

**STATE OF VERMONT  
PROFESSIONAL RESPONSIBILITY PROGRAM**

In re: Christopher Moll, Esq.  
PRB Docket No. 2019-032

**Decision No. 223**

Disciplinary Counsel and Respondent initiated these proceedings by filing a proposed stipulation of facts along with jointly proposed conclusions of law. The parties also submitted Joint Exhibits A and B for the Panel's consideration. The parties have waived their right to any further hearing in connection with this matter, and they have jointly recommended that the Hearing Panel issue a public reprimand based on their submissions.

Pursuant to Administrative Order 9, Rule 11(D)(5)(a), the Panel hereby accepts the proposed stipulation of facts and joint exhibits, with minor exceptions, and concludes that further evidence is unnecessary.

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

**FINDINGS OF FACT**

1. Respondent is an attorney licensed to practice law in Vermont. He was admitted to the Vermont Bar in 1988 and maintains a solo practice in Essex.
2. Respondent has no prior record of discipline.
3. In March 2016 HH retained Respondent to represent her in connection with an investigation by the Office of Professional Regulation (OPR), Board of Nursing, into whether HH diverted drugs for unauthorized use while she was employed as a school nurse.
4. When HH hired Respondent she paid him a retainer, and she and Respondent agreed that he would bill her at an hourly rate of \$250.00

5. On May 10, 2017, an OPR prosecuting attorney charged HH with several professional regulation violations and requested that HH's nursing license be revoked, suspended, reprimanded, conditioned, or otherwise disciplined.

6. On July 18, 2017 Respondent filed a Notice of Appearance and Answer on HH's behalf.

7. All communications from OPR to HH in connection with the charges were directed to Respondent as HH's counsel of record.

8. A hearing date in HH's case was initially set for November 13, 2017, but it was later continued to February 12, 2018.

9. On October 31, 2017, the OPR prosecuting attorney filed an Amended Specification of Charges against HH.

10. The OPR records indicate that service by mail upon Respondent for the February 12, 2018 hearing and the Amended Specification of Charges was returned by the post office as undeliverable.

11. Notwithstanding this lack of delivery, Respondent was aware of the hearing date and the Amended Specification of Charges as a result of having been in communication with the prosecuting attorney about a possible stipulation.<sup>1</sup>

12. At some point in 2017, Respondent changed his office mailing address from an Essex post office box to an Essex street address.

13. Although Respondent told OPR about the address change, he was aware in late 2017 and

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<sup>1</sup> The proposed stipulation of facts includes a statement that Respondent was aware of the hearing for an additional reason: that he "had been receiving some items from OPR via email." (emphasis added). Without specification of which items he received, and when, the Panel is unable to evaluate this statement and therefore rejects it. However, that statement is not essential to resolution of this matter and therefore its rejection does not prevent the Panel from deciding this matter based on the remainder of the stipulated facts.

2018 that he was having a problem reliably receiving paper mail from OPR.<sup>2</sup>

14. Respondent's email address and phone number for purposes of communication with OPR were unaffected by this change of address in 2017.

15. In January and February 2018, Respondent continued negotiations on behalf of HH with the OPR prosecuting attorney about a possible stipulation. As a result, Respondent filed an unopposed motion to continue the February 12, 2018 hearing for thirty days. The Board of Nursing granted the motion, changing the hearing date to March 12, 2018.

16. Subsequently, Respondent and the OPR prosecuting attorney agreed to another one-month continuance. The Board of Nursing approved the parties' joint motion to continue and the hearing date was rescheduled for April 9, 2018.

17. The OPR records indicate that the order granting the motion to continue and the notice of hearing for April 9, 2018 were mailed to Respondent. However, Respondent did not receive them.<sup>3</sup>

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<sup>2</sup> The reference to a "problem reliably receiving paper mail [in late 2017 and 2018]" is vague. The statement raises questions as to the cause of the purported problem and fails to identify specific instances when paper mail was purportedly not received. Nevertheless, because the statement does not appear to be central to the resolution of the charges, the Panel will not require a hearing to take evidence on those issues.

