Vermont Supreme Court
Professional Responsibility Program

In re Richard Bowen, Esq. **Hearing Panel 10**
PRB File Nos. 2019-083 & 2019-088

DECISION NO. 233

On June 28, 2019, Disciplinary Counsel filed a petition of misconduct charging the Respondent, Attorney Richard Bowen, with violating Rules 1.8(b) and 1.9(c)(2) of the Vermont Rules of Professional Conduct. Respondent answered and the matter came before Hearing Panel for a hearing on December 11, 2019. Disciplinary Counsel and Respondent appeared, with Respondent representing himself. At the conclusion of the hearing, during which Disciplinary Counsel and Respondent presented evidence and cross-examined witnesses, the panel set a deadline to file post-hearing memoranda. At Respondent's request, the deadline was later extended to March 10, 2020. Disciplinary Counsel and Respondent filed separate post-hearing memoranda on the deadline. As required by Rule 11(D) of Supreme Court Administrative Order 9, the panel makes the following findings of fact and conclusions of law, and suspends the Respondent's license to practice law in Vermont for three (3) months.

I. Findings of Fact

1. Respondent, Richard Bowen is an attorney admitted to practice law in Vermont. Respondent was admitted to the bar of the Vermont Supreme Court in 1986. He practiced in a small firm in Springfield for many years, before opening his own practice in or around 2000. He has been a sole practitioner ever since. Respondent's primary area of practice is real estate. It is an area of practice in which he has significant experience. Respondent also provides other legal services typical of small-town Vermont lawyers. Respondent has three staff members.

2. In 2015, Respondent agreed to represent a litigant in connection with post-divorce proceedings. The litigant married almost 20 years ago, then separated more than 10 years ago. During the marriage, the litigant and the litigant's spouse (Ex-Spouse) did not live

in Vermont. However, upon separating, Ex-Spouse moved to Vermont and the couple owned several pieces of property in Vermont. By the time that Respondent entered an appearance on litigant's behalf in 2015, the divorce and post-judgment matters had resulted in multiple publicly available decisions from both the Superior and Supreme Courts.

3. The scope of Respondent's representation of the litigant in 2015 was to attempt to reopen the divorce. Respondent and the litigant alleged that Ex-Spouse had committed a fraud upon the court during post-judgment proceedings by misleading the courts (and litigant) as to the nature and amount of Ex-Spouse's assets. Respondent's claims on behalf of the litigant were not successful and were rejected in publicly available decisions issued by both the Superior and Supreme Courts. Respondent's representation of Former Client ended in the spring of 2017. When it did, the litigant became Respondent's former client (Former Client).

4. Once the divorce finally resolved, Respondent was awarded an undeveloped lot in Springfield, Vermont (the Springfield property). Former Client and Ex-Spouse had purchased the Springfield property while married. At the time, the seller took back a mortgage. Shortly before Former Client separated from his ex-spouse, the seller sought to foreclose the mortgage. Respondent represented the couple in defending against and resolving the foreclosure issue. Nevertheless, Respondent represented Former Client in post-divorce proceedings without seeking or obtaining Ex-Spouse informed consent.[1]

[1] Disciplinary Counsel did not charge Respondent with a violation related to the fact that Respondent represented Former Client in a post-judgment proceeding after having previously represented the couple during the marriage. When Respondent admitted to having done so on direct examination, Disciplinary Counsel did not appear to have been aware of the Respondent's representation of the couple in the foreclosure action. It is relevant here in that the foreclosure involved the Springfield property, the same property that, as will become clear, is central to this case.

5. Once Respondent's representation of Former Client ended in 2017, Respondent billed approximately $11,000 in legal services. The bills remained unpaid until February 2019. In the interim, Respondent's office sent monthly invoices to Former Client and, on at least a few occasions, Former Client and Respondent discussed the outstanding bill by phone. As a sole practitioner with three staff members, an unpaid bill of nearly $11,000 is of significant concern and impact to Respondent.
6. In 2018, Former Client listed the Springfield property for sale. Husband and Wife own and reside on an adjacent lot. Husband and Wife appreciate living next to an undeveloped lot. Nervous that a buyer might build houses on the Springfield property, Husband and Wife eventually decided to make an offer. For reasons not relevant here, Wife alone entered into a purchase and sale agreement to buy the Springfield property from Former Client.
7. While Wife was the purchaser, Husband was involved in many aspects of the transaction, including coordinating with a lawyer. In September 2018, Husband asked Respondent to represent Wife in connection with the purchase. Respondent agreed. Throughout the course of the representation, and with Wife's consent, Husband was Respondent's principal contact.
8. In September 2018, Husband and Wife provided Respondent with the purchase and sale agreement and other information related the transaction. Per the purchase and sale agreement, closing was set for November 15, 2018. Respondent reviewed the information provided by Husband and Wife and gave them general advice as to the process. Respondent informed Husband and Wife that he would perform a title search, but not until after Wife had secured financing. Respondent did not inform Husband or

Wife that Respondent had previously represented Former Client in post-judgment divorce proceedings, or that Respondent has previously represented Former Client and Ex-Spouse in an action to foreclose upon a mortgage they had given to the seller when they purchased the Springfield property. Respondent did not ask for or receive Former Client's informed consent to represent Husband and Wife.

