has been an attorney primarily involved in civil practice in Rutland since 1980. In 1997, respondent received a three-year suspension from the practice of law as a result of multiple violations of the Rules of Professional Conduct taking place over an eight-year period. See In re Wysolmerski, 167 Vt. 562, 702 A.2d 73 (1997) (mem.). These violations included making false statements to attorneys and to the courts, failing to keep in contact with clients, and failing to file a promised lawsuit. Respondent was reinstated to the Vermont bar and the suspension lifted in 2001. Respondent received a private admonition in 2012 for misconduct not related to the conduct at issue in this case.

¶ 3. This disciplinary matter arises out of respondent's representation of T.L., on a contingent-fee basis, in connection with T.L.'s claims against his mortgage lender seeking a mortgage modification and claiming deceptive lending practices. Respondent's representation of T.L. began in 2008. Ultimately, respondent filed a civil action in December 2014 on T.L.'s behalf against multiple entities, including West Star Mortgage Inc. Throughout the pendency of the lawsuit, T.L. lived in Maine.

¶ 4. The complaint alleged that West Star Mortgage Inc.'s predecessor, CFIC, had assigned T.L.'s loan to others. Respondent had obtained information concerning West Star's potential involvement from a phone number on T.L.'s loan paperwork. Respondent called the number and reached a person in Virginia who claimed to be working for "West Star Mortgage." Based on that call, respondent concluded that West Star Mortgage Inc. was the successor-corporation to T.L.'s original lender. Respondent had the complaint served on the registered agent of "West Star Mortgage Inc." It was identified only as "West Star" in the sheriff's return of service.

¶ 5. It turned out that there were two West Star Mortgage entities, a "West Star Mortgage, Inc.," based in Virginia, and a "West Star Mortgage Corporation" located in the southwestern United States. General counsel of West Star Mortgage Inc., Jeremy Martin, who received the complaint, called respondent and told him that his company had no record of lending to T.L., and that respondent had probably served the wrong entity. Respondent told Martin he would look into the issue and get back to him. Respondent agreed that no answer was required by Martin's company in the interim. Martin sent an email to respondent the same day confirming respondent's agreement granting an extension of time to answer if one became necessary. Respondent never got back to Martin and never responded to the email.

¶ 6. In the meantime, respondent filed a motion to amend his complaint by changing "West Star Mortgage Inc." to "West Star Mortgage" without the suffix.[1] The court granted his motion a few days later. He did not serve the first amended complaint on West Star Mortgage Co. or on West Star Mortgage Inc.

¶ 7. In late January 2015, Martin sent another email to respondent, again confirming counsel's understanding that respondent had agreed to an extension of time to answer and requesting an update on respondent's efforts to identify the proper West Star Mortgage entity. Respondent did not reply to this email either.

¶ 8. The hearing panel found respondent verbally agreed to give Martin's company an indefinite extension of time to answer the complaint, subject to further communication between respondent and corporate counsel. Attorneys entered appearances for the other defendants named in the suit, including in the second amended complaint, which also was not served on either West Star Mortgage entity. No one appeared on behalf of West Star Mortgage Co. or West Star Mortgage Inc.

[1] As used in this opinion, "West Star Mortgage Inc." refers to the entity in Virginia, "West Star Mortgage Co." refers to the entity in the southwest, and "West Start Mortgage" refers to the unspecified entity that respondent named in the amended complaint.

¶ 9. As the lawsuit progressed, respondent filed three affidavits with the court which had purportedly been signed by T.L. Each of these affidavits was notarized by respondent and stated, "Signed and subscribed under oath by [T.L.] a person known to me." The first was dated in August 2015 and filed in opposition to a motion to dismiss by a defendant. The second was dated in October 2016 and filed in opposition to a motion for summary judgment filed by another defendant. The third was dated in January 2017 and filed in support of a motion for entry of default judgment by T.L. against West Star Mortgage. The hearing panel concluded that none of the affidavits had been signed by T.L. The panel was unable, however, to determine who signed T.L.'s name to the affidavits, whether the affidavits had been signed with T.L.'s authorization or consent, or whether respondent was aware that T.L. had not signed them. The hearing panel found the content of the affidavits were consistent with the guidance T.L. had provided to respondent in pursuit of his claim. Respondent asserted that the affidavits were signed remotely and returned to him, and when he notarized them he believed they bore T.L's signature.[2] The panel was unable to conclude otherwise.

¶ 10. In connection with T.L.'s motion for default judgment against West Star Mortgage, respondent filed his own affidavit in which he asserted West Star Mortgage was the successor to CFIC, and that service had been accomplished on West Star Mortgage. Respondent also filed a copy of the return of service made by the sheriff on "West Star." The caption of the motion listed "West Star Mortgage" as the defendant, but the body of the motion and the affidavit referenced "West Star Mortgage Inc." Respondent did not explain why he continued to use "West Star Mortgage Inc." after he had moved to amend the complaint to eliminate the "Inc."

[2] The hearing panel's findings incorrectly state that respondent maintained that, at the time he notarized the affidavits he believed they bore "[r]espondent's signature." The hearing panel obviously meant that respondent maintained that, at the time he notarized them, he believed they bore T.L.'s signature. This error plays no part in our decision.