<sup>3</sup> The statement in the parties' proposed stipulation that the purported failure to receive the notice from OPR was "presumably due to the problem [Respondent] was having with receiving paper mail following his address change" amounts to speculation and, therefore, is rejected by the Panel. In addition, while the Panel will accept the joint statement that Respondents did not receive the order and notice of hearing, it does so with some reservations. The statement that Respondent did not receive the papers is vague and subject to question in light of other parts of the record submitted by the parties. The Board of Nursing made findings of fact, presented to the Panel as Joint Appendix A, that the papers were sent to Respondent's then-current mailing address (his street address) – not to his prior post office address – and that they were not returned by the post office as undeliverable. Joint Appendix A at 15 (Finding # 10). Under Vermont law, "when a letter, properly addressed, is mailed there is a presumption of its receipt in due course." *Mary Fletcher Hosp. v. City of Barre*, 117 Vt. 430, 431, 94 A.2d 226, 228 (1953). Do the parties dispute that Respondent's law office received the papers? Was there factual information sufficient to overcome the presumption and, if so, why was it not presented to the Panel? Did the parties intend to state only that while the mail was received in the office Respondent did not "personally" become aware of the papers? Respondent's acknowledgement that he experienced "organizational and caseload difficulties," Respondent's Sanctions Mem., 2/15/19, at 3, further reinforces the question of whether the problem was not with the mail but rather with Respondent's law office management procedures. In sum, the statement that Respondent did not receive the papers (without any explanation or attempt to address these other

18. Despite not having received a ruling on the joint motion to continue the March 12, 2018 hearing,<sup>4</sup> Respondent took no steps in March or April to find out the status of the motion.

19. HH's OPR hearing was held as scheduled on April 9, 2018.

20. Neither Respondent nor his client appeared at the hearing.

21. On May 23, 2018, the Board of Nursing issued a decision consisting of findings of fact, conclusions of law, and an order suspending HH's nursing license.

21. On June 5, 2018, HH received a letter from a national nursing registry which referred to her license as being suspended. This notice caused her great alarm.

22. HH immediately contacted OPR and OPR informed her that a hearing had been held on April 9, 2018 and that an order had been issued on May 23, 2018 suspending her license. At HH's request, a case manager at OPR sent HH a copy of the Order by email that same day.

23. On June 5, 2018 HH contacted Respondent by telephone and told him that she and Respondent had missed the hearing. Respondent told HH that he had not received the order suspending HH's license. HH emailed a copy of the order to Respondent that same day.

24. Prior to his communication with HH on June 5, 2018, Respondent took no affirmative steps to determine the status of HH's case.

25. On June 5, 2018, after conferring with HH, Respondent contacted OPR and requested that the order suspending HH's license be vacated on grounds that he did not receive the hearing notice.

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portions of the record) raises several questions. Nevertheless, because Respondent engaged in misconduct in this case whether or not he timely received the papers, the Panel does not feel compelled to take evidence on the issue and therefore will accept the statement while noting its reservations. Finally, the Panel reminds Disciplinary Counsel that factual statements submitted in a proposed stipulation of facts should be framed as specifically as possible and that when the parties wish to stipulate to facts but are unable to frame with specificity one or more factual issues, Disciplinary Counsel may submit a partial stipulation of facts along with a request to hold a hearing on one or more remaining factual issues.

<sup>4</sup> See footnote 3, above.

OPR referred Respondent to the procedure for filing an appeal, which was set out in the order.

26. During a two-week period following HH's June 5, 2018 phone call with Respondent, HH attempted on multiple occasions to contact Respondent by text messages and phone calls. HH did not return her messages.

27. HH eventually stopped trying to contact Respondent and contacted OPR directly. HH initiated on her own the process for seeking license reinstatement. Her license was conditionally reinstated on October 11, 2018.

28. Without consulting HH in advance, Respondent filed a document on June 23, 2018 entitled "Appeal of Board Decision of May 23, 2018" ("Respondent's appeal"). Respondent did not notify HH of this filing or send her a copy of the filing, and HH did not know about it at the time.

29. Respondent's appeal was rejected by OPR on grounds that it failed to comply with the requirements of the OPR rules for filings in disciplinary proceedings.

30. The ruling rejecting Respondent's appeal was mailed by OPR to Respondent on June 26, 2018. However, Respondent did not receive the ruling.<sup>5</sup>

31. Respondent failed to take any steps in June, July, August, September, or October to determine the status of his attempt to appeal the suspension of HH's license.