9. For various reasons, the closing on the Springfield property was postponed many times. Finally, in late December 2018, Wife arranged for the necessary funding to close as a cash sale. Closing was set for February 7, 2019.

10. Sometime in January 2019 Respondent conducted a title search. He did not find a deed in which Ex-Spouse quit claimed any interest in the Springfield property. He found several ex parte liens that Ex-Spouse had filed against the Springfield property.

11. In addition to representing Husband and Wife in the purchase, Respondent served as their title insurance agent. The title insurance company informed Respondent that it would not insure the title. The title insurance company informed Respondent that it was concerned that Ex-Spouse had never quit claimed her interest in the Springfield property, that her interest had not been extinguished, and, therefore, that Former Client might not have marketable title.

12. At some point in late January or early February of 2019, Respondent informed Husband and Wife of the potential cloud on title. Respondent told them that the title insurance company would not insure the title. He explained the pros and cons of going forward without it. He told Husband and Wife that he doubted Ex-Spouse would seek to enforce any interest that she might have in the Springfield property because she had inherited a substantial sum of money. He told them that he knew about the inheritance because he

had represented Former Client in the post-judgment divorce proceedings. The panel finds as fact that, indeed, Respondent's knowledge of the inheritance came from his representation of Former Client.

13. Respondent's disclosure to Husband and Wife was the first time that he informed them that he had previously represented Former Client. Prior to the disclosure, Husband and Wife had little knowledge of Former Client and did not know his ex-spouse had supposedly inherited millions. Former Client never consented to Respondent disclosing any information about the representation to Husband, Wife, or anyone else.
14. Respondent advised Husband and Wife to ask Former Client to agree to indemnify them for any claims that Ex-Spouse might make. They agreed. They also agreed to proceed with the purchase without title insurance.
15. Barry Polidor is an attorney licensed to practice law in Vermont. Attorney Polidor represented Former Client in the sale of the Springfield property. Beginning in late January 2019, Attorney Polidor and Respondent engaged in a series of discussions and negotiations, including whether Former Client had marketable title or would agree to indemnify Husband and Wife against Ex-Spouse.
16. Attorney Polidor disagreed with any contention that Former Client lacked marketable title. Attorney Polidor had filed Former Client's final divorce order in the Springfield Land Records. In his legal opinion, the final order clearly awarded the Springfield property to Former Client and obviated any concern over Ex-Spouse never having executed a quit claim deed.
17. At some point in the on-going negotiations, Respondent informed Attorney Polidor that Former Client owed Respondent approximately $11,000 in legal fees from the post-

judgment divorce proceedings. Respondent indicated that he intended to deduct from the proceeds of the sale of the Springfield property an amount equal to Former Client's outstanding bill. Attorney Polidor expressed concern with such a proposal.

18. On February 5, 2019, Respondent sent Attorney Polidor an email that included a copy of the bill allegedly owed by Former Client. Again, he indicated that he would withhold the bill from the proceeds of the sale. Attorney Polidor forwarded the information to Former Client and, over the next several days, provided Former Client with legal advice on the issue.

19. Attorney Polidor and Respondent spoke by phone later on February 5. Respondent pressed his insistence that his legal bill be paid from the proceeds of the sale. Attorney Polidor told Respondent that there was "no lien on the property" and expressed doubt that Respondent could withhold money without Former Client's consent. By this time, Former Client had not consented to Respondent disclosing the amount of the bill, or anything else about the prior representation, to Attorney Polidor.

20. On February 6, 2019, the Respondent commenced an action in the Windsor Superior Court to collect his legal fees from Former Client. Respondent included an ex parte motion for a writ of attachment on Former Client's proceeds of the sale of property to Husband and Wife.

21. On February 6, the Windsor Superior Court granted the Respondent's ex parte request. The Court issued a writ of attachment in the amount of $11,792.26 and indicated that the writ "may be satisfied if set amount is paid to Mr. Bowen at closing or placed in escrow".

In Respondent's words, he asked for and received a lien. The Court scheduled a hearing on the writ for the following week. Respondent recorded the lien in the Springfield Land Records.

22. Respondent did not consult or communicate with Husband or Wife prior to filing the collections case and the request for a writ of attachment. Husband and Wife did not consent to Respondent requesting an attachment that would encumber the proceeds of the sale. Husband and Wife did not consent to Respondent filing the lien that encumbered the Springfield property.
23. As this was taking place, on February 6, one of Respondent's employees contacted Husband. The employee informed Husband that Husband or Wife needed to bring to Respondent's office $3,000 to be used at closing. That same day, Husband dropped off a check in the required amount at Respondent's office. An employee told Husband to call Respondent.
24. Respondent and Husband differ as to what happened next. Respondent contends that he and Husband spoke by telephone and that Respondent informed Husband that Respondent has placed a lien on the proceeds of the sale. Respondent contends that Husband did not express any concern, replying instead that lawyers deserve to be paid.
25. Husband's recollection is different. The panel finds Husband's version of events more credible. As such, the panel finds as fact after being instructed to do so by Respondent's employee, Husband called Respondent. Respondent told Husband that "someone" had filed a lien against the proceeds of the sale of the Springfield property. Husband was upset and troubled that the transaction might be imperiled.