¶ 11. Neither the motion for default nor respondent's affidavit in support made any mention of the extension of time that had been given by respondent to West Star Mortgage Inc. Likewise, they did not mention that West Star Mortgage Inc. asserted that the wrong entity had been sued, that West Star Mortgage Corporation might be the appropriate party, or give any indication that respondent had investigated this assertion. Respondent was aware of the previous communications with West Star Mortgage Inc. and knowingly chose to make no mention of them to the court. He also did not provide West Star Mortgage Inc. with a copy of the motion for default.

¶ 12. The motion for default was granted against West Star Mortgage in May 2017 with judgment for $325,000. Respondent made no effort to execute on the judgment against West Star Mortgage Inc.

¶ 13. In June 2017, respondent filed an appeal with this Court from the trial court's decision granting summary judgment in favor of two other defendants in the suit. While the appeal was pending, respondent requested and received an extension of time to file an appellant's brief on behalf of T.L. The order granting the extension warned that the appeal might be dismissed without further notice if the brief was not timely filed. Subsequently, respondent failed to file a brief and the appeal was dismissed.

¶ 14. During the pendency of the appeal, respondent and T.L. had several conversations. Respondent had doubts about the possibility of success concerning T.L.'s appeal, which he communicated to T.L. Despite those concerns, respondent at no time told T.L. that he wanted to withdraw as his attorney or that he would be filing a motion to withdraw. Respondent also failed to tell T.L. that he would not be filing a brief on his behalf.

¶ 15. On September 14, 2017, before the appeal was dismissed, T.L. sent an email to respondent advising him that T.L. understood respondent had sent documents concerning the appeal to him but that T.L. had not yet gotten them. Respondent did not reply to the email. T.L.

sent a follow-up email on September 25, 2017, again informing respondent that T.L. had not received any documents and expressing his concern. Respondent did not reply to this email either.

¶ 16. About three weeks after T.L.'s second email, he traveled to Rutland to meet with respondent. At that time, respondent told T.L. the appeal had been dismissed by the Court. Respondent had not told T.L. of the dismissal at the time it occurred.[3] Following that meeting, T.L. contacted the Court directly and learned the appeal had been dismissed because respondent missed the filing deadline. T.L. then emailed respondent expressing his surprise, anger, and disappointment. Respondent did not reply to the email.

¶ 17. In 2017, respondent's sister became ill with a serious disease. In July 2017, her condition worsened, and she required extensive assistance and out-of-state medical services. Respondent served as primary caregiver for his sister during her final illness until her death on September 13, 2017. His sister's illness caused respondent significant emotional distress and placed demands on his time.

¶ 18. Respondent accepts responsibility for the dismissal of T.L.'s appeal and for not promptly telling T.L. that he would not be filing a brief on his behalf.

¶ 19. In March 2018, West Star Mortgage Inc.'s successor's corporate counsel, who had previously communicated with respondent on behalf of West Star Mortgage Inc., sent another email to respondent requesting an update on the status of the lawsuit. The email also asked respondent to confirm that an agreement remained in place, and that no answer would be required from West Star Mortgage Inc. until further notice and discussion between counsel for the parties. Respondent sent a reply email that day stating that he no longer represented T.L. He did not tell corporate counsel that a judgment for $325,000 had been entered against West Star Mortgage Inc. several months previously as a result of respondent's motion for default.

[3] The appeal was dismissed on September 21, 2017, four days before T.L. sent his second email to respondent expressing his concern.

¶ 20. Once they learned of the default judgment, West Star Mortgage Inc.'s successor hired local counsel and filed a motion to vacate the default. A hearing was scheduled on the motion to vacate at which corporate counsel for West Star Mortgage Inc.'s successor appeared and testified. Respondent attended the hearing and advised the court that he was moving to withdraw as counsel for T.L., who also attended the hearing. The court granted respondent's motion to withdraw but directed him to remain in the courtroom during the hearing on the motion to vacate. Respondent made no statement to the court concerning the motion to vacate. The hearing panel found respondent knowingly kept the court in the dark about the communications he had with West Star Mortgage Inc.'s counsel, and amended the complaint to an entity that bore common elements to West Star Mortgage Inc. and West Star Mortgage Corporation without any explanation. The hearing panel found respondent's misconduct to be knowing. The ABA Standards for Attorney Discipline A. 1.1 define "knowledge" as the "conscious awareness of the nature or attendant circumstances of his or her conduct both without the conscious objective or purpose to accomplish a particular result." ABA Standards, Theoretical Framework p. 6.

¶ 21. Disciplinary Counsel filed a petition alleging five counts of misconduct. The first three counts each alleged conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 8.4(c) arising from respondent's filing of the three affidavits discussed above. Count four alleged that respondent "knowingly made a false statement of fact or law to a tribunal or failed to correct a false statement of material fact or law previously made to the tribunal" in violation of Rule 3.3(a)(1). This charge was predicated on respondent's conduct surrounding the motion for default judgment. The final count alleged that respondent failed to keep T.L reasonably informed about the status of his pending appeal to this Court in violation of Rule 1.4(a)(3). Following a hearing, a panel of the Professional Responsibility Board found that respondent knowingly engaged in each of the charged actions, and that this misconduct violated Rules 8.4(c),

3.3(a)(1), and 1.4(a)(3). It concluded that the appropriate sanction was a twelve-month suspension from the practice of law.

