STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In Re: Sigismund Wysolmerski, Esq.
PRB File No. 2018-069

Decision No. 226

Disciplinary Counsel alleges that the Respondent, Sigismund Wysolmerski, Esq., violated the Rules of Professional Conduct by engaging in dishonest conduct and by failing to keep his client reasonably informed as to the status of a matter on which Respondent was working for the client. Evidence was presented by the parties at a hearing held on May 2, 2019. The parties submitted proposed findings of fact and conclusions of law on or about June 17, 2019.

Based on the credible evidence presented, the Hearing Panel finds and concludes that Respondent engaged in dishonest conduct in connection with the notarization and filing of various affidavits. In addition, the Panel finds and concludes that Respondent engaged in dishonest conduct by failing to disclose material information in the course of a court proceeding and by failing to keep his client reasonably informed. The Panel concludes that Respondent should be suspended for twelve months as a sanction for his unprofessional conduct.

FINDINGS OF FACT

Respondent was admitted to the practice of law in Vermont in 1980. Throughout the time period referenced in the petition of misconduct and continuing to the present Respondent has provided legal services as a sole practitioner with a concentration in the area of civil litigation.

In 2008, Respondent agreed to represent T.L. in connection with T.L.'s claim that he was the victim of predatory lending practices related to a mortgage on his residence. Respondent

entered into a contingency fee agreement with T.L. to provide the services in question. In December 2014, Respondent filed a civil action in the Rutland Civil Division of the Superior Court. The lawsuit named J.P. Morgan Chase ("Chase"), West Star Mortgage, Inc., and Seterus, Inc. ("Seterus"), as defendants. The complaint alleged that defendant West Star Mortgage, Inc.'s corporate predecessor, Challenge Financial Investment Corporation ("CFIC"), a so-called "subprime lender," had entered into the subject mortgage loan agreement with T.L. and had subsequently assigned the loan to Chase. The complaint alleged that Seterus was liable as the servicer of the loan agreement.

At some point prior to filing the complaint, Respondent and T.L. placed a phone call together to a phone number listed on some CFIC papers associated with the loan agreement. Based on Respondent's understanding that the phone call was answered by a person located in Virginia who claimed to be working for a company identified as West Star Mortgage, Respondent concluded that a foreign corporation registered with the Vermont Secretary of State's office, West Star Mortgage, Inc., was the corporate successor to CFIC.

On December 9, 2014, Respondent arranged for the complaint to be served by the Washington County Sheriff's Office on the Corporation Service Company as an agent for service of process purposes designated by West Star Mortgage, Inc. in its registration on file with the Secretary of State.[1] On December 15, 2014, after receiving notice of the lawsuit, the corporate counsel for West Star Mortgage, Inc. ("corporate counsel"), telephoned Respondent and advised him that he believed that T.L. had sued the wrong entity. The corporate counsel explained that his company had no record of any loan agreement with T.L. He further stated that the corporate successor of the entity which had entered into the subject loan agreement with T.L. might be a

[1] The sheriff's return of service form indicated that the summons and complaint were served on "West Star" through service on the Corporation Service Company.

different company, West Star Mortgage Corporation, and that there had been other instances of confusion between that entity and West Star Mortgage, Inc. During the phone conversation, the corporate counsel requested an extension of time to file an answer to the complaint so that Respondent could investigate whether the proper entity had been sued by T.L. The corporate counsel sent a confirming email that same day stating as follows:

> Per our conversation, I understand you have agreed to extend the time by which WestStar Mortgage, Inc. must respond to the referenced suit. During the interim, you will be investigating whether the suit should have been filed against WestStar Mortgage Corporation, which is an unaffiliate[d] third party headquartered in Arizona, and/or another entity. I note that after a diligent search by my team, I have not unearthed a connection between WestStar Mortgage Inc. and CFIC and/or WestStar Mortgage, Inc. and the plaintiff. To the extent you intend to pursue a claim against WestStar Mortgage, Inc. after your investigation is completed, please contact me so that we can discuss an appropriate deadline for filing responsive pleadings.
> ****

Ex. DC-2 at 17 (emphasis in original).

Respondent did not reply to this email.

Two days later, on December 17, 2014, Respondent filed a motion to amend the complaint to substitute Select Portfolio Servicing, Inc. ("SPS") in place of Seterus as a party defendant and to change the named defendant "West Star Mortgage Inc." to "West Star Mortgage" ("first amended complaint"). Respondent provided no explanation in his filing for dropping the suffix "Inc."

After the motion to amend was granted, Respondent did not undertake any action to serve the first amended complaint on any "West Star Mortgage" entity, even though no appearance had been entered as of that point in time by any attorney on behalf of any West Star Mortgage entity.

On January 29, 2015, the corporate counsel of West Start Mortgage, Inc., sent a follow-up email to Respondent to confirm corporate counsel's understanding that Respondent had

agreed to extend the deadline for an answer to be filed until Respondent had investigated whether corporate counsel's company had been correctly named as a defendant in the lawsuit. The email requested an update on the status of Respondent's investigation. Respondent did not reply to this email.

The Panel finds that Respondent verbally agreed, during his December 9, 2014 phone conversation with corporate counsel, to provide an extension of time to West Star Mortgage, Inc., to file an answer in the lawsuit. The extension consented to by Respondent was indefinite in duration and subject to further communication between Respondent and corporate counsel.

In February 2015, in response to a motion to dismiss filed by Chase, Respondent filed a second amended complaint, which was eventually granted by the court in March 2015. Respondent did not undertake any action to serve the second amended complaint on any West Star Mortgage entity, even though no appearance had been entered as of that point in time by any attorney on behalf of any West Star Mortgage entity.

On three occasions during the course of the lawsuit, Respondent filed affidavits with the court that purported to have been signed by T.L. Respondent filed an affidavit attributed to T.L. dated August 20, 2015 in response to SPS's motion to dismiss ("the August 2015 affidavit"). *See* Exhibit DC-1 at 147. The affidavit bore a typewritten date of August 18, 2015; however, the "18" was stricken by hand and "20" was handwritten in its place on the affidavit.

Respondent filed a second affidavit attributed to T.L. in response to a motion for summary judgment that had been filed by Chase ("the October 2016 affidavit"). *See* Exhibit DC-1 at 311. Respondent filed a third affidavit attributed to T.L. in support of a motion by T.L. requesting the entry of default judgment against West Star Mortgage ("the January 2017 affidavit"). *See* Exhibit DC-1 at 371.