26. In fact, Respondent had filed the lien. Prior to doing so, Respondent did not consult or communicate with Husband and Wife had, did not inform them that he intended to encumber the property that they intended to purchase, and did not receive their consent to encumber the property.

27. On February 7, the morning of the closing, Respondent sent closing documents to Attorney Polidor by email. The closing was scheduled for later that afternoon. Attorney Polidor reviewed the material sent by Respondent. When he did, he noticed that Respondent had included the Writ of Attachment and applied the outstanding legal fee to the settlement statement. Attorney Polidor concluded that Respondent intended to escrow proceeds of the transaction to collect the legal fee allegedly owed by Former Client. This was the first that Attorney Polidor had learned of the writ.

28. Attorney Polidor contacted Former Client. Former Client was distressed that Respondent was using the real estate transaction as leverage to collect a bill that Former Client did not feel was owed. Attorney Polidor and Former Client discussed options. Eventually, they decided to push the closing back another day. Attorney Polidor so informed Respondent.

29. That same day, Husband and Former Client spoke directly by telephone. Former Client told Respondent that, in fact, it was Respondent who had encumbered the property. This was the first time that Husband or Wife learned that Respondent had sought the writ or encumbered the property.

30. Husband immediately called the Respondent. Husband demanded an explanation. Respondent admitted that he had encumbered the property. Respondent told Husband that, a few years prior, Respondent had represented Former Client in matters related to a divorce. Respondent told Husband that the divorce was “contentious” and “really, really

ugly." Respondent told Husband that Former Client owed Respondent approximately $11,000 in legal fees. Respondent added that Former Client was not happy with the outcome of the divorce. Respondent told Husband that, as a result, Former Client did not want to pay the bill.

31. Former Client never consented to Respondent revealing information related to the divorce representation to anyone, including Husband, Wife, and Attorney Polidor.

32. On February 7 and 8, Attorney Polidor had several conversations with Former Client and Respondent. In one conversation with Respondent, Attorney Polidor advised Respondent of his concern that Respondent was putting the closing at risk to pursue Respondent's interest in being paid by Former Client. Respondent replied that the only repercussion might be a "nasty letter" from Bar Counsel. Respondent made it clear to Attorney Polidor that if Former Client did not satisfy Respondent's bill, or that if proceeds of the sale were not placed in escrow pending a court hearing, the closing would not take place and that Former Client would be in breach of the purchase and sale contract.

33. At 2:03 PM on February 8, hours before the closing, Respondent sent an email to Attorney Polidor. In it, Respondent stated "The Court order says the amount must be escrowed. Is he agreeing to the escrow? If not, he can't give clear title under the P & S." The panel finds as fact that Respondent intended the email to use the closing to leverage payment of the outstanding legal bill.

34. At 3:35 PM, on February 8, Husband sent Respondent an email. The closing was less than hour away. In the email, Husband stated that Respondent "unethically asserted your own interests by placing an attachment on the property two days prior to the close." The email continued "we find it egregious that the Attorney we have hired to represent us has

inserted himself in a position to hold up the closing on said property because you did not pursue other means of collection in the last year and a half other than sending Bills via mail". The email continued "Why are we holding up our transaction for your business". At the time, Husband and Wife had arranged to have workers come to the Springfield property to clear some of it and to build a fence. The panel finds as fact that Respondent's conduct caused Husband and Wife to experience unnecessary stress and anxiety.

35. Eventually, Former Client agreed to pay half of Respondent's asserted bill and the transaction closed. A few days later, Respondent dismissed the collections case that he had filed against Former Client.

36. During the disciplinary hearing, Respondent testified that he always intended to allow the closing to happen. He testified that if he and Former Client had not reached an agreement regarding his outstanding invoice, he would have "waived the lien" so as not to delay the closing, but likely would have escrowed the amount in dispute until the dispute could be resolved in the Superior Court. The panel finds as fact that Respondent used the threat of delaying the closing - or having Husband and Wife walk away from the transaction absent satisfaction of the writ - to leverage payment of a legal fee from Former Client.

II. Conclusions of Law

Disciplinary Counsel alleges that Respondent violated Rules 1.8(b) and 1.9(c)(2) of the Vermont Rules of Professional Conduct.[2] The burden is on Disciplinary Counsel to establish

[2] Rules 1.8(b) and 1.9(c)(2) are the only violations charged in the Petition of Misconduct.

each violation by clear and convincing evidence. *Administrative Order 9, Rules 16(C) and (D).* The panel addresses each in turn.

A. V.R.Pr.C. 1.8(b).

Rule 1.8(b) states that "a lawyer shall not use information relating to the representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules." Disciplinary Counsel contends that Respondent violated the rule by using information relating to the representation of Wife to secure a writ of attachment that operated to her disadvantage. The panel agrees.

In late January and early February of 2018, Respondent engaged in a course of conduct intended to ensure that a legal bill allegedly owed by Former Client would be paid out of the proceeds of the sale of the Springfield property. He did so by using information relating to his representation of Wife to her disadvantage and without her consent.

Respondent's representation of Former Client ended in 2017. When it did, Respondent asserted a bill for approximately $11,000. Throughout 2017 and 2018, Respondent's office regularly billed Former Client. The two discussed the fee at least once by telephone. For whatever reason, by the end of 2018, Former Client had not paid the bill.[3]

Respondent's persistent effort to collect the fee is not surprising. He makes his living by charging for his work. Further, and as Respondent testified, he operates a small business that employs three others. Collecting fees helps to keep the business going.