¶ 22. We review the hearing panel's factual findings for clear error. A.O. 9, Rule 11(E). "[W]hether the findings are purely factual or mixed law and fact," we will uphold them where "clearly and reasonably supported by the evidence." In re Strouse, 2011 VT 77, ¶ 8, 190 Vt. 170, 34 A.3d 329 (per curiam) (quotation omitted). The panel's legal conclusions, which include its violation determinations and sanction recommendations, are reviewed de novo. In re Robinson, 2019 VT 8, ¶ 27, __ Vt. __, 209 A.3d 570 (per curiam).

I. Hearing Panel Findings

¶ 23. Respondent challenges only two factual findings of the hearing panel. First, he denies that he told West Star Mortgage Inc.'s counsel that he could have an extension of time to answer until respondent investigated the identity question further, and that no answer was required in the meantime. At the disciplinary hearing, Attorney Martin testified that respondent told him no answer would be required until respondent had investigated the issue of the correct defendant. Respondent does not dispute that this evidence was provided at the hearing. Rather, he denies he made those statements. Reconciling conflicting testimony is the province of the factfinder. Travia's Inc. v. State, Dept. of Taxes, 2013 VT 62, ¶ 17, 194 Vt. 585, 86 A.3d 394 (noting credibility of contravening evidence is question for factfinder). The hearing panel chose not to believe respondent and to credit the contrary evidence. Respondent's continued denial does not make the panel's finding erroneous.

¶ 24. Respondent also denies that he knowingly kept the trial court in the dark about the true state of affairs concerning the default motion. He argues he had moved to withdraw from the case prior to the hearing on the motion to vacate, although the withdrawal motion was not granted until the start of the hearing on the motion to vacate. Respondent does not clearly articulate why he feels the hearing panel's finding was erroneous. His apparent position is that he was under no

obligation to make any statement to the court once his motion to withdraw was granted. We disagree with respondent's position. See V.R.Pr.C. 3.3(a) ("A lawyer shall not knowingly. . . fail to correct a false statement of material fact . . . previously made to the tribunal by the lawyer . . . ."); id. cmt. 13 (explaining that obligation to rectify such statements continues until a proceeding has concluded, i.e., "when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed"). In any event, there is ample evidence supporting the hearing panel's determination on this issue, even confining consideration to the pre-withdrawal conduct of respondent. Respondent knowingly made no mention of the telephone conversation or the three emails he had received from West Star Mortgage Inc. confirming the indefinite extension of time to answer or the doubts raised by West Star Mortgage Inc. concerning the identity of the correct defendant in his motion for default. Id. cmt. 3 ("There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."). He submitted a motion for default which said that West Star Mortgage had "failed to appear, plead, or otherwise defend within the time prescribed by the Rules." In addition, respondent amended the complaint from asserting a claim against "West Star Mortgage Inc." to "West Star Mortgage" without further identification. He provided no explanation to the court for the amendment, although this action followed closely on the heels of doubts being raised as to the identity of the proper defendant.

¶ 25. The hearing panel's finding that the respondent gave an indefinite extension to answer and that he knowingly did not disclose important information concerning the default motion are both clearly and reasonably supported by the evidence. There was no error in the hearing panel's findings.

II. Legal Conclusions

¶ 26. We are left then to consider whether the hearing panel's legal conclusions, including its violations determinations, were correct. If they were, we must then further consider the panel's sanction recommendation. We review the panel's legal conclusions, including its

violations determinations and sanctions recommendations, de novo. See supra, ¶ 22. We have recently clarified that in considering a hearing panel's sanctions recommendations, "the 'great weight' afforded to panel recommendations is more appropriately characterized as giving consideration to the panel in light of this Court's plenary authority, rather than giving the panel 'deference' as that term is used in our broader caselaw." Robinson, 2019 VT 8, ¶ 25. Thus, while we carefully consider the panel's conclusions, where our analysis parts ways with that employed by the panel, we "exercise our plenary authority to reach the appropriate conclusions and sanctions." Id. ¶ 27.

¶ 27. Respondent argues that the sanction recommended by Disciplinary Counsel and that imposed by the hearing panel is too severe. Despite the lack of challenge to any of the panel's violations determinations, we review them in the context of our sanctions decision. Where a violation of the Rules of Professional Conduct has occurred, the American Bar Association's Standards for Imposing Lawyer Sanctions guide our sanctions determinations. In re Fink, 2011 VT 42, ¶ 35, 189 Vt. 470, 22 A.3d 461; see Ctr. for Prof'l Responsibility, Am. Bar Ass'n, Standards for Imposing Lawyer Sanctions (1986) (amended 1992) [hereinafter ABA Standards]. "Under this construct, we consider: '(a) the duty violated; (b) the lawyer's mental state; (c) the actual or potential injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors.' " Fink, 2011 VT 42, ¶ 35 (quoting ABA Standards § 3.0). The standards provide a presumptive sanction "[d]epending on the importance of the duty violated, the level of the attorney's culpability, and the extent of the harm caused." Id. However, the presumptive sanction may be altered "depending on the existence of aggravating or mitigating factors." Id. Notably, "the purpose of sanctions is not to punish attorneys, but rather to protect the public from harm and to maintain confidence in our legal institutions by deterring future misconduct." Id. (quotation omitted). We consider each violation in turn.