All three affidavits were notarized by Respondent. The notarization language on each affidavit states: "Signed and subscribed under oath by [T.L.] a person known to me."

Throughout the pendency of the lawsuit, T.L. resided in Maine. On some occasions, Respondent transmitted documents to T.L. in Maine when they required his signature, either by postal service or by email attachment, with a request to return the documents after signing. On other occasions, T.L. signed documents at Respondent's office while T.L. was visiting the Rutland area.

The Panel finds that although the content of the three affidavits was, from T.L.'s perspective, fully consistent with the guidance he had provided to Respondent regarding the pursuit of his claims in the lawsuit and his expectations, the three affidavits filed with the court were not signed by T.L. T.L. testified credibly that the signature appearing on each of the three affidavits was not his signature. Moreover, T.L. identified his signature on other exhibits admitted into evidence and credibly described the differences between the signature on those documents and the signature on the three subject affidavits. The Panel's finding that T.L. did not sign the three affidavits filed with the court is also supported by the fact that the signatures in the record that are claimed by T.L. as his own are relatively consistent and readily distinguishable from the signatures on the three subject affidavits.

The Panel is unable to determine the precise circumstances surrounding the signature and notarization of the three affidavits filed with the court other than the fact that T.L. did not sign the affidavits. Specifically, the panel cannot determine by clear and convincing evidence – the required standard of proof – whether Respondent or a third party signed the affidavits that were filed with the court – and, in either event, whether the affidavits were signed with or without T.L.'s authorization or consent. There was insufficient evidence to determine who signed the

affidavits and whether Respondent was aware when he notarized the affidavits that the affidavits were not signed by T.L.

There was evidence presented that on one or more occasions Respondent electronically transmitted an affidavit to T.L. with a request to sign it and return it to him for subsequent notarization.[2] And on one occasion T.L. transmitted to Respondent a copy of the August 2015 affidavit bearing his signature and the date August 18, 2015. This copy was not notarized. It was transmitted electronically to Respondent by T.L. on August 26, 2015 – six days after the first affidavit (dated August 20) had already been filed with the court. *See* Exhibit R-J. T.L. identified the signature on this August 18 version of the first affidavit as his signature.

Exhibit R-J supports Respondent's testimony that T.L. signed affidavits outside the presence of a notary and transmitted them to Respondent for subsequent notarization and filing. It also supports T.L.'s testimony that the August 20 affidavit submitted to the court did not bear T.L.'s signature. The respective signatures are significantly different. However, the exhibit is not clear and convincing evidence of the circumstances surrounding the signature and notarization of the August 20 affidavit that was notarized by Respondent and filed with the court.[3]

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[2] Respondent testified that after receiving a signed affidavit from T.L., he telephoned T.L. and administered the notary's oath by telephone before filing the affidavit. Respondent further testified that asking a client to sign an affidavit outside his presence, or that of another notary, was not typical in his practice but that he utilized this procedure in T.L.'s case because T.L. was residing in Maine and he was familiar with T.L.

[3] There was no expert or non-expert testimony presented that would assist the panel to determine, under the applicable clear-and-convincing-evidence standard, whether Respondent or someone else forged T.L.'s signature on the affidavits and, assuming Respondent did not forge the signatures, whether he was aware that the signatures were not genuine. And while the signed August 18, 2016 affidavit (transmitted to Respondent on August 26, 2015) bore a signature with significant differences from the signature on the August 20, 2016 affidavit filed with the court, there was no evidence presented regarding the context of the August 26, 2016 transmission or Respondent's perception of the August 26, 2016 affidavit – in other words, whether he compared the two signatures at that time and noticed the difference or whether he considered it without careful examination to be simply a duplicate of the already filed affidavit.

Respondent maintains that the three affidavits were signed remotely and returned to him, and that at the point in time when he notarized them he believed they bore Respondent's signature.[4] Absent further evidence as to Respondent's state of mind, the Panel cannot conclude otherwise.

* * *

T.L.'s January 2017 motion for default judgment stated that West Star Mortgage had "failed to appear, plead, or otherwise defend within the time prescribed by the Rules." Exhibit DC-1 at 369. Respondent submitted an affidavit of his own, along with the affidavit of T.L., in support of the motion. Exhibit DC-1 at 372. In his affidavit, Respondent stated that: "West Star is the Successor company to CFIC financial to the extent that they, even as a Virginia company answer the telephone number for CFIC as listed in Florida." The affidavit further stated that service had been accomplished by the sheriff on December 9, 2014 and Respondent filed a copy of the sheriff's return with the motion. Although the caption of the on the first page of the motion listed "West Star Mortgage" as defendant, both the motion and affidavit of Respondent included references to "West Star Mortgage, Inc." in the body of the motion and affidavit. *See* Ex. DC-1 at 369 (moving "as against West Start Mortgage Inc.") & 372 ("West Star Mortgagee [sic] Inc is not infirm, disabled, incompetent or member of the military."). No explanation was provided by Respondent for why he continued using the "Inc." in his filings after having amended the complaint to eliminate the "Inc."

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[4] During the hearing, Respondent testified that that he believed T.L. signed the third affidavit while in Respondent's office based on the fact that he could not locate any email communications between them related to that affidavit. T.L. testified that he was in Boston that day to attend to a family matter and did not sign the affidavit. In his post-hearing proposed findings, Respondent takes the position that all three affidavits were signed remotely by T.L. and returned to Respondent for notarization. The Panel will treat Respondent's proposed finding as a judicial admission that the third affidavit was not signed in Respondent's presence.

Neither the motion for default judgment nor Respondent's affidavit made any mention of the extension of time that had been granted by Respondent to the corporate counsel for West Star Mortgage, Inc. Nor did the motion or affidavit disclose the fact that corporate counsel for West Star Mortgage, Inc., had asserted that the wrong entity had been sued and had suggested that a different company named West Star Mortgage Corporation might be the appropriate party. Nor did the submission include any indication that Respondent had investigated this assertion and, if so, the extent of the investigation. Respondent was aware of the previous communications and knowingly chose not to make any mention of them in his filing with the court. In addition, Respondent did not make any attempt to send the motion for default judgment to corporate counsel by email, even though he had previously received email from corporate counsel.

Based on the motion for default judgment, judgment was eventually entered by the court against "West Star Mortgage" in May 2017 and T.L. was awarded $325,000 in damages. Ex. DC-1 at 397. Subsequent to the entry of judgment, Respondent took no action at any time to execute on the judgment against West Star Mortgage, Inc., or to otherwise pursue collection from that entity.