Of course, it is not uncommon for a client not to pay a lawyer. When that happens, the lawyer's recourse is not to use the representation of a new client to leverage payment from a former client. Here, when given the opportunity, that is exactly what Respondent did.

[3] Neither the accuracy of the bill nor the reasonableness of fee is an issue before this panel. Nothing in this decision is to be construed as a comment or opinion on the fee.

In September 2018, Respondent learned that Wife intended to purchase the Springfield property from Former Client. As soon as he did, Respondent was on notice that, as Wife's closing attorney, he would come into possession of funds intended for Former Client. These two simple facts were information relating to the representation of Wife. Once aware of the information, Respondent used it to Wife's disadvantage without her consent.

Respondent broached the unpaid bill with Attorney Polidor. Respondent was clear: he intended to withhold the fee from the proceeds of the sale of the Springfield property. Respondent never asked for or received Wife's consent to inject his own interests into the transaction.

Initially, Attorney Polidor informed Respondent that Former Client would not agree to pay out of the closing proceeds and, further, that Respondent had not recorded a lien. So, Respondent pressed on. As he testified, he asked for and received a lien, and then recorded it in the Springfield land records. Again, Wife knew none of this and did not consent to Respondent's use of the information relating to her representation.

Respondent persisted to the end. With the closing but hours away, Respondent sent a final email to Attorney Polidor in which he made his position clear: if Former Client did not satisfy the bill or agree to have funds escrowed, the closing would not take place. Rather, Respondent would consider Former Client unable to convey marketable title and would pursue a breach of contract action against Former Client. Again, Wife did not consent or authorize Respondent's conduct. Rather, Respondent unilaterally chose to use his representation of Wife to his own benefit.

Respondent's unauthorized use of Wife's information disadvantaged Wife. For one, Respondent caused Former Client to consider whether to walk away from the transaction, a

transaction that Respondent knew Wife wanted to happen. Similarly, Respondent's use of Wife's information to pursue his own benefit disadvantaged her by causing unnecessary worry, stress, anxiety, and concern. In sum, Respondent prioritized his own interests over Wife's and, in the process, risked the very transaction Wife had paid him to effectuate.

Lawyers are not entitled to leverage a client's matter for personal gain. Stated differently, nothing associated with Respondent's mission to collect from Former Client "advantaged" Wife.

Indeed, as Disciplinary Counsel points out, Respondent's self-serving conduct is the very conduct that Rule 1.8(b) endeavors to deter. Comment [5] states the using "information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. It goes on to state that the rule "applies when the information is used to **benefit either the lawyer** or a third person . . ." (emphasis added). That is exactly what happened here. Without his client's consent, Respondent used information relating to his representation of Wife to attempt to benefit himself to the disadvantage of his client. Nothing in the rules permitted Respondent to do so.[4]

For these reasons, the panel concludes that the evidence clearly and convincingly establishes that Respondent violated Rule 1.8(b).

B. V.R.Pr.C. 1.9(c)(2)

Rule 1.9(c)(2) states that a "lawyer who has formerly represented a client in a matter . . . shall not thereafter reveal information relating to the representation except as these rules would permit or require with respect to a client."

[4] Disciplinary Counsel's brief focuses on an argument that Respondent suggested during the hearing: that Rule 1.8(i) authorizes a lawyer to "acquire a lien authorized by law to secure the lawyer's fee or expenses." On its face, the argument is specious. Nothing in Rule 1.8(i) authorizes a lawyer to acquire a lien against one client and then use it to another client's disadvantage.

Disciplinary Counsel alleges that Respondent violated the rule by revealing information relating to the representation of Former Client in the post-judgment divorce proceedings to Husband, Wife, and Attorney Polidor. Respondent does not dispute that he revealed information relating to his representation of Former Client to Husband, Wife, and Attorney Polidor. Rather, he argues that the information was "public record."

For the reasons stated below, the panel concludes that the Respondent violated Rule 1.9(c)(2) by revealing information relating to the representation of Former Client in a manner that was not permitted or required by the Rules of Professional Conduct.

1. <u>A lawyer's duty of confidentiality.</u>

The Rules of Professional Conduct recognize and prescribe the scope of a lawyer's duty of confidentiality in various contexts. The analysis begins with Rule 1.6.

Rule 1.6(a) prohibits a lawyer from revealing "information relating to the representation of a client unless the client gives informed consent, the disclosure of which is impliedly authorized in order to carry out the representation, or the disclosure is required by paragraph (b) or permitted by paragraph (c)." The Comments to Rule 1.6 explain the underpinnings and scope of the Rule. For example, "[a] fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. This contributes to the trust that is the hallmark of the client-lawyer relationship." V.R.Pr.C., Comment [2]. Then:

> [3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and the work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is

> sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

V.R.Pr.C. 1.6, Comment [3].

Of course, Rule 1.6 rule applies to current clients. However, in stressing its application to current clients, Comment [1] makes a distinction that is critical to this case:

> [1] This rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

The Comment foreshadows the fact Rules 1.9(c)(1) and (2) impose separate and distinct duties.