A. Violation of Rule 8.4(c)—Notarization of Affidavits

¶ 28. With respect to the three affidavits that respondent notarized and submitted to the court, the hearing panel concluded that respondent had violated Rule 8.4(c) of the Rules of Professional Conduct, which provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The panel concluded, and we agree, that to find a violation of Rule 8.4(c), some culpable state of mind is necessary. Although Rule 8.4 is broad, we have previously recognized that it applies only to conduct "so egregious that it indicates that the lawyer charged lacks the moral character to practice law." In re PRB Docket No. 2007-046, 2009 VT 115, ¶ 12, 187 Vt 35, 989 A.2d 523. Because an attorney's mental state determines how his conduct reflects on his moral character, we agree that some scienter is required to support a violation of Rule 8.4(c). Compare Strouse, 2011 VT 77, ¶ 18 (affirming Rule 8.4(c) violation where attorney's actions "motivated by a self-serving desire to keep both her employment and her relationship"), with PRB Docket No. 2007-046, 2009 VT 115, ¶ 17 (declining to find Rule 8.4(c) violation where "respondents earnestly believed that their actions were necessary and proper" and were motivated by desire to defend their client).

¶ 29. It is not contested that respondent filed three affidavits, executed at various times over the course of nearly eighteen months, that respondent knew had not been signed in his presence. He made no disclosure to the court that he had not seen the affiant sign the documents, which failure defeated the purpose of the notarization. The jurat omitted the standard "subscribed to and sworn before me" phrasing, but represented that they were signed under oath.[4] This did not

[4] We note that respondent's misconduct took place prior to the effective date of the Uniform Law on Notarial Acts, 26 V.S.A. §§ 5301-5378. See id. § 5364 (providing that person executing signature "shall appear personally before the notary public," accomplished either by being "in the same physical place" or "communicating through a secure communication link" pursuant to standards prescribed by rulemaking by the Secretary of State). However, the office of the notary is one " 'long known to the civil law,' " as is its characteristic responsibility to "attest to the authenticity of signatures" by notarizing documents. Notary Public, Black's Law Dictionary (11th ed. 2019) (quoting J. Proffatt, A Treatise on the Law Relating to the Office and Duties of Notaries Public § 1, at 1 (J. Tyler & J. Stephens eds, 2d ed. 1892)); Jurat, Blacks Law Dictionary

put the court on notice that respondent did not see T.L. sign the affidavits or that any oath administered to him was not sworn in respondent's presence.[5] See Sargent v. Shepard, 94 Vt. 351, 11 A. 447, 448-49 (1920) (holding that "[t]he omission of the words 'before me' preceding the signature of the notary" does not alone destroy the presumption that the "affidavit was sworn to before the notary who attached his signature to the jurat," and finding that jurat stating "[s]ubscribed and sworn to" was sufficient "to warrant a [court's] inference that the affiant personally appeared before the officer who signs the jurat"). Respondent's submission of the affidavits under his signature as notary constituted his representation that the signature of the affiant was genuine and that T.L. swore the content was true. See V.R.C.P. 11(b) ("By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other document, an attorney . . . is certifying that to the best of [his] knowledge. . . [the] factual contentions have evidentiary support . . . ."). As respondent did not see the documents being signed and did not administer the oath to T.L. in his presence, he had no basis upon which to make those representations. Respondent concedes "there may [have] be[en] a technical violation of the notarization process."

¶ 30. We agree with the Supreme Court of Ohio, which has explained that an attorney acting in his capacity as a notary

> owe[s] his clients, the public, and the judicial system a duty to conscientiously observe his duties as a notary public. . . . [A]uthenticating a document through notarization is not a trifle, and the failure to do so properly is a fraud on anyone who later relies on the document. Respondent owed an equally important duty to his

(11th ed. 2019) ("A certification added to an affidavit . . . stating when and before what authority the affidavit . . . was made. A jurat typically says 'Subscribed and sworn to before me this ____ day of [month], [year],' and the officer (usu[ally] a notary public) thereby certifies three things: (1) that the person signing the document did so in the officer's presence, (2) that the signer appeared before the officer on the date indicated, and (3) that the officer administered an oath or affirmation to the signer, who swore to or affirmed the contents of the document.").

[5] Respondent claimed he administered the oath to T.L. over the telephone.

> clients, the public, and the judicial system to ensure the authenticity of documents executed at this direction.