32. During that time period, Respondent also failed to contact HH or to return her phone calls. Respondent's last record of having been in touch with HH was on June 5, 2018.

33. Respondent first learned of the current status of HH's matter (the conditional reinstatement of HH's license) in an interview with Disciplinary Counsel on November 1, 2018.

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<sup>5</sup> The statement in the parties' proposed stipulation that Respondent did not receive the ruling "again likely due to the continued problem with his mail" constitutes speculation and is therefore rejected. With respect to the statement that Respondent did not receive the ruling rejecting his appeal, the Panel will not require an evidentiary hearing on the issue because the issue is not critical to the determination of the charges against Respondent.

During the interview Respondent promptly apologized and accepted responsibility for his conduct.<sup>6</sup>

34. Respondent attributes his conduct in connection with HH's case to the challenges of staying organized as a solo practitioner with a high volume of work. He has committed to assessing his organizational protocols to ensure that this type of problem does not recur.

35. Respondent apologized to HH directly and refunded her entire retainer.

### **CONCLUSIONS OF LAW**

The parties joint proposed conclusions of law specify that Respondent's conduct violated Rule 1.3 and Rule 1.4(a)(2) of the Vermont Rules of Professional Conduct.

#### **Rule 1.3**

Rule 1.3 of the Vermont Rules of Professional Conduct provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." The Comments to Rule 1.3 provide, in pertinent part, that "[a] lawyers' work load must be controlled so that each matter can be handled competently." *Id.*, Comment [2]. They also recognize that different types of harm may result from a violation of this rule: "A client's interests often can be adversely affected by the passage of time. \*\*\* Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness." *Id.* Comment [3].

Respondent failed to act diligently and promptly while representing HH. Respondent failed to monitor the status of HH's case. For several months after he understood that a motion had been filed seeking to continue a scheduled hearing Respondent took no action to check with OPR on the status of the motion or otherwise work on resolving HH's case through a stipulation. Respondent should have

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<sup>6</sup> The proposed statements in paragraphs 35 and 36 of the parties' stipulation to the effect that Respondent has admitted various failures in his duties to his client amount to jointly proposed conclusions of law and, therefore, are omitted from the findings of fact. Instead, the Panel will simply find, for purposes of its sanctions determination, that during the interview Respondent promptly accepted responsibility for his misconduct.

checked with OPR during that time to ensure that the previously scheduled hearing had, in fact, been continued. As a result of his lack of diligence, Respondent and his client failed to attend the hearing on the merits of the disciplinary charges that were pending against HH in the OPR proceeding. HH lost her opportunity to defend against the charges.

In addition, Respondent's conduct in connection with the appeal he attempted to file with OPR violated Rule 1.3. For several months Respondent took no action to ascertain the status of the appeal and, as a result, was unaware that the appeal had been dismissed for failure to comply with OPR's rules. Given the urgency of the situation at the time – HH had been suspended from working as a nurse – Respondent had a duty under Rule 1.3 to ensure that the appeal was going forward. Moreover, his failure to monitor the status of the appeal and the resulting passage of time might also have prejudiced any subsequent attempt to appeal from the dismissal of the appeal. A duty of diligence applied and required him to check on the status of the appeal.

Actual prejudice to a client is not a required element of a violation under Rule 1.3. *See, e.g., Attorney Grievance Comm'n v. Davis*, 825 A.2d 430, 448 (Md. Ct. App. 2003) (“no harm, no foul” defense not available under Rule 1.3); *In re Seaworth*, 603 N.W.2d 176, 180 (N.D. 1999) (prejudice not required for Rule 1.3 violation). Therefore, the Panel need not decide whether HH's license would have been suspended in any event even if she had had an opportunity to defend against the OPR charges. Likewise, the fact that HH's license was ultimately reinstated with conditions does not obviate the conclusion that Respondent failed to act diligently and promptly in violation of Rule 1.3. In sum, Respondent violated Rule 1.3.<sup>7</sup>

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<sup>7</sup> Disciplinary Counsel appears to argue in her memorandum of law that Respondent's failure to return HH's phone calls and text messages in June 2018 constituted separate and independent grounds for finding a violation of Rule 1.3. *See* Mem. in Support of Public Reprimand, 2/15/19, at 2. It is not clear to the Panel that a lawyer's failure to return client messages, by itself, should be considered a failure to act promptly “in representing a client.” V.R.Pr.C. 1.3. Moreover, a different rule addresses communications between a lawyer and client. Its

## Rule 1.4

Rule 1.4(a)(2) of the Rules of Professional Conduct provides, in pertinent part, as follows:

(a) A lawyer shall:

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(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished[.]