Turning to Rule 1.9, the rule addresses a lawyer's duties to former clients. As does Rule 1.6 with respect to current clients, Rule 1.9(c) imposes confidentiality obligations regarding former clients:

> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

The case law and literature are replete with discussion and debate as to whether information that is "public record" is "generally known." The panel could spend pages engaged in an otherwise thoughtful and interesting debate. It will not. A plain reading of Rule 1.9(c) makes clear that the "public record" v. "generally known" debate is pertinent to paragraph

(c)(1), but not to paragraph (c)(2).

The panel's conclusion is informed first by the comment:

> Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be **used or revealed** by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from **using** generally known information about that client when later representing another client.

Id., Comment [8]. The phrase "generally known" modifies "use," but not "reveal."

Indeed, based on the presence of the "generally known" language in subsection (1) and its absence from subsection (2), commentators have opined that "the ban on revealing a former client's confidential information remains in effect even after [such] information has become public knowledge." BNA, Lawyers' Manual on Prof'l Conduct: Practice Guides, "Confidentiality, Adverse Use of Information," 55:2004.

One court has proffered the following analysis and rationale for allowing "use" when information has become generally known:

> Regarding "use," the drafters considered and weighed several factors: the existence or termination of the attorney-client relationship, the harm or lack thereof to the client/former client, and the exposure the information has previously had beyond the attorney-client relationship. The drafters notably did not provide comparable factors to define when attorneys may "reveal" confidential client information to third parties. The restrictions on an attorney's "use" of confidential client information are much less onerous than restrictions on an attorney's "revealing" to third parties of such client information. The relative leniency in the "use" rules presumably emanates from the realistic premises that, first, an attorney cannot mentally ignore what she has learned during representation of a client and, second, the private (undisclosed) use of the information is likely to cause less, if any, harm to a client or former client. * * * Where the representation [of a client] has concluded, the attorney has more leeway: he may "use" the information (but, again, not "reveal" it to others) without restriction if the use does not harm the former client. *See* TEX. R. 1.05(b)(3).

Sealed Party v. Sealed Party, 2006 WL 1207732, at *12 (S.D. Tex.).

In 2017 the A.B.A. issued a formal opinion to generate workable guidance for determining whether information is generally known:

> The "generally known" exception to the duty of former-client confidentiality is limited. It applies **(1) only to the use, and not the disclosure or revelation, of former-client information**; and (2) only if the information has become (a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client's industry, profession, or trade." (emphasis added)

ABA Formal Opinion 479 (issued 12/15/17). The opinion draws on many authorities, including advisory ethics opinion from Illinois and New York. [5] While issued to provide guidance on whether information is "generally known," the opinion reiterates that the "generally known" exception does not apply to Rule 1.9(c)(2).

In other words, with respect to Respondent's argument that the information he revealed about his prior representation of Former Client was "public record," he might bootstrap that argument to a defense to an allegation that he violated Rule 1.9(c)(1), but it is not relevant to Disciplinary Counsel's allegation that he violated Rule 1.9(c)(2). The omission of "generally known" language from subsection (c)(2) shows an intent not to allow the defense where there is disclosure to a third party.

Finally, even assuming the "generally known" defense were somehow engrafted onto subsection (c)(2) – the weight of the case law and ABA Formal Opinion 479 are compelling authority in support of the proposition that information is not generally known simply because it is public record.[6]

---

[5] The State Bar of Michigan has issued an ethics opinion that essentially follows ABA Opinion 479. *See* Mich. Ethics Op. RI-377, 2018 WL 5725274.

[6] See, e.g., Sealed Party (lawyer's press release concerning settlement of a lawsuit in which he had previously represented a client revealed confidential information in violation of Texas's analog to Model Rule 1.9(c)(2)); see also In re Anonymous, 932 N.E.2d 671, 674 (Ind. 2010) (observing that Rule 1.9(c) "contain[s] no exception allowing revelation of information relating to a representation even if a diligent researcher could unearth it through public sources"); In re Harman, 628 N.W.2d 351, 361 (Wis. 2001)

With the law in mind, it is clear that Respondent violated Rule 1.9(c)(2). Respondent revealed information relating to his prior representation of Former Client to Husband, Wife, Attorney Polidor, and the Superior Court. The revelations included that the divorce was contentious, "ugly," and that Respondent was not pleased with the outcome. The revelations included the very motivation behind Former Client's attempt to reopen the divorce: Ex-Spouse's inheritance. Finally, the revelations included Respondent's invoices that detailed work performed for Former Client and the amount of Former Client's unpaid bill. Other than Respondent's own intent to collect the bill, nothing in the Rules of Professional Conduct permitted Respondent to reveal information relating to his representation of Former Client. Therefore, the panel concludes that the evidence clearly and convincingly establishes that Respondent violated Rule 1.9(c)(2).

III. <u>Sanction</u>

Having concluded that Respondent violated Rules 1.8(b) and 1.9(c)(2), the panel will impose a sanction against Respondent's law license. *See, A.O. 9, Rule 8(A)* (misconduct shall be grounds for the imposition of a sanction). The Supreme Court has often outlined the sanction analysis.