Disciplinary Counsel v. Roberts, 117 Ohio St. 3d 99, 2008-Ohio-505, ¶¶ 12, 14, 881 N.E.2d 1236 (per curiam) (citation omitted) (disciplining attorney for knowingly "dishonoring his notary jurat"). In this case, had respondent been truthful concerning the affidavits, a party or the court could have challenged them. Whether the affidavits contained information which was consistent with T.L.'s position is beside the point. The affidavits were not what respondent represented them to be, and respondent knew this. Respondent's submission of the affidavits when he had not seen T.L. sign them and had not administered the oath in T.L.'s presence was knowingly dishonest conduct and a violation of Rule 8.4(c). Regardless of the affidavit's consistency with T.L.'s position, respondent's actions caused harm to the legal system. See In re McCarty, 2013 VT 47, ¶ 30, 194 Vt. 109, 75 A.3d 589 ("[A]ny time an attorney purposely ignores legal procedures [even] for his client's benefit, the legal system is undermined and thereby harmed."). The presumptive sanction under ABA Standards § 7.2 for "knowingly engag[ing] 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 suspension.

B. Violation of Rule 3.3(a)(1): Default-Judgment Motion and Affidavit

¶ 31. The hearing panel found respondent's submission of his affidavit in support of a default judgment after agreeing to an open-ended extension of time for the defendant to answer and without disclosing the concerns over the identity of the responsible West Star entity was a violation of Rule 3.3(a)(1). That Rule provides that "[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."

¶ 32. Respondent submitted his affidavit which made no mention of either his discussion with West Star Mortgage Inc.'s counsel or the communications confirming the open-ended extension of time to answer. In addition, respondent amended the complaint twice without

providing a copy to any West Star entity and filed for default judgment against West Star Mortgage[6] after providing assurances to counsel that an extension of time to answer had been given.

¶ 33. Respondent's position that he had no obligation to inform the court of any of these details at the time of the hearing to vacate the default because he had moved to withdraw overlooks two things. First, respondent was not candid with the court at the time he filed the motion for default and his supporting affidavit. See V.R.Pr.C. 3.3 cmt. 3 ("[A]n assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer . . . , may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry."). This was well before he moved to withdraw as T.L.'s counsel. Although the hearing panel did not do so, it is appropriate to consider that respondent's affidavit was submitted in support of a default motion in which he had a significant financial stake in the outcome by virtue of his contingent-fee agreement with T.L.

¶ 34. Secondly, respondent did not inform the court of any of these discussions or agreements when he moved to withdraw or when he attended the hearing on his motion to withdraw, which was held concurrently with the motion to set aside the default judgment. Respondent's duty of candor to the court continued even if his motion to withdraw was granted, and, under these circumstances, his failure to make a disclosure was the equivalent of an affirmative misrepresentation. See V.R.Pr.C. 3.3 cmt. 3. The general duty of candor to the tribunal continues. Malautea v. Suzuki Motor Co., Ltd., 987 F.2d 1536, 1546 (11th Cir. 1993) ("All attorneys, as 'officers of the court,' owe duties of complete candor and primary loyalty to the court before which they practice. . . . This concept is as old as common law jurisprudence itself."), cert. denied, 510 U.S. 863 (1993); United States v. Shaffer Equip. Co., 11 F.3d 450, 457-58 (4th Cir.

[6] Consistent with his amended complaint, respondent moved for default judgment against "West Star Mortgage" without a suffix.

1993) ("The [judicial] system can provide no harbor for clever devices to divert the search, mislead opposing counsel or the court, or cover up that which is necessary for justice in the end."); Griffis v. S. S. Kresge Co., 197 Cal. Rptr. 771, 777 (Cal. Ct. App. 1984) ("The concealment of material information within the attorney's knowledge as effectively misleads a judge as does an overtly false statement."). "A review of the cases throughout the country clearly illustrate that the general duty of candor may be thwarted through an attorney's silence." Gum v. Dudley, 505 S.E.2d 391, 400 & n.14 (W. Va. 1997) (collecting cases). Respondent cannot escape his duty to be candid with the court by taking refuge behind a motion to withdraw, which itself did not inform the court of the information leading to the motion to vacate. None of the information that respondent possessed concerning the time to answer or identity of the West Star defendant required disclosure of any attorney-client confidences which might have served to explain his nondisclosure. Respondent's actions in seeking the default and in not bringing forward the additional information were done knowingly. Had the court been informed of these things, its decision to enter the default likely would have been different, as evidenced by the court vacating the default judgment when all the facts came to light.

¶ 35. Respondent asserts in his brief that no harm was caused to West Star Mortgage Inc. by his actions because it did not spend anything in defense of the initial claims, it had incurred no appearance or other expenses, and respondent "to this day, believes the proper party had been served, and by this maneuver has evaded liability richly deserved." We disagree. Harm was caused to West Star Mortgage Inc. in the time and expense necessary to vacate the default. Harm was also caused to the judicial system in wasting court resources to vacate a judgment that would not have been entered had respondent fulfilled his duty of candor to the court.[7] See V.R.Pr.C. 3.3

[7] Respondent claims he was improperly prohibited from cross-examining West Star Mortgage Inc.'s successor's counsel at the disciplinary hearing concerning misconduct by West Star in lending practices. This argument was not preserved, and we do not consider it. In any event, the transcript shows respondent received an answer to the question he posed and did not pursue further inquiry.

cmt. 2 (explaining that Rule 3.3 "sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process"). Respondent's conduct was knowing.