V.R.Pr.C. 1.4(a).

When Respondent was informed by HH that the Nursing Board had issued an adverse decision and suspended her nursing license, Respondent proceeded to file an appeal from that decision without first consulting with HH and obtaining her consent and without sending her a copy of the appeal. An appeal was not HH's only option. Indeed, in the course of representing herself, HH eventually negotiated a stipulation with the prosecuting attorney that provided for her license to be reinstated with conditions. Moreover, aside from the strategic aspects of the decision, pursuing an appeal would have conceivably entailed substantial expenses to HH. Respondent's failure to consult with HH regarding the options available to her following the suspension of her license violated Rule 1.4(a)(2).

## SANCTIONS DETERMINATION

The Vermont Rules of Professional Conduct are "intended to protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar." *In re Berk*, 157 Vt. 524, 532,

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provisions include an express requirement that a lawyer "promptly comply with reasonable requests for information," *see* V.R.Pr.C. 1.4(a)(4), and Comment [4] provides further explicit guidance: "When a client makes a reasonable request for information . . . paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. *Client telephone calls should be promptly returned or acknowledged.*" *Id.*, Comment [4] (emphasis added). The more specific language of Rule 1.4(a)(4) and its related Comment suggests that Rule 1.3 was not intended to address a lawyer's failure to communicate. Disciplinary Counsel has not alleged that Respondent's conduct violated Rule 1.4(a)(4) in any respect and, therefore, the Panel will not consider the question.

602 A.2d 946, 950 (1991). The purpose of sanctions is not “to punish attorneys, but rather to protect the public from harm and to maintain confidence in our legal institutions by deterring future misconduct.” *In re Obregon*, 2016 VT 32, ¶ 19, 201 Vt. 463, 145 A.3d 226 (quoting *In re Hunter*, 167 Vt. 219, 226, 704 A.2d 1154, 1158 (1997)).

### **Applicability of the ABA Standards for Imposing Lawyer Sanctions**

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

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

*In re Andres*, 2004 VT 71, ¶ 14, 177 Vt. 511, 857 A.2d 803.

“Depending on the importance of the duty violated, the level of the attorney’s culpability, and the extent of the harm caused, the standards provide a presumptive sanction.

\*\*\* This presumptive sanction can then be altered depending on the existence of aggravating or mitigating factors.” *In re Fink*, 2011 VT 42, ¶ 35, 189 Vt. 470, 22 A.3d 461.

### **The Duty Violated**

The ABA Standards recognize a number of duties that are owed by a lawyer to his or her client. *See Standards for Imposing Lawyer Sanctions* (ABA 1986, amended 1992) (“*ABA Standards*”), Theoretical Framework, at 5. Other duties are owed to the general public, the legal system, and the legal profession. *Id.* In this case, Respondent violated the duty owed to his client under Rule 1.3. and Rule 1.4 – the duties of diligence and of communication. *Id.*

### **Mental State**

“The lawyer’s mental state may be one of intent, knowledge, or negligence.” *ABA Standards*, § 3.0, Commentary, at 27. For purposes of the sanctions inquiry, “[a lawyer’s] mental state is [one] of

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

The Supreme Court has observed that “application of these definitions is fact-dependent” and that “[t]he line between negligent acts and acts with knowledge can be fine and difficult to discern . . . .” *In re Fink*, 2011 VT 42, ¶ 38. In addition, the Court has concluded that while a lawyer’s constructive knowledge, in contrast to a lawyer’s subjective belief, may support a determination that an ethics violation has occurred, “[i]n the context of sanctions . . . knowing conduct does not encompass both knew or should have known.” *Id.* ¶ 38. In reaching this conclusion, the Court has reasoned that [i]f the definition [of the term “knowledge”] extended to constructive knowledge, then no misconduct would be negligent because rather than failing to heed a substantial risk we would always assume the lawyer should have known the substantial risk.” *Id.* ¶ 41. Thus, “while a lawyer’s good faith, but unreasonable, belief that his actions are not misconduct is not a defense to a violation, such an error can be a factor in imposing discipline.” *Id.*

Here, the Panel concludes that Respondent’s state of mind is best described as that of negligence. Respondent’s conduct did not meet the accepted standard of care that a reasonable lawyer would exercise in that situation. But Respondent was not aware that his conduct would result in failing to attend the merits hearing on the OPR charges against HH.