(lawyer who transmitted former client's medical records to prosecutor used confidential information to disadvantage of the client and violated the separate prohibition on disclosure; irrelevant that records had been made public in the client's prior medical malpractice action); Lawyer Disciplinary Bd. v. McGraw, 461 S.E.2d 850, 860 (W. Va. 1995) ("[t]he ethical duty of confidentiality is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it"); People v. Isaac, 2016 WL 6124510, at *3 & n.14 (Colo. O.P.D.J.) (irrelevant whether information revealed by lawyer who posted responses on the internet to negative client reviews was already public); Turner v. Commonwealth, 726 S.E.2d 325, 333 (Va. 2012) (Lemons, J., concurring) ("While testimony in a court proceeding may become a matter of public record even in a court denominated as a 'court not of record,' and may have been within the knowledge of anyone at the preliminary hearing, it does not mean that such testimony is 'generally known.' There is a significant difference between something being a public record and it also being 'generally known.'").

Most recently, the Court reaffirmed its long-held position that it is appropriate to turn to the ABA Standards for Imposing Lawyer Sanctions for guidance. *In re Adamski* 2020 VT 7, ¶ 34, ___ Vt. ___; ___ A.3d ___; see also *In re Robinson*, 2019 VT 8, ¶ 40, ___ Vt. ___, ___ A.3d ___. The ABA Standards require consideration of "(1) the duty violated; (2) respondent's mental state; and (3) the actual or potential injury caused by [respondent's] misconduct; and (4) the presence of aggravating or mitigating factors." *Adamski,* 2020 VT 7, ¶ 34 (citing *ABA Standard § 3.0; Robinson* 2019 VT 8, § 33). More specifically, a weighing of the first three factors results in a "presumptive sanction" that "'can be tailored to the case, based on the existence of aggravating or mitigating factors.'" *Adamski,* 2020 VT 7, § 34 (quoting *In re Strouse*, 2011 VT 77, ¶ 19, 190 Vt. 170, 34 A.3d 329).

The ABA Standards are not intended to be applied inflexibly, but to "provide a theoretical framework to guide courts in imposing sanctions." *Adamski,* 2020 VT 7, ¶ 34 (quoting ABA Standards, Theoretical Framework). Thus, while helpful, the Standards do not bind this panel. *Adamski,* 2020 VT 7, § 34; see also *Robinson,* 2019 VT 8, ¶ 40. Finally, the purpose behind sanctioning misconduct 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.

Disciplinary Counsel argues that Respondent knowingly violated duties to a client and former client and caused "minimal" injury that had the potential to be more significant. Thus, citing to ABA Standards 4.22 and 4.32, Disciplinary Counsel argues that "suspension is warranted." In Vermont, a disciplinary suspension must be "for an appropriate fixed period of time not in excess of three years." *A.O. 9, Rule 8(A)(3).* Disciplinary Counsel does not argue for or recommend a "fixed period of time" but contends that a "brief period of suspension" would be

appropriate. [7] Respondent does not address the sanction issue, apparently resting on his argument that he did not violate the rules.

A. Sanction Analysis

1. Summary

The panel agrees that Standard 4.0 of the ABA Standards applies to Respondent's misconduct. It is without question that a "lawyer must. . . maintain client confidences . . . and avoid conflicts of interest." *ABA Standards, 4.0, Introduction.* Respondent did not. As such, the panel also agrees that Standard 4.2 (Failure to Preserve the Client's Confidences) and Standard 4.3 (Failure to Avoid Conflicts of Interest) apply.

The subsections in Standards 4.2 and 4.3 outline a range of potential sanctions, from admonition to disbarment. They indicate that an attorney's mental state and the nature of harm are distinguishing factors. As will be discussed below, the evidence clearly establishes that Respondent's misconduct caused injury and potential injury. Thus, Respondent's mental state becomes the critical factor.

The panel concludes that Standards 4.22 and 4.32 apply best. The former calls for suspension "when a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client." *ABA Standard 4.22.* The latter indicates that a suspension is "appropriate when a lawyer knows of a conflict of interest and does not fully disclose to the client the possible effect of that conflict, and causes injury or potential injury to the client." *ABA*

[7] By rule, suspensions can last for three years. *A.O. 9, Rule 8(A)(3).* A lawyer suspended for 6 months or longer must petition for reinstatement. *A.O. 9, Rule 22(B).* Finally, a suspension of any length requires a lawyer to comply with various other provisions set out in Rule 22. The panel construes Disciplinary Counsel's argument for a "brief suspension" as one that is less than six months. In the future, Disciplinary Counsel (and respondents) might consider more precise recommendations, especially given the collateral consequences of a license suspension.

Standard 4.32. The panel applies these Standards because the panel concludes that the evidence supports a conclusion that Respondent's mental state was one of "knowledge," not "intent" or "negligence." Again, the distinction is critical. The panel now turns to each of the individual considerations.

2. The Duties Violated.

The evidence establishes that Respondent failed to avoid a conflict of interest and failed to maintain client confidences. Respondent's violation of Rule 1.8(b) was a violation of his duty to avoid using information relating to his representation of Wife to create a conflict of interest between him and Wife. Respondent's violation of Rule 1.9(c)(2) was a violation of his duty to maintain Former Client's confidences. For these reasons, the panel concludes that Standard 4.2 (Failure to Preserve the Client's Confidences) and Standard 4.3 (Failure to Avoid Conflicts of Interest) apply.