¶ 36. Respondent's conduct was a violation of Rule 3.3(a)(1). As with the violation of Rule 8.4(c), the presumptive ABA sanction, pursuant to § 7.2, for "knowingly engag[ing] 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 suspension.

C. Violation of Rule 1.4(a)(3)—Keeping Client Informed

¶ 37. Rule 1.4(a)(3) establishes that an attorney has a duty to keep his or her "client reasonably informed about the status of the matter." V.R.Pr.C. 1.4(a)(3). Respondent admits that he failed to tell T.L. he was not going to file an appellate brief to support the appeal he had filed on T.L.'s behalf. This was despite several phone calls between respondent and T.L. about the appeal while it was pending and two inquires via email by T.L. to respondent asking about the status of the appeal. One email was before the appeal was dismissed, and one was after. Respondent never answered either one. His only excuse for not doing so was because of his sister's illness. And while respondent accepts responsibility, he still attempts to blame T.L., arguing that the professional-conduct complaint against him is an effort by T.L. to gain an advantage in a potential malpractice suit. Respondent's conduct in not keeping T.L. informed was knowing, which respondent does not dispute. This included delay in telling T.L. the appeal had been dismissed in the face of his specific inquiry about its status. Respondent's actions were a violation of Rule 1.4(a)(3) in failing to keep T.L. reasonably informed of the status of his appeal. Respondent's violation resulted in injury to T.L., who lost his opportunity to appeal. This loss of the right to appeal also caused T.L. anxiety.

¶ 38. When a lawyer knowingly fails to perform a service for a client and causes injury or potential injury to the client, ABA Standards § 4.42(a) provides that the presumptive sanction

is suspension. Lawyers should fulfill a client's reasonable expectations for information consistent with the duty to act in the client's best interests. V.R.Pr.C. 1.4 cmt. 5. Respondent's breach of duty here was to his client, which the ABA regards as the most serious ethical duty. ABA Standards, Theoretical Framework p. 5.

D. Sanction

¶ 39. The Vermont Rules of Professional Conduct serve a twofold purpose: to protect the public from persons unfit to serve as attorneys 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 McCoy-Jacien, 2018 VT 35, 207 Vt. 624, 186 A.3d 626 (mem.). The purpose of sanctions is not to punish, but to further those two ends. In re Obregon, 2016 VT 32, ¶ 19, 201 Vt. 463, 145 A.3d 226. In consideration of appropriate sanctions, we draw guidance from the ABA Standards for Imposing Lawyer Discipline, which call for weighing "the duty violated, the attorney's mental state, the actual or potential injury caused by the misconduct, and the existence of aggravating or mitigating factors." In re Andres, 2004 VT 71, ¶ 14, 177 Vt. 511, 857 A.2d 803 (mem.). As noted above, see supra, ¶ 26, we have further clarified that we consider the recommendation of the hearing panel to be "just that—a recommendation." Robinson, 2019 VT 8, ¶ 27. "If our analysis comports with the recommendation of the panel, we will affirm it; if it does not, we will exercise our plenary authority to reach the appropriate conclusions and sanctions." Id.

¶ 40. The Standards provide that in each case, after making an initial sanctions determination, the court should then consider the presence of aggravating and mitigating circumstances to arrive at the appropriate sanction. Strouse, 2011 VT 77, ¶ 19 (explaining that Standards provide presumptive sanction which "can then be tailored to the case, based on the presence of aggravating or mitigating factors"). Respondent has breached three Rules of Professional Conduct, each carrying a presumptive sanction of suspension. With this background

in mind, we consider the aggravating and mitigating circumstances. ABA Standards § 9.2 sets forth a non-exclusive list of factors which may justify an increase in the degree of discipline to be imposed and are thus aggravating circumstances. ABA Standards § 9.3, in turn, lists a non-exclusive group of factors which may justify a downward departure from the presumptive sanction.

¶ 41. Foremost among the aggravating circumstances here is respondent's prior disciplinary history resulting in his suspension in 1997. ABA Standards § 9.22(a). That suspension stemmed from numerous violations of the Code of Professional Responsibility taking place between 1985 and 1993. Among the violations, respondent acted without clients' approval and bound them to unauthorized settlements; misrepresented to other attorneys his authority to bind his clients; lied to clients about the status of their cases; was knowingly and repeatedly dishonest with clients, other attorneys, and the courts; failed to keep in contact with clients and inform them of their legal obligations; failed to file a promised lawsuit; failed to forward settlement offers and court papers; did not fulfill his professional contracts with clients; and engaged in conduct adversely reflecting on his fitness to practice law. While recognizing that "[s]uch behavior generally merits disbarment," the Court followed the recommendation of the Professional Conduct Board, imposing a three-year suspension while characterizing respondent's misconduct as "grave." Wysolmerski, 167 Vt. at 563, 702 A.2d at 74-75. The Court did not disbar respondent at that time solely because of mitigating factors, primarily respondent's problems in his personal life. Id.