## **Injury and Potential Injury**

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

HH was harmed by Respondent’s conduct. Even assuming that the OPR charges against her had merit, she was deprived of her right to defend against those charges. In addition, the circumstances surrounding HH’s discovery that her license had been suspended were undoubtedly stressful. She was informed by a national nursing registry that her license had already been suspended for some time and learned that she and her lawyer had failed to attend the hearing. *Cf. In re Scholes*, 2012 VT 56, ¶ 3, 192 Vt. 623, 54 A.3d 520 (finding violation of Rule 1.3 due to delay in the prosecution of bankruptcy proceedings and observing that “there does not appear to be any financial injury, but there is the very real anxiety felt by the clients who wanted to move their bankruptcy petitions to conclusion”). And, finally, having lost confidence and trust in her attorney, HH had to take steps on her own to try to secure reinstatement of her license. She ended up proceeding without legal representation.

### **Presumptive Standard under the ABA Standards**

The Panel concludes that Standard 4.43 provides the most pertinent guidance. It provides for a reprimand to be issued “when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.” Respondent failed to act with

reasonable diligence and failed to communicate adequately with his client regarding critical aspects of the representation. His negligence resulted in injury to his client. Standard 4.43 has been applied as the presumptive standard under similar circumstances. *See, e.g., In re Andres*, 170 Vt. 599, 601, 749 A.2d 618, 620 (2000) (respondent failed to file a timely appeal, causing his client to lose her right to appeal from an adverse decision); *In re Farrar*, PRB Decision No. 82 (2005) (respondent failed to provide advice concerning the client's obligations following an unsuccessful appeal and failed to attend a contempt hearing that resulted in a ruling against his client).

The Panel concludes that the standard providing for a private admonition (Standard 4.44) is too lenient under the facts presented. It applies when a respondent's negligence results in "little or no actual or potential injury." As discussed above, the injury caused in this case was substantial and therefore merits a more serious sanction. Likewise, the Panel concludes that the standard providing for a suspension (Standard 4.42) is too harsh. That standard requires either a mental state of "knowledge" on the part of the lawyer, *see* § 4.42(a), or a "pattern of misconduct," *see* § 4.42(b). Neither knowledge nor a pattern of misconduct is present in this case. Respondent's state of mind was that of negligence, not knowledge. And his conduct involved one client and one matter. In sum, Respondent's conduct was less extensive than the conduct that has justified application of the suspension standard. *See, e.g., In re Hongisto*, 2010 VT 51, ¶¶ 3 & 15, 188 Vt. 553, 998 A.2d 1065 (applying Standard 4.42(a) where respondent took no action on behalf of client after receiving a retainer and failed to respond to "between forty and fifty phone messages" from client); *In re Blais*, 174 Vt. 628, 631, 817 A.2d 1266, 1270 (2002) (applying the suspension standard in § 4.42 where respondent engaged in "repeated instances of neglect of client matters" in connection with five separate client matters).

### **Aggravating and Mitigating Factors Analysis**

Next, the Panel considers any aggravating and mitigating factors and whether they call for increasing or reducing the presumptive sanction of a public reprimand. Under the ABA Standards, aggravating standards are “any considerations, or factors that may justify an increase in the degree of discipline to be imposed.” *ABA Standards*, § 9.21, at 50. Mitigating factors are “any considerations or factors that may justify a reduction in the degree of discipline to be imposed.” *Id.* § 9.31, at 50-51.

The following aggravating factors under the ABA Standards are present:

**§ 9.22(d) (multiple offenses)** – Respondent committed multiple violations of the Rules of Professional Conduct.

**§ 9.22(i) (substantial experience in the practice of law)** – Respondent had been practicing law for approximately thirty years at the time of the violations.<sup>8</sup>

#### **(b) Mitigating Factors**

The following mitigating factors under the ABA Standards are present:

**§ 9.32(a) (absence of prior disciplinary record)** – Respondent has no record of any prior disciplinary action having been taken against him.