* * *

In June 2017, Respondent filed an appeal with the Vermont Supreme Court on behalf of T.L. from the trial court's decisions granting judgment in favor of defendants Chase and SPS. Respondent subsequently requested and was granted a 30-day extension of time to file T.L.'s brief. The order granting the motion included a warning that the appeal might be dismissed without further notice if a brief were not filed within the time specified.

Respondent failed to file a brief on behalf of T.L. with the Supreme Court before expiration of the deadline. As a result, the Court issued an order on September 21, 2017 that dismissed the appeal.

Respondent and T.L. had several conversations concerning the appeal. At the time Respondent filed the notice of appeal and thereafter he had concerns as to whether T.L.'s appeal could succeed, in part based on the fact that T.L. had prior to the filing of the lawsuit obtained some relief from CFIC through negotiation and had executed a release of some sort in favor of CFIC. In conversations with T.L. subsequent to the filing of the appeal, Respondent communicated those concerns. However, at no time did Respondent indicate to T.L. that he wanted to withdraw as T.L.'s attorney or that he would be filing a motion to withdraw. Moreover, at no point did Respondent advise T.L. that he would not be filing a brief on behalf of T.L. in the appeal.

On September 14, 2017 – prior to dismissal of the appeal – T.L. sent an email to Respondent expressing condolences for the passing of Respondent's sister and indicating that he understood Respondent had sent documents concerning the appeal to him but that they had not yet been received. Ex. DC-6. Respondent did not reply to this email communication.

After having received no response to his September 14 email, T.L. sent a follow-up email on September 25 stating once again that he had not received any documents regarding the appeal and expressing concern. T.L. stated in the email that he had checked with his local post office and would also contact the post office in Rutland to inquire about the documents. Ex. DC-7. Respondent did not reply to this email communication.

T.L. traveled to Rutland and met with Respondent at his office sometime over the following three-week period. During the meeting, Respondent advised T.L. that the appeal had been dismissed by the Court.

Around mid-October, following his meeting with Respondent, T.L. contacted the clerk of the Supreme Court and was informed that the appeal had been dismissed because of Respondent's failure to file a brief prior to the deadline. T.L. sent an email to Respondent in which he expressed surprise, anger, and disappointment. Ex. DC-8. Respondent did not respond to the email.

Based on the all the credible evidence presented, the Panel finds that Respondent did not prepare or filed a brief on behalf of T.L. in the appeal and that T.L. was not informed of that fact; nor was he informed of the dismissal of the appeal at the time the dismissal order was issued. Respondent did not inform T.L. of the dismissal until sometime subsequent to September 25, 2017.

In 2017, Respondent's sister became ill with a life-threatening disease. In July 2017 her condition worsened and required extensive assistance and out-of-state medical services. She passed away on September 13, 2017. Throughout his sister's final illness Respondent served as the primary caretaker for his sister. Respondent experienced significant emotional stress and physical demands on his time as a result of his sister's final illness.

Respondent accepts responsibility for the dismissal of the Supreme Court appeal.

* * *

In March 2018, the corporate counsel of West Star Mortgage, Inc.'s successor corporation – who had previously communicated with Respondent, as described above – sent another follow up email to Respondent requesting an update on the status of the lawsuit. The

email asked Respondent to confirm that an agreement remained in place "that no answer would be required from WestStar Mortgage, Inc. . . . until further notice and discussion between us as counsel for the parties." Ex. DC-2 at 16. Respondent sent a reply email that same day stating that "I no longer represent Mr. Luther." *Id.* He did not inform corporate counsel, either verbally or in writing, that a judgment had been entered against West Star Mortgage. At that point in time, the relationship between Respondent and T.L. was strained due to the prior dismissal of T.L.'s Supreme Court appeal.

Following this communication, the corporate counsel contacted the clerk of the Rutland Civil Division and learned that a default judgment had been entered against West Star Mortgage. He then proceeded to hire local counsel in Vermont to seek relief from the judgment.

West Star's corporate successor filed a motion to vacate the default judgment. As part of its motion, the corporate successor presented an affidavit from its corporate counsel describing the prior communications between himself and Respondent. A hearing was held by the Civil Division on the motion. Respondent attended the hearing and advised the court that he was moving to withdraw as counsel for T.L. and that T.L. was pursuing an ethics complaint against him and had retained an attorney to pursue a malpractice claim against him. T.L. attended the hearing and requested that the court not grant Respondent's request to withdraw prior to the hearing being concluded. The presiding judge granted Respondent's request to withdraw but directed Respondent to remain in the courtroom during the hearing in case any party wished to examine him. Respondent was not questioned by any party during the hearing and did not ask to make any statement regarding the motion to vacate the judgment.

* * *

All of the legal services performed by Respondent on behalf of T.L. in connection with the lawsuit were undertaken on a contingency-fee basis. T.L. did not pay any money to Respondent for any legal services rendered by Respondent.

* * *

In 1997, Respondent received a three-year suspension for multiple violations of the ethical rules over an eight-year period of time. The violations included "ma[king] false statements to other attorneys and the courts . . . failing to keep in contact with clients . . . [and] failing to file a promised lawsuit." *In re Wysolmerski*, 167 Vt. 562, 702 A.2d 73 (1997). In 2001, Respondent was reinstated as a member of the Vermont Bar and the suspension was lifted. In 2012, Respondent received a private admonition for conduct that is unrelated to the conduct at issue in this proceeding.[5]

During the hearing, Disciplinary Counsel stipulated that Respondent was cooperative toward this disciplinary proceeding. The Panel therefore so finds.[6]

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[5] Administrative Order 9 provides that when a private admonition has been imposed, "the lawyer shall not be identified in the published decision," A.O. 9, Rule 8(A)(5)(b), but that a prior admonition nevertheless "may be used in subsequent proceedings in which the respondent has been found guilty of misconduct as evidence of prior misconduct bearing upon the issue of the sanction to be imposed in the subsequent proceeding." *Id.*; *see also id.*, Rule 8(B) ("Prior findings of misconduct, including admonitions, may be considered in imposing sanctions."). After reviewing the prior admonition, the Panel has determined that the conduct previously at issue is not related to the conduct alleged in the current proceeding. In light of this determination and the protection that is conferred under Rule 8(A)(5)(b) on a private admonition, the Panel will not identify the prior admonition.