3. Mental State.

In the context of disciplinary sanctions, assessing a respondent's mental state can be difficult. While the ABA Standards state that "the lawyer's mental state may be one of intent, knowledge, or negligence," *ABA Standards*, § 3.0, Commentary, at 27, a fine line often separates the various states of mind. *In re Fink*, 2011 VT 42, ¶ 38.

It would not be unreasonable to conclude that Respondent's mental state was one of intent. Indeed, "[a lawyer's] mental state is [one] of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result." *ABA Standards*, Theoretical Framework, at 6. Here, the evidence is clear: Respondent intended to use Wife's closing to collect an unpaid bill from Former Client. From the moment he first raised the issue with Attorney Polidor to the email he sent shortly before the closing in which he insisted that Former

Client's options were to escrow a portion of the proceeds or be in breach of the purchase and sale contract, Respondent's conscious objective and entire course of conduct was to accomplish a particular result: securing payment from Former Client. There is an argument, then, that Respondent's mental state was one of intent.

The panel declines to reach such a conclusion. It is a conclusion reserved for "the most culpable mental state." *Adamski,* 2020 VT 7, ¶ 36 (quoting ABA Standards, Theoretical Framework). While wrong to do what he did, Respondent's mental state was not the most culpable.

For instance, in *Adamski,* the respondent concealed a settlement check from her law partners in order to prevent them from placing the settlement funds in trust and asserting an interest therein. The Court found that the respondent's mental state was one of intent. *Adamski,* 2020 VT 7, ¶ 36. In so doing, the Court noted that the respondent *decided* to engage in deceitful conduct. Id., ¶ 31.

Similarly, in *Obregon*, the respondent did not file income tax returns. The Court characterized her state of mind as one of intent, citing record evidence that she knew she was legally obligated to file returns, but chose not to do so. *Obregon*, 2016 VT 32, §23. Again, conduct was deemed intentional when a respondent decided to do something that the respondent knew was wrong.

In another case, the Court applied an "intentional" standard when sanctioning an attorney who consciously chose to lie to the police during an investigation into the attorney's involvement in a motor vehicle accident. *In re Neisner,* 2010 VT 102, ¶ 16, 189 Vt. 145, 16 A.3d 587. Again, when faced with a choice, a lawyer chose misconduct.

Respondent violated the rules. Yet, his mindset was not as egregious as in the cases in which lawyers were deemed to have acted with intent. He did not intentionally choose to do wrong. Rather, Respondent expected Former Client's sale proceeds to be escrowed, with the amount owed to him to be resolved later by the Superior Court. While mistaken as to the control he exercised over the situation, Respondent never intended to derail the closing. He believed that, in the end, he would "waive" the lien, thus allowing the closing to proceed.

This is important. In *Fink*, when assessing the attorney's mental state, the Court said:

> "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. See In re PRB Docket No. 2007-046, 2009 VT 115, ¶ 23, 187 Vt. 35, 989 A.2d 523 (considering that lawyers acted in good faith in arriving at appropriate discipline); see also La. State Bar Ass'n v. Marinello, 523 So. 2d 838, 842-43 (La. 1988) (noting that ignorance of disciplinary rules is no excuse, but lack of intent to commit wrongdoing was mitigating factor); N. Moore, Mens Rea Standards in Lawyer Disciplinary Codes, 23 Geo. J. Legal Ethics 1, 52 (2010) (explaining that lawyer's mistake of law is not an excuse to disciplinary violation, but courts consider whether lawyer acted in good faith in fashioning sanction)."

Fink, 2011 VT 42, ¶ 41. The panel is not excusing Respondent's conduct or necessarily concluding that he acted in "good faith." However, Respondent's unreasonable belief that his conduct did not violate the rules or have the potential for harm evinces a lack of intent to commit wrongdoing.

Similarly, Respondent did not act with the most culpable mental state when he revealed details of Former Client's divorce to Husband, Wife, and Attorney Polidor. Instead, he mistakenly believed that the publicly available court records stripped the information of the confidentiality it was due.

In short, simply because Respondent meant to do what he did, the panel cannot conclude that Respondent acted with "the most culpable intent," especially when compared to cases in which "the most culpable intent" has been reserved for lawyers who, when forced to choose between right and wrong, intentionally chose wrong.

On the other hand, nothing associated with Respondent's conduct can be reasonably characterized as "negligent." This was not a mere "deviation of the standard of care that a reasonable lawyer would exercise in the situation." *ABA Standards, Theoretical Framework*, at 6 (definition of "negligence").

Misconduct is knowing "when the lawyer acts with conscious awareness of the nature or attendant circumstances of [the lawyer's] conduct but without the conscious objective or purpose to accomplish a particular result." That is what happened. Respondent knowingly turned the days leading to the closing into a high-stakes game intended to cause Former Client to blink. Respondent knew what he was doing when he (1) repeatedly asked to have the sale proceeds escrowed, (2) requested, secured and filed a lien; (3) threatened to deem Former Client in breach if funds were not escrowed; and (4) put the closing at risk of happening. In sum, the evidence clearly establishes that Respondent was fully aware of what he was doing but startingly oblivious as to the effect and results of his actions. Therefore, the panel concludes that Respondent's mental state was "knowing."

4. Injury

Respondent caused actual and potential injury to Wife.