**§ 9.32(b) (absence of a dishonest or selfish motive)** – Respondent did not engage in any dishonest conduct, nor did he seek to advance his own interests.

**§ 9.32(d) (timely good faith effort to make restitution or to rectify consequences of misconduct)** – Respondent took steps to return HH’s retainer to her. The consequences of Respondent’s

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<sup>8</sup> Disciplinary Counsel suggests that the aggravating factor set forth in § 9.22(h) (vulnerability of victim) should apply because “[t]he OPR records indicate HH’s underlying conduct *may have been related to* substance use disorder.” See Disciplinary Counsel’s Mem., 2/15/19, at 6 (emphasis added). This statement amounts to speculation. Moreover, whether or not the OPR charges against HH were related to substance abuse on her part, there was insufficient evidence presented to find that HH suffered from any condition that rendered her vulnerable at the later points in time when Respondent was representing HH in the OPR proceeding. Therefore, the Panel rejects that factor.

misconduct were that his representation of HH was largely, if not entirely, devoid of value. Returning HH's retainer was a good faith effort to rectify those consequences. However, it appears that the retainer was not returned to HH until after Respondent was interviewed by Disciplinary Counsel in November 2018. *See* Respondent's Sanctions Mem., 2/15/19, at 2 (referencing Respondent's letter to HH in which he "lauded HH for taking the steps she did in . . . bringing this matter to the attention of Disciplinary Counsel and . . . apologized and refunded all monies deposited for HH's case"). Since the refund of the retainer appears to have been made only after a complaint had been filed by HH, the Panel will give lesser weight to this factor than if Respondent had promptly acknowledged his failures.

**§ 9.32(e) (full and free disclosure to disciplinary board or cooperative attitude toward proceedings)** – Respondent was cooperative during the course of the disciplinary process. However, that cooperation is not entitled to significant weight because Respondent has a duty under V.R.Pr.C. 8.1(b) to cooperate in connection with any disciplinary investigation. *See, e.g., In re Richmond's Case*, 872 A.2d 1023, 1030 (N.H. 2005) ("[W]e do not ascribe significant weight to this factor because a lawyer has a professional duty to cooperate with the committee's investigation").

**§ 9.32(l) (remorse)** – Respondent has apologized to HH and expressed remorse for his misconduct. However, it appears that the apology was extended only after HH's complaint was filed. *See* Respondent's Mem. at 2 (referencing letter in which Respondent apologized while also "laud[ing] HH for. . . bringing this matter to the attention of Disciplinary Counsel . . ."); *see also id.* at 3 (acknowledging "my failure to immediately acknowledge [to HH the difficulties I put HH through]"). Accordingly, this factor will receive relatively lesser weight than it would if Respondent had expressed remorse at the time he learned that he and HH had failed to attend the merits hearing. The Panel does find that the expression of remorse set forth in Respondent's Sanctions Memorandum is sincere.

### (c) Weighing the Aggravating Mitigating Factors

Although the mitigating factors outnumber the aggravating factors, the relative weight of the competing factors is fairly equivalent. Although the absence of a prior disciplinary record and absence of a selfish motive are entitled to significant weight, the Panel places relatively greater weight on the harm that resulted to HH from Respondent's lack of diligence – the loss of HH's "day in court" and her need to represent herself going forward in light of Respondent's deficiencies – and the fact that Respondent committed multiple offenses. The balancing of the factors does not call for any adjustment of the presumptive sanction.

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Having in mind that "[i]n general, meaningful comparisons of attorney sanction cases are difficult as the behavior that leads to sanction varies so widely between cases," *In re Strouse*, 2011 VT 77, ¶ 43, 190 Vt. 170, 34 A.3d 329 (Dooley, J., dissenting), the Panel must nevertheless consider whether a public reprimand is consistent with past disciplinary determinations.