[6] Disciplinary Counsel takes the position in proposed findings of fact that this factor does not apply because of a discovery dispute between the parties. During the merits hearing Disciplinary Counsel stipulated that Respondent was cooperative. In addition, the Panel is not persuaded that the discovery dispute should negate Disciplinary Counsel's stipulation.

CONCLUSIONS OF LAW

Counts 1–3
(Affidavits of T.L.)

Rule 8.4(c) of the Vermont Rules of Professional Conduct states that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." V.R.Pr.C. 8.4(c). The term "dishonesty" has been defined as:

> [e]ncompass[ing] fraudulent, deceitful, or misrepresentative behavior. In addition to these, however, it encompasses conduct evincing a lack of honesty, probity or integrity in principle; a lack of fairness and straightforwardness. Thus, what may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty.

Matter of Shorter, 570 A.2d 760, 768 (D.C. 1990) (quoting *Tucker v. Lower,* 200 Kan. 1, 4, 434 P.2d 320, 324 (1967)).

A finding of deceit can be predicated on either affirmative actions or concealment. *See, e.g., Attorney Grievance Comm'n of Maryland v. Floyd*, 929 A.2d 61, 66 (Md. 2007) ("[T]he law recognizes that deceit can be based on concealment of material facts as well as on overt misrepresentations."); *In re Strouse*, 2011 VT 77, ¶ 14, 190 Vt. 170, 34 A.3d 329 (associate who failed to inform senior attorney that she had renewed a relationship with the senior attorney's client's husband engaged in deceit in violation of Rule 8.4(c)). Moreover, "[a] duty [to speak] may arise from the relations of the parties, or superior knowledge, or means of knowledge." *Id.* ¶ 15.

In order to find a violation of Rule 8.4(c), the majority of courts "look for some culpable state of mind." ABA Ctr. For Prof'l Responsibility, Annotated Model Rules of Prof'l Conduct 679 (8th ed. 2015); *see, e.g., Iowa Supreme Court Disciplinary Board v. Netti*, 797 N.W.2d 591, 605 (Iowa 2011) ("[T]he better view is to require some level of scienter that is greater than negligence to find a violation of [Rule 8.4(c)]"); *In re Cutright*, 910 N.E.2d 581, 589-90 (Ill.

2009) (requiring "some act or circumstances that showed the respondent's conduct was purposeful").

"[W]hile Rule 8.4(c) is broad and . . . encompasses conduct both within and outside the realm of the practice of law . . . .[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 (2009); *see also id.* (concluding that the rule reaches conduct "that reflects on an attorney's fitness to practice law").

Applying these principles to the facts, the Panel concludes that Respondent's filing with the court of the three affidavits of T.L. was dishonest conduct. Respondent's notarization of the affidavits constituted a representation to the court and the other parties in the litigation that T.L. had, in the presence of Respondent, signed and taken the requisite oath as to the content of the respective affidavits. However, as Respondent concedes, the affidavits were not signed by T.L. in Respondent's presence. While maintaining that he believed T.L. had signed the three affidavits, Respondent concedes that the affidavits were not signed in his presence.

It is universally recognized that a person who intends to sign an affidavit (the "affiant") must sign the affidavit in the presence of a notary and take an oath administered by the notary as to the truth of the contents of the affidavit. The Vermont Notary Public Guide includes the following provision:

> An affidavit is a sworn or affirmed written statement of declaration of facts made voluntarily by an individual (affiant). The oath or affirmation that confirms the truth of an affidavit may be taken *before* a notary public in Vermont. 12 V.S.A. 5854. An oath or affirmation should be taken (see the following oath form) and a jurat completed at the end of the affidavit, reading "Subscribed and sworn to *before me* this __ day of _____, 20__,: and signed by the notary following this statement. The affiant should also sign the document.

Addendum 1, 2015 Vermont Notary Guide, "Affidavits and Depositions," at p. 5 (available at https://web.archive.org/web/20150906004309/https://www.sec.state.vt.us/media/68413/notaryguide_2015.pdf) (emphasis added).[7]

It is obvious why an affiant must sign in the presence of a notary. Unless the affiant is in the presence of the notary, the notary cannot be sure that the individual is, in fact, who he or she claims to be. This aspect of the notarization process is essential to prevent fraud from being perpetrated.

The fact that Respondent's conduct involved his certification as a notary public does not shield him from responsibility. "Rule 8.4 reaches conduct outside the practice of law." ABA Annotated Model Rules, Rule 8.4, at 670. Moreover, it is apparent the while the misconduct involves notarization of documents, the dishonesty is tied to Respondent's submission of the documents to the court in his capacity as an attorney representing a party in a lawsuit. Not surprisingly, courts in other jurisdictions have found violations of Rule 8.4(c) and the related rule prohibiting the making of false statements to a tribunal. *See, e.g., Disciplinary Counsel v. Roberts*, 881 N.E.2d 1236, 1239 (2008) ("Authenticating 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."); *In re Swain*, 725 S.E.2d 244, 245 (2012) (finding violation of Rule 8.4 where lawyer notarized a document that was signed outside his presence and despite a phone call having been made by the

[7] The Notary Guide was first published by the Vermont Secretary of State's Office in 1991 and was periodically revised thereafter. Based on Respondent's certification in the T.L. affidavits that his term as a notary expired on February 10, 2019, he was appointed February 1, 2015. The Guide in effect at that time ("the 2015 Guide") provided as follows: "Notaries taking office on February 1, 2015, will serve full four-year terms. The law then allows a ten-day grace period before a notary is automatically removed from office by law on February 10, 2019." Guide at 3 ("Term of Office"). The 2015 Guide contains the same language pertaining to notarization of affidavits as appeared in the original 1991 Guide. In 2018, the Vermont Legislature enacted a uniform statute governing notaries. *See* 26 V.S.A. §§ 5301-5378. However, that newly enacted statute has no bearing on this proceeding since the T.L. affidavits were notarized prior to the July 1, 2019 effective date of the new statute.

lawyer in an effort to obtain verbal acknowledgement of the signature); *State ex rel. Okla. Bar Ass'n v. Dobbs*, 94 P.3d 31, 51 (Okla. 2004) (finding violation of Rule 8.4(c) based on false notarization where affiant did not personally "appear[ ] before respondent, sign[ ] the affidavit, and sw[ear] to the truth of the statements contained in it."); *In re Ganley*, 549 N.W.2d 368, 369 (Minn. 1996) (concluding that respondent made a false statement to a tribunal by notarizing an affidavit without his client signing the affidavit in his presence).