¶ 42. Because of the passage of time, the hearing panel here did not ascribe significant weight to the prior misconduct in aggravation, despite noting "some similarity between the current violations and the misconduct underlying the 1997 suspension that is troubling the panel."[8]

[8] Disciplinary Counsel did not argue before the hearing panel, and the panel did not consider, whether ABA Standards § 8.1(b) applied to this misconduct. Section 8.1(b) provides that "[d]isbarment is generally appropriate when a lawyer" has previously "been suspended for the same or similar misconduct, and intentionally or knowingly engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession." Given the similarity between some of respondent's current misconduct and that which was the subject of the 1997 suspension order, Standards § 8.1(b) provides additional support for our

Relying on In re Fink, 2011 VT 42, the hearing panel determined that the prior discipline should carry little weight "[b]ecause of the lengthy period of time that elapsed between the events underlying those charges and the conduct currently charged." It is true that we considered the remoteness of prior misconduct to be a mitigating factor in Fink, consistent with ABA Standards § 9.32(m).[9] See Fink, 2011 VT 42, ¶ 45. However, we think that Fink paints with too broad a brush. Although remoteness of prior misconduct is a mitigating circumstance, many jurisdictions have recognized that where the prior misconduct is severe or where it is similar to the current misconduct, the mitigating value of remoteness is dampened or eliminated. In re Disciplinary Proceeding Against VanDerbeek, 101 P. 3d 88, 92 (Wash. 2004) (holding that remoteness of lawyer's past misconduct was not mitigating factor where prior disciplinary offenses were similar in nature to instant offense); Disciplinary Matter Involving Stepovich, 386 P. 3d 1205, 1212 (Alaska 2016) (holding that remoteness did not lessen weight of prior-offense aggravator because, while offenses were "not all similar, a lawyer with a history of professional discipline should be familiar with the Rules of Professional Responsibility and particularly apt to tread carefully in circumstances that are ethically uncertain"). Given the gravity and similarity of respondent's prior misconduct, the passage of time does not blunt its significance as an aggravating factor in this case.

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sanctions determination. See also People v. Bottinelli, 926 P.2d 553, 558 (Colo. 1996) (en banc) ("Were this the first time that the respondent had engaged in this type of misconduct, a period of suspension might be appropriate. The respondent, however, has engaged in such conduct before, and has been suspended for it, with no apparent effect on his subsequent behavior." (citations omitted)); In re Friedland, 416 N.E.2d 433, 439 (Ind. 1981) (finding disbarment appropriate where attorney was subject to prior discipline and "[t]he misconduct found in the prior proceeding together with the misconduct present in this cause establishes a pattern" indicating that "Respondent d[id] not appear to understand the responsibilities of attorneys admitted to practice in this State"); Benson v. State Bar, 531 P.3d 581, 584, 588, 590-91 (Cal. 1975) (finding disbarment appropriate sanction for attorney, previously suspended for misappropriation of client funds, who induced client to loan him money by making false representations and then failing to repay loan).

[9] Although the ABA Standards identify the remoteness of prior conduct as a "mitigating" factor, it is better understood as a consideration that reduces or eliminates the aggravating impact of the prior misconduct.

We disagree with the hearing panel's assessment that the prior misconduct was not entitled to significant weight given the passage of time.

¶ 43. A dishonest or selfish motive is also an aggravating circumstance pursuant to ABA Standards § 9.22(b). The hearing panel recognized this as a potential aggravating circumstance, finding that respondent acted with a dishonest motive in connection with the notarization of the affidavits and in omitting material information from his default motion. However, the panel found he did not act in with any motive to benefit himself in connection with any of the violations. The panel therefore found the absence of a selfish motive tempered somewhat the application of this factor. Leaving aside that respondent had a financial interest in obtaining a judgment in T.L.'s favor, we believe the panel reads the application of this aggravating circumstance too narrowly. ABA Standards § 9.22 does not require conduct to be dishonest and selfish in order to be aggravating; it is an aggravating circumstance if the conduct is dishonest or selfish. See ABA Standards § 9.22(b) ("dishonest or selfish motive" (emphasis added)). While the extent of aggravation might have been greater had the conduct been both dishonest and selfish, the absence of selfishness did not make the conduct any less dishonest.

¶ 44. ABA Standards § 9.22(c) recognizes "a pattern of misconduct" as an aggravating circumstance. The hearing panel correctly recognized that respondent engaged in a pattern of misconduct. The panel felt it was important that respondent's dishonest conduct was isolated to one case and one client. We disagree with the panel's position that the impact of an aggravating circumstance due to a pattern of misconduct is somehow lessened if the misconduct occurs within one case and is limited to one client, absent some suggestion that the misconduct was triggered by factors unique to that case or that client. Even were that to be the case, respondent's misconduct here was directed at the court, opposing counsel, and respondent's client. Under the circumstances of this case, that the misconduct occurred within one case and involved only one of respondent's clients does not serve to lessen the aggravating circumstance posed by a pattern of misconduct.