In *In re Farrar*, PRB Decision No. 82 (2005), the hearing panel found that respondent violated Rule 1.3 and Rule 1.4 by failing to provide his client with advice concerning the client's obligations following an unsuccessful appeal and by failing to attend a subsequent contempt hearing that resulted in a ruling against his client. While noting that the respondent took steps to remedy the financial injury that resulted to his client from the contempt motion, the panel determined that the respondent had been negligent and that the potential financial injury to the client that had resulted from the contempt finding, along with the client's "anxiety, stress, and frustration," called for a public reprimand. *Id.* at 3. The mitigating factors consisted of the absence of a selfish motive, his cooperation with Disciplinary Counsel and his expression of remorse. The aggravating factors consisted of his substantial experience in the practice of law and one prior disciplinary offense. The panel concluded that the aggravating and

mitigating factors were “not of sufficient weight to cause us to deviate from the recommended sanction under [ABA Standard] 4.43.” *Id.*

In *In re DiPalma*, PRB Decision No. 44 (2002), which involved negligent violations of both Rule 1.3 and Rule 1.4, the hearing panel applied a presumptive sanction of public reprimand (Standard 4.43) in the absence of any evidence that respondent’s conduct was intentional. The panel indicated that it was rejecting the lesser sanction of private admonition because of the harm that resulted to the client. While the panel also cited the fact that the respondent had been previously disciplined for neglecting a client matter, that was not the primary consideration – the harm to the client was primary. In addition, the panel considered as an aggravating factor that the respondent had substantial experience in the practice of law.

Finally, *In re Andres*, 170 Vt. 599, 749 A.2d 618 (2000), is noteworthy. In that case, the Supreme Court approved the Board’s recommendation under Standard 4.43 that a public reprimand issue for respondent’s neglect which resulted in dismissal of his client’s appeal. The mitigating factors consisted of the absence of a prior disciplinary record, lack of a selfish motive, and cooperation with bar counsel. The Board considered respondent’s substantial experience in the practice of law and the fact there were multiple offense to be aggravating factors. *Id.* at 603-03; 749 A.2d. at 622. The Board chose not to enhance or reduce the sanction based on these factors.

Imposing a public reprimand in the instant case is consistent with the decisions in *Farrar*, *DiPalma*, and *Andres*. Respondent failed to monitor HH’s case diligently and, as a result, failed to attend the merits hearing on behalf of HH and failed to notify HH of the hearing date. Respondent also failed to consult with HH before filing an appeal on her behalf. While HH eventually succeeded in having her nursing license reinstated with conditions, she was without a license for a period of months and felt compelled to represent herself in light of Respondent’s neglect of her case. The harm to her was

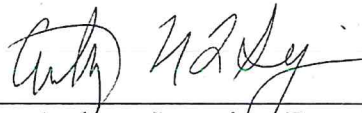
real and could not be fully undone – she was deprived of her day in court on the merits of the charges against her. Moreover, Respondent’s misconduct did not amount to an isolated instance. Even though it involved one client, there were multiple offenses. In addition, Respondent had substantial experience practicing law. For all these reasons, the Panel concludes that a private admonition would not be appropriate. A public reprimand should issue.

### ORDER

Based on the Panel’s findings of fact and conclusions of law, Respondent is hereby publicly reprimanded for his violations of Rule 1.3 and 1.4 of the Rules of Professional Conduct.<sup>9</sup>

Dated: March 8, 2019

#### Hearing Panel No. 1



Anthony Iarrapino, Esq., Chair



Emily Tredeau, Esq., Member



Scott Hess, Public Member

<sup>9</sup> The Panel is aware that a period of probation has been included in some disciplinary proceedings involving a lawyer’s neglect of client matters. *See, e.g., In re Blais*, PRB Decision # 194 (File No. 2015-084) at 17 (imposing public reprimand and period of probation; *In re Di Palma*, PRB Decision # 44 (File No. 2002-031). In those cases, the panels determined on the basis of the specific facts presented that some form of monitoring would be prudent going forward to protect the public. Among the facts presented in those cases were that both respondents had a prior record of having neglected one or more client matters and the instances of neglect were extensive. Here, by contrast, Respondent has no prior record and the violations concerned one case and one client. Moreover, the parties have stipulated that Respondent has taken steps to improve his organizational protocols. Finally, Disciplinary Counsel has not requested that a period of probation be imposed or proposed any plan of probation. For all these reasons, the Panel has decided not to place Respondent on probation.