The notarization language utilized by Respondent deviated from the standard form. It stated that each affidavit had been "[s]igned and subscribed under oath by [T.L.] a person known to me" – omitting the standard "before me" language. However, even assuming that Respondent actually believed that T.L. had signed the affidavits and further assuming that he administered an oath to T.L. by telephone based on a signature that he believed was T.L.'s (as he contended at the hearing), the omission of "before me" language does not shield him from a Rule 8.4(c) violation. An affidavit must be signed and an "oath" taken in person before a notary. There was no authority in Vermont at the time that provided any exception to these requirements. And, even assuming Respondent's account, he could not ascertain that the individual on the other end of any such phone call was "known to [Respondent]," as he represented. In sum, the "under oath" and "known to me" language used by Respondent implied to the court and to the parties in the case that the affidavits had been signed and that oaths had been given by the affiant in Respondent's presence.

Moreover, even assuming some ambiguity in the meaning of the "under oath" language, Respondent's deviation from the standard notarization language amounted to deception because it did not notify the parties and the court that the affiant had in fact not signed or taken the requisite oath in Respondent's presence. If Respondent had said so, the parties could have

challenged the affidavits. Respondent cannot benefit from an obfuscation of his obligation as a notary.

Finally, Respondent was aware that he was submitting the three affidavits under circumstances where the affiant had not signed or taken the requisite oath in Respondent's presence. His conduct was knowing.

The Panel notes that this is not a case in which an attorney has attempted to perpetrate fraud through a bogus affidavit. T.L. had full knowledge of and was comfortable with the content of the affidavits. Nevertheless, Respondent's representations to the court and the parties through his notarization of the affidavits were dishonest and must be recognized as such. His conduct violated Rule 8.4(c).

Count 4

(Statements in Support of the Motion for Default Judgment)

Rule 3.3(a)(1) 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." The Comments to Rule 3.3 provide that "[t]his Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process." V.R.Pr.C. 3.3, Comment [1]; *see also id.* (referencing "advocate's duty of candor to the tribunal"). The Comments further provide as follows:

> [A]n assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, 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. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.

Id., Comment [3].

The Panel concludes that Respondent failure to provide certain information to the court in connection with the motion for default judgment against West Star and Respondent's supporting affidavit amounted to a violation of Rule 3.3(a)(1). Respondent should have disclosed the communications he had previously received from the corporate counsel for West Star Mortgage – counsel's assertion that the company had no record of any loan to T.L. and his suggestion that a different company, West Star Mortgage Corporation, might be the appropriate party. If Respondent had disclosed these communications, the court would likely have wanted to know what further investigation had been undertaken by Respondent to be sure that T.L. had sued the proper party. Respondent's motion and affidavit contained no information regarding the communications or any subsequent actions undertaken by Respondent to investigate counsel's assertions.

Respondent maintains that he had a good-faith belief he had sued the proper party based on his understanding that a "West Star" representative located in Virginia answered his pre-lawsuit phone call and the fact that West Star Mortgage Inc. was the only "West Star" registered with the Vermont Secretary of State to do business in Vermont at the time. But, aside from the fact that Respondent's pre-suit phone call preceded the phone call and email communication in which corporate counsel called into question Respondent's understanding and the fact that a corporate registration to do business is not necessarily dispositive of whether an entity has a connection to a particular business transaction, Respondent never gave the court an opportunity to evaluate whether his investigation was sufficiently responsive to the information provided by the corporate counsel.

In addition, Respondent failed to inform the court the fact that he had agreed to provide an open-ended extension of time for West Star to file an answer and had not yet informed West

Star's counsel that an answer should be filed. The court would not have proceeded to decide the motion for default judgment if it had been aware of that information.

These omissions violated Rule 3.3(a)(1).

Count 5

(Failure to Keep T.L. Reasonably Informed)

Rule 1.4(a)(3) provides that "[a] lawyer shall . . . keep the client reasonably informed about the status of the matter." The Comments to the rule state that "[r]easonable communication between the lawyers and the client is necessary for the client effectively to participate in the representation." V.R.Pr.C. 1.4, Comment [1]. They further state that "paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation." *Id.*, Comment [3]. "The guiding principle is that the lawyers should fulfill reasonable expectations for information consistent with the duty to act in the client's best interest, and the client's overall requirements as to the character of representation." *Id.*, Comment [5].

Respondent failed to keep T.L. reasonably informed about the status of T.L.'s appeal. After filing a notice of appeal and requesting an extension of time to file T.L.'s appeal brief, Respondent stopped working on the appeal and missed the filing deadline, resulting in dismissal of the appeal. During that time, he failed to respond to two emails from T.L. requesting information about the appeal.

Respondent had reservations about whether T.L.'s appeal had merit and he expressed these reservations to T.L. However, at no point did he advise T.L. that he could not in good

conscience file a brief on T.L.'s behalf and would have to withdraw from representing T.L. in the appeal.

As a result of Respondent's failure to communicate with T.L., T.L. lost his opportunity to pursue his appeal. If Respondent had timely notified T.L. that he considered the appellate issues to be without merit and therefore did not feel comfortable pursuing the appeal, T.L. might have sought representation from another lawyer. Because T.L. only learned about the dismissal of the appeal after it had already occurred, that was no longer an option.

In sum, Respondent's failure to keep his client reasonably informed about the status of his appeal violated Rule 1.4(a)(3).[8]

SANCTIONS DETERMINATION

The Vermont Rules of Professional Conduct "are 'intended to protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar.'" *In re PRB Docket No. 2006-167*, 2007 VT 50, ¶ 9, 181 Vt. 625, 925 A.2d 1026 (quoting *In re Berk*, 157 Vt. 524, 532, 602 A.2d 946, 950 (1991)). The purpose of sanctions is not "to punish attorneys, but rather to protect the public from harm and to maintain confidence in our legal institutions by deterring future misconduct." *In re Obregon*, 2016 VT 32, ¶ 19, 201 Vt. 463, 145 A.3d 226 (quoting *In re Hunter*, 167 Vt. 219, 226, 704 A.2d 1154, 1158 (1997)).