¶ 45. Respondent committed five violations of the Rules of Professional Conduct. Multiple offenses are an aggravating circumstance. ABA Standards § 9.22(d). The hearing panel noted that three of the offenses were closely related and that all of the offenses pertained to one case and one client. In this case, we do not find the aggravating circumstance posed by multiple offenses to be lessened because three of them were closely related or because the misconduct occurred in one case and involved one client.

¶ 46. The ABA Standards provide that, where either a pattern or multiple instances of misconduct are aggravators, "[t]he ultimate sanction imposed 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, Theoretical Framework at 7, see also McCoy-Jacien, 2018 VT 35. Here, respondent engaged in both a pattern of misconduct and multiple instances of misconduct. As a result, the Standards support a sanction more severe than the presumptive sanction for the most serious misconduct. In this case, the presumptive sanction for the most serious misconduct is suspension. The next-more severe sanction—which generally should apply where multiple instances of misconduct are involved—is disbarment. Therefore, we find that the appropriate sanction is not suspension, but disbarment. See Eshleman's Case, 489 A.2d 571, 574 (N.H. 1985) (holding that presence of mitigating factors does not preclude sanction of disbarment).

¶ 47. Finally, "substantial experience in the practice of law" is an aggravating circumstance pursuant to ABA Standards § 9.22(i). Respondent had been an attorney since 1980, save for the three-year suspension he served beginning in 1997. He had substantial experience in the practice of law. See, e.g., In re Neisner, 2010 VT 102, ¶ 19, 189 Vt. 145, 16 A.3d 587 (concluding "substantial experience" aggravator appropriate where respondent "had been practicing for nearly twenty years"); In re Blais, 174 Vt. 628, 628, 630, 817 A.2d 1266, 1267,

1269 (2002) (finding "substantial experience" aggravator appropriate where attorney had eighteen years of experience at time of earliest misconduct).

¶ 48. The hearing panel found that the following mitigating factors were present: respondent was under the stress of personal and emotional problems in the summer and fall of 2017, see § 9.32(c); respondent was generally cooperative in connection with the disciplinary proceeding, § 9.32(e); respondent expressed remorse for failing to inform T.L. he would not be filing an appellate brief on his behalf, § 9.32(l); and the temporal remoteness of respondent's prior disciplinary offenses § 9.32(m). As set forth supra, ¶¶ 41-42, because respondent's prior offenses were both serious in nature and similar to the conduct at issue here, we find no mitigation under § 9.32(m). We address the remaining mitigating factors in turn.

¶ 49. The panel accepted respondent's "testimony that in the summer and fall of 2017 he was under considerable stress and distracted from his professional duties as a result of his sister's final illness," and correctly limited the associated mitigation to "the time period when the misconduct associated with T.L.'s appeal occurred." Respondent's personal difficulties have no mitigating effect on his serious misconduct in connection with the three affidavits or the motion for default. Similarly, respondent expressed remorse only for failing to inform T.L. that he would not be filing a brief on his behalf. He did not express remorse for his misconduct in connection with the affidavits or the motion for default. The panel appropriately assigned respondent's limited expression of remorse limited weight in mitigation.

¶ 50. The panel also found that respondent was "generally cooperative" in connection with the disciplinary proceeding. However, it did not afford significant weight to this factor because, pursuant to V.R.Pr.C. 8.1(b), respondent had a professional duty to cooperate with the investigation. See In re Farrar, 2008 VT 31, ¶ 9 n.2, 183 Vt. 592, 949 A.2d 438 (mem.) ("Attorneys are independently obligated under the rules to . . . cooperate with disciplinary proceedings."). We

agree that little mitigation arises from respondent refraining from further violation of the Rules by cooperating as he was required to do while the instant misconduct was under investigation.

¶ 51. We disagree with the panel's determination that the aggravating factors do not substantially outweigh the mitigating factors. We find that the collective weight of respondent's very substantial experience in the practice of law; the pattern of misconduct at issue; the multiple instances of misconduct; his dishonest motive; and his history of serious misconduct, very similar to the conduct at issue here, overwhelms the scant mitigation afforded by his cooperation, limited expression of remorse, and the stress of his personal problems during the period of T.L.'s appeal. This, too, supports a sanction of disbarment.

¶ 52. "Disbarment is a protective device, not an additional punishment." In re Harrington, 134 Vt. 549, 552, 367 A.2d 161, 163 (1976). In this case, we conclude that disbarment is the only sanction sufficient to protect the public. Further, we note that,

> [o]ur adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. . . . Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process. As soon as the process falters in that respect, the people are then justified in abandoning support for the system in favor of one where honesty is preeminent.

Shaffer Equip. Co., 11 F.3d at 457. For these reasons, we likewise conclude that disbarment is the only response sufficient to maintain public confidence in the Vermont bar. Therefore, we respectfully depart from the panel's sanctions recommendation.

Sigismund Wysolmerski is hereby disbarred from the practice of law. The date of this order is the effective date of respondent's disbarment for purposes of calculating the five-year period before respondent may apply for readmission.

FOR THE COURT:

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Associate Justice