[8] Disciplinary Counsel did not charge Respondent with making dishonest representations to T.L. in connection with the appeal. *See* Petition of Misconduct, Count 5 of 5, at 2. To pursue such a charge, Disciplinary Counsel would have had to assert a violation of Rule 8.4(c). Since no such violation was charged, the Panel will not address such issues. *See In re Robinson*, 2019 VT 8, ¶ 52 (respondent "entitled to know the rules alleged to have been violated"; hearing panel precluded from considering possible rule violation not alleged in petition).

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. "[T]he standards assume that the most important ethical duties are those obligations which a lawyer owes to *clients*." *Id.* (emphasis in original). Other duties are owed to the general public, the legal system, and the legal profession. *Id.* In this case, Respondent violated duties owed to his client, the legal system, and the legal profession. Respondent's false notarization of affidavits and his withholding of material information related to the motion for default judgment breached his duty of honesty and duty of candor as an officer of the court. In connection with T.L.'s appeal, Respondent breached the duty of diligence owed to his client.

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 "[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.*

The Panel concludes that Respondent acted knowingly in committing the alleged violations. Although Respondents maintains that he believed T.L. had signed the affidavits, he concedes that they were not signed in his presence. Respondent did not have a good-faith basis for notarizing and filing the three affidavits that were signed outside his presence. The fact that he was unable to cite any other instance in which he engaged in this practice undermines his assertion of a good-faith belief.

Likewise, at the time he filed the motion for default judgment Respondent was aware of the communications from West Star's corporate counsel expressing counsel's belief that the wrong "West Star" had been sued. Respondent decided not to mention the communications in his court filings. The fact that Respondent was aware of the communications and knowingly kept the court in the dark is further reinforced by the fact that after receiving the email communication from corporate counsel, Respondent filed an amended complaint with the court that changed the name of the defendant to "West Star Mortgage," dropping the suffix "Inc." and resulting in a name that bore common elements with both "West Star Mortgage, Inc." entity originally named in the complaint and the "West Star Mortgage Corporation" entity identified by corporate counsel. The amendment was made without any explanation. The motion for default judgment similarly made no mention of the communications from corporate counsel. In sum, the evidence supports the conclusion that the omission from the motion for default judgment was not negligent, but rather knowing.

Finally, there is clear and convincing evidence that Respondent knowingly failed to keep his client informed of the status of his appeal. Although Respondent was undoubtedly distracted from his work by his sister's months-long final illness, he not only failed to respond to multiple email requests for information from his client, but also conversed with his client on several

occasions while the appeal was pending and nevertheless failed to keep him informed. He also delayed in informing T.L. that the appeal had been dismissed. Under all these circumstances, his state of mind must be considered to have been knowing in nature.

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.

In this case no actual injury to the client resulted from Respondent's misrepresentations regarding the notarization of T.L.'s affidavits. T.L. was aware of and comfortable with the substance of the affidavits. However, there is injury to the legal system and the profession whenever a lawyer makes misrepresentations in the course of a legal proceeding. The essential requirement of notarization – confirming that an oath is taken in the presence of a notary – provides an important safeguard in the court system. A lawyer's honesty is the currency that ensures respect for the court system and the lawyers who represent clients in the system.

Respondent's omissions in connection with the motion for default judgment caused monetary harm to a third party and unnecessarily consumed judicial resources. West Star had to hire an attorney to file a motion to vacate the default judgment. If Respondent had notified the court of the communications between himself and corporate counsel for West Star Mortgage,

Inc., the court would at the very least have scrutinized whether Respondent's investigation of that entity was adequate and afforded West Star an opportunity to respond to the motion. Moreover, based on the information provided by West Star – that it had no record of T.L. having a loan with any corporate predecessor of West Star – and the absence of any challenge to that information when the motion to vacate was subsequently heard by the court, it is likely that the motion for default judgment would never have been granted by the court. Instead, additional resources from a third party and the court were required to undo the default judgment.

Respondent's omissions also caused non-monetary harm to the legal system and the legal profession. The entry of judgment is a serious judicial action. Because the court system is charged with doing justice, it necessarily expects a complete and accurate accounting from a party moving for a default judgment. Respondent's failure to disclose the prior communications with corporate counsel harmed the system. Likewise, his omissions were harmful to the profession in that he disregarded his agreement to provide another lawyer, West Star's corporate counsel, with an extension to answer the complaint.

Finally, Respondent's failure to communicate with T.L. regarding his appeal resulted in the loss of Respondent's right to appeal. It is unclear whether T.L.'s appeal had merit or not. Nevertheless, T.L. lost the opportunity to try to convince the Supreme Court that his appeal had merit. If Respondent had timely notified T.L. that he did not feel comfortable pursuing the appeal, T.L. might have sought representation from another lawyer. In addition, Respondent's failure to respond to communications from T.L. and the ultimate dismissal of the appeal due to Respondent's failure to file a brief on time caused T.L. to experience substantial anxiety. Anxiety and frustration to a client have been recognized as forms of harm in attorney disciplinary proceedings. *See, e.g., 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"); *In re Hongisto*, 2010 VT 51, ¶ 11 188 Vt. 553, 998 A.2d 1065 (citing as actual injury client's "frustration and aggravation from respondent's failure to communicate").

Presumptive Standard under the ABA Standards

With respect to the T.L. affidavits, the Panel concludes that Standard 7.2 is most pertinent. It provides that "[s]uspension is most appropriate 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." Here, Respondent notarized three affidavits without his client signing the affidavits in his presence and submitted them to the court. He submitted the affidavits knowing that they had not been notarized in his presence. Accordingly, suspension is the presumptive sanction.[9]

Likewise, Respondent's withholding of information materially related to the motion for default judgment calls for suspension under Standard 7.2. Respondent owed a duty to the legal system to be fully forthcoming in the course of requesting a default judgment on behalf of T.L. against West Star. He was aware of important information, having spoken with and received email communications from West Star's corporate counsel and having moved to drop the suffix

[9] There does not appear to be any other clearly applicable standard for Respondent's abuse of his authority as a notary public. *See In re Robinson*, 2019 VT 8, ¶ 47 n.7 (applying Standard 7.0 where no other "clearly applicable" standard for respondent's misconduct). Standard 5.13 provides that "[r]eprimand is generally appropriate when a lawyer knowingly engages in any . . . conduct [other than that specified in Standards 5.11 and 5.12] that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law." ABA Standards, § 5.13. Standard 5.11(a) and 5.12 call for disbarment and suspension, respectively, in the context of serious criminal conduct or other criminal conduct that seriously adversely reflects on a lawyer's fitness to practice and, therefore, would not be applicable. Because Standard 5.13, though not limited to criminal conduct, is general in nature and, by comparison, Standard 7.2 focuses on harm to the legal system, the Panel concludes that the latter is most appropriate.

"Inc." from the corporate name shortly after learning that corporate counsel believed Respondent had sued the wrong party. His dishonesty caused injury to West Star, which had to hire an attorney to move to vacate the judgment, and to the legal system – because the judgment should never have been entered in the first place and the court system had to incur time and resources addressing the motion to vacate the judgment.

With respect to Respondent's failure to communicate with T.L. regarding the status of his appeal, the Panel concludes that Standard 4.42 is most pertinent. It provides that "[s]uspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client." The services Respondent was obligated to provide to T.L. included the duty to keep T.L. sufficiently informed so that he could participate in the representation by Respondent. Respondent knowingly failed to perform those services.[10]

Aggravating and Mitigating Factors Analysis

Next, the Panel considers any aggravating and mitigating factors and whether they call for increasing or reducing the presumptive standard of suspension. Under the ABA Standards, aggravating standards are "any considerations, or factors that may justify an increase in the degree of discipline to be imposed." *ABA Standards*, § 9.21, at 50. Mitigating factors are "any considerations or factors that may justify a reduction in the degree of discipline to be imposed."

[10] Disciplinary Counsel suggests that Standard 4.63 should pertain to Respondent's failure to keep his client informed of the status of the appeal. It provides that "[r]eprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client." Apart from the fact that Respondent's conduct was knowing – not negligent – the overarching Standard 4.6 is described as "generally appropriate in cases where the lawyer engages in fraud, deceit, or misrepresentation directed toward a client." As Disciplinary Counsel did not, in connection with T.L.'s appeal, charge a violation with an element of deceit or misrepresentation, the Panel concludes that the other presumptive sanctions under Standard 4.6 should not be applied. *See, e.g.*, Standard 4.62 (providing for suspension "when a lawyer knowingly deceives a client and causes injury or potential injury to the client.").

Id. § 9.31, at 50-51. Following this analysis, the Panel must decide on the ultimate sanction that will be imposed in this proceeding.

(a) Aggravating Factors

The following aggravating factors under the ABA Standards are present:

§ 9.22(a) (prior disciplinary offenses) – Respondent was suspended in 1997 for multiple violations, some of which involved dishonest conduct. He was subsequently reinstated to the Vermont Bar. The conduct underlying Respondent's 1997 suspension occurred between 1985 and 1993. *See Wysolmerski*, 167 Vt. at 562. Because of the lengthy period of time that elapsed between the events underlying those charges and the conduct currently charged – more than twenty years – the Panel cannot ascribe significant weight to this factor. *See In re Fink*, 2011 VT 42, ¶¶ 44-45, 189 Vt. 470, 22 A.3d 461 (respondent's prior discipline not given significant weight as aggravating factor due to remoteness in time).

§ 9.22(b) (dishonest or selfish motive) – Plaintiff acted with a dishonest motive in connection with his notarization of affidavits filed in the lawsuit and in omitting from his motion for default judgment material information relating to communications to and from corporate counsel for West Star. However, he did not act with any motive to benefit himself in connection with any of the violations. The absence of a selfish motive tempers somewhat the application of this factor.

§ 9.22(c) (pattern of misconduct) – Respondent engaged in a pattern of misconduct. On several occasions he notarized affidavits that had not been signed in his presence. In addition, he engaged in dishonest conduct with both the court and West Star's counsel. On the other hand, it is important to note that the conduct was isolated to one case and one client.

§ 9.22(d) (multiple offenses) – Respondent committed five violations of the Rules of Professional Conduct. However, the Panel notes that the three offenses based on the affidavits of T.L. were closely related. And, again, the offenses all pertained to one case and one client.

§ 9.22(i) (substantial experience in the practice of law) – At the time of the conduct in question, Respondent had practiced law for approximately thirty years (excluding his previous three-year suspension).

(b) Mitigating Factors

The following mitigating factors under the ABA Standards are present:

§ 9.32(c) (personal or emotional problems) – The Panel accepts 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. Although the physical and emotional strain on Respondent did not excuse his conduct, it does constitute a mitigating factor. However, this mitigating factor is limited to the time period when the misconduct associated with T.L.'s appeal occurred. It was not a factor in the prior misconduct.

§ 9.22(e) (cooperative attitude toward proceedings) – Respondent was generally cooperative in connection with this disciplinary proceeding. However, this factor 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 expressed remorse for failing to inform T.L. that he would not be filing a brief on his behalf. Respondent did not express remorse for any other

violation. Because of the limited nature of the expression of remorse, the Panel assigns limited weight to this factor.

§ 9.32(m) (remoteness of prior offense) – As noted above, the prior offenses for which Respondent was previously suspended were remote in time.

(c) Weighing the Aggravating Mitigating Factors

The aggravating factors do not significantly outweigh the mitigating factors in number. After considering the nature and relative weight of the various aggravating and mitigating factors the Panel concludes that the presumptive sanction of suspension should be neither be increased nor reduced. Although there is some similarity between the current violations and the misconduct underlying the 1997 suspension that is troubling to the panel, the intervening passage of more than twenty years and Respondent's subsequent reinstatement suggest that the prior disciplinary record should carry little weight. In addition, although Respondent engaged in dishonest conduct, there was no selfish motive and the conduct was limited to one case and one client. In addition, with respect to Respondent's failure to keep his client informed regarding the status of the appeal, the Panel believes that Respondent's emotional and physical stress during the time period of the appeal merits significant weight. Respondent was understandably preoccupied with his sister's final illness and her eventual loss.

* * *

Having in mind that "[i]n general, meaningful comparisons of attorney sanction cases are difficult as the behavior that leads to sanction varies so widely between cases," *In re Strouse*, 2011 VT 77, ¶ 43, 190 Vt. 170, 34 A.3d 329 (Dooley, J., dissenting), the Panel has considered past disciplinary determinations in order to decide what sanction should be imposed in this case.

Absent significant aggravating factors and when mitigating factors are present, other jurisdictions have typically imposed public reprimands for lawyers' improper notarization of legal documents. See, e.g., *In re Davis*, 728 S.E.2d 548, 549 (Ga. 2012) (public reprimand issued to lawyer who signed for his client and notarized document believing he had his client's tacit permission); *In re Swain*, 725 S.E.2d 244, 245 (Ga. 2012) (public reprimand issued to lawyer who notarized documents outside the presence of his client); *Cincinnati Bar Assn. v. Thomas*, 754 N.E.2d 1263, 1264 (Ohio 2001) (public reprimand issued to lawyer who signed divorce client's signature on affidavit with client's permission and notarized the affidavit); *see also Disciplinary Counsel v. Roberts*, 881 N.E.2d 1236, 1240 (concluding that "a public reprimand will issue if the lawyer does nothing improper in addition to notarizing a signature affixed outside the lawyer's presence").

Respondent's failure to keep T.L. informed about the status of the appeal calls for a more serious sanction. In *In re Blais*, 174 Vt. 628, 817 A.2d 1266 (2002), the respondent was suspended for five months based on multiple incidents of neglecting client matters and making misrepresentations to clients regarding the status of their cases. *Id.* at 630; 817 A.2d at 1269; *see also In re Sunshine*, PRB #2001-001 (four-month suspension plus probation imposed where respondent neglected a client matter and lied to client about status of lawsuit). More recently, in *In re Hongisto*, the Court upheld a six-month suspension for various misconduct that included respondent's failure to keep her client reasonably informed and failure to respond to inquiries from the client. *See* 2010 VT 51, ¶¶ 3, 11, 188 Vt. 553, 998 A.2 1065.

In *Hongisto*, as in the current proceeding, the client lost the opportunity to pursue a claim as a result of respondent's conduct. *Id.* (observing as justification for six-month suspension that the client "could not pursue a case that he thought he would have won"). Although Respondent

was experiencing personal problems when he failed to keep T.L. reasonably informed about the status of his appeal – a mitigating factor not present in *Hongisto* – the fact that the misconduct occurred over an extended period of time and the consequences of Respondent's failure – the loss of T.L.'s right of appeal – cause the Panel to conclude that the violation by itself would merit a six-month suspension.

Assessing the appropriate sanction for Respondent's dishonesty related to the motion for default judgment is difficult. Several cases in which the Supreme Court has imposed lengthy suspensions for dishonest conduct were arguably based on more extensive and serious conduct and/or aggravating factors. In *In re Neisner*, 2010 VT 102, 189 Vt 145, 16 A.3d 587, the respondent was suspended for two years following a felony conviction for lying to a police officer. *Id.*, ¶ 13. The commission of a felony arguably called for a more severe suspension. By contrast, no crime was committed in the current case.

In the case that led to Respondent's prior three-year suspension, Respondent was found to have engaged in dishonest conduct towards clients and the courts on multiple occasions over an eight-year period of time in five unrelated instances. The extensive nature of the dishonesty weighed heavily in the decision. *Wysolmerski*, 167 Vt. at 562-63. The scope of dishonest conduct was clearly far greater in that case than in the current one, which involves one case and one client.

In *In re Griffin*, PRB Decision 76 (2005), the respondent received a thirty-month suspension for demanding payment based on a bogus fee agreement on which he forged client's signature and where there was no actual injury to the client but the actions were intended for respondent's personal gain. Here, Respondent was pursuing his client's interests and there was no selfish motive. In *In re Colburn*, PRB Decision 102 (2007), a three-year suspension was

imposed where the respondent engaged in neglect and lack of diligence and made various misrepresentations to three separate clients regarding the status of their cases and there existed a pattern of lying to his partners in the law firm as well. The circumstances in the current case are clearly more limited.

On the other end of a continuum are dishonesty cases imposing suspensions of less than one year. For example, in *In re McCarty*, 2013 VT 47, ¶ 4, 194 Vt. 109, 75 A.3d 589, a lawyer who drafted and sent to a tenant an unlawful notice to vacate premises had a recommended six-month suspension reduced to three months based on various mitigating factors, including the fact that the violations had occurred more than ten years previously and that respondent had not violated the rules of conduct since that time. *Id.*, ¶ 34. In *In re Levine*, PRB Decision 63 (2002), an attorney moving for admission *pro hac vice* falsely stated that he had not been the subject of any disciplinary proceeding in another jurisdiction. Based on the fact that respondent was experiencing personal problems at the time of the infraction, had a very heavy caseload, and was relying on local counsel's draft affidavit, and in light of the isolated nature of the violation, the panel ultimately imposed a 30-day suspension. In *In re Rice*, PRB Decision 64 (2004), the respondent was found to have assisted a client in hiding assets from a creditor, for which he was suspended for ninety days.

Most recently, in *In re Gilmond*, PRB Decision 212 (2018), the respondent received a 6-month suspension for dishonest conduct directed at his client's insurance adjuster and opposing counsel concerning a settlement agreement. The conduct involved a single case. While there was no harm to respondent's client, there was harm to the court system and the legal profession. In addition, the respondent was found to have failed to keep his client's insurance company reasonably informed about the status of settlement negotiations in the case.

The *Gilmond* case bears some striking similarities to the current one. And, yet, it did not involve an additional harm that the Panel has found in the current case – the loss of Respondent's client's right of appeal.

In cases involving multiple violations, the ABA Standards provide that "[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, Part II, "Theoretical Framework," at 7.

Based on all these considerations and the serious nature of the misconduct pertaining to the motion for default judgment and T.L.'s appeal to the Supreme Court, the Panel concludes that a 12-month suspension is appropriate in this case. Respondent's dishonesty in connection with his motion for default judgment deprived the court of essential information and resulted in the issuance of an unwarranted judgment against a third party. The issuance of a judgment is the most serious consequence of a judicial proceeding and a request for a default judgment should be pursued with the utmost care and caution to avoid an unjust result. Respondent's dishonesty resulted in costs not only to West Star but also to the legal system, which was required to devote time and personnel to hearing the motion to vacate. A 12-month suspension also recognizes the separate harm that resulted to T.L. in the loss of his appeal.

ORDER

It is hereby ORDERED, ADJUDGED and DECREED as follows:

1. Respondent, Sigismund Wysolmerski, Esq., has violated Rules 1.4(a)(3), 3.3(a)(1), and 8.4(c) of the Rules of Professional Conduct, as set forth above;

2. Respondent is suspended from the office of attorney and counselor at law for a period of twelve (12) months effective from the date of this decision.

Dated: July 18, 2019.

Hearing Panel No. 6

By: _____
Caryn E. Waxman, Esq., Chair

By: _____
David A. Berman, Esq.

By: _____
William Schubart, Public Member