Wife experienced actual injury in the way of the stress and anxiety that resulted from Respondent's decision to let his personal interests jeopardize Wife's purchase. An otherwise routine transaction became anything but for Husband and Wife, with the resulting uncertainty attributable to nothing but Respondent's divided loyalty.

In addition, Respondent's actions had the potential to cause much more significant injury. Had Former Client walked away from the transaction, Wife and Husband would have been left without the ability to purchase property in which they were keenly interested. Owning it, and

leaving it undeveloped, bode well for them. Running the risk of having Former Client decide to keep it or put it back on the open market did not.

On this point, Respondent contends that he never would have let the closing fall through. That is, worst case, he would have "waived" the lien and then asked the Superior Court to resolve his dispute with Former Client. Respondent misses the point.

First, the Supreme Court and the ABA Standards clearly contemplate "potential injury" as a factor in the sanction analysis. *ABA Standards, 3.0* (sanction analysis includes "actual or potential injury caused by the lawyer's misconduct"); *Adamski,* 2020 VT 7, § 34 (sanction decision includes weighing the "actual or potential injury caused by [the] misconduct"); *Neisner*, 2010 VT 102, ¶ 15 (sanction consideration includes "actual or potential injury caused by the misconduct").

Further, Former Client had no reason to believe that Respondent might be bluffing. Former Client could have walked away at any moment. In fact, Former Client and Respondent went to the wire before negotiating a resolution of Respondent's outstanding bill. Respondent's contention that he alone had the power to ensure that the transaction would close is not accurate.

Finally, Respondent seems to suggest that even if the transaction had fallen through, Wife would have had a breach of contract claim against Former Client. Perhaps, but, a remedy does not exist without harm. While the legal remedy might have been against Former Client, the harm would have resulted from Respondent's misconduct.

The evidence establishes only one reason that Wife's purchase had the potential not to close: Respondent's insistence on leveraging the closing to collect a fee.

In addition, Respondent caused actual injury to Former Client. Respondent's improper disclosures revealed to Husband and Wife confidential information relating to Respondent's

divorce. In and of itself, that is an injury. The fact that the disclosure included detailed characterizations of the divorce and Respondent's billing records clearly establishes additional injury. And, as Disciplinary Counsel argues, the evidence establishes that Respondent's misconduct caused Former Client to incur legal fees to Attorney Polidor over and above what he would have incurred in a transaction free of the misconduct.

Finally, perhaps the most significant injury to Former Client was not addressed by Disciplinary Counsel or Respondent. Respondent's misconduct forced Former Client to choose between (1) paying a bill that he did not believe was owed; or (2) exposing himself to a breach of contract claim in an entirely unrelated matter. Such an involuntary method of resolving a fee dispute smacks of coercion and constitutes actual injury to Former Client.

5. Presumptive Sanction

The flexible guidance provided by the ABA Standards indicates the presumptive sanction is suspension.

Respondent knowingly revealed information relating to the representation of Former Client that was not authorized to be revealed and caused injury to Former Client. Thus, suspension is the presumptive sanction under *ABA Standard 4.22.*

In addition, Respondent knew his actions in securing an interest in the proceeds of the sale conflicted with Wife's interest in a seamless closing. He did not fully disclose the possible effect of that conflict and caused actual and potential injury to Wife. Therefore, suspension is the presumptive response under *ABA Standard 4.32.*[8]

[8] The panel is keenly aware that the presumptive standard would have been disbarment had it concluded that Respondent intentionally acted to benefit himself. *See ABA Standards 4.21 and 4.31.* The evidence might reasonably have led to such a conclusion. Yet, exercising the flexibility that the Supreme Court has observed is built into the ABA Standards, the panel concludes that disbarment is not the appropriate presumptive response to misconduct that is not the most culpable or egregious.

6. Aggravating and Mitigating Factors

Sections 9.2 and 9.3 of the ABA Standards set out the factors to be considered after determining a presumptive sanction.

Disciplinary Counsel argues that "[i]t appears aggravating and mitigating factors . . . generally balance each other out." In aggravation, Disciplinary Counsel cites to Respondent's selfish motive, *ABA Standard 9.22(b),* and substantial experience in the practice of law, *ABA Standard 9.22(i)*. Also, Disciplinary Counsel suggests that Respondent may not have acknowledged the wrongful nature of his misconduct. *ABA Standard 9.22(g).* In mitigation, Disciplinary Counsel cites to Respondent's lack of a disciplinary record, *ABA Standard 9.32(a)* and cooperation with the disciplinary process, *ABA Standard 9.32(e)*. Referring to Standard 9.32(l), "remorse," Disciplinary Counsel states without elaboration that "[t]his factor may apply considering respondent apologized to the client." Again, Respondent makes no argument with respect to any aspect of the sanction analysis.

The panel concludes that the aggravating factors outweigh the mitigating. The Respondent's unblemished disciplinary history is offset by the fact that he has practiced long enough to know better. Further, the panel does not assign significant weight to the fact that Respondent participated in the disciplinary process. However, Respondent's selfish motive and failure to understand the wrongful nature of his conduct clearly and convincingly establish that the aggravating factors predominate.

ABA Standard 9.22(b) states that a lawyer's "dishonest or selfish motive" is an aggravating factor. It is the factor that weighs most heavily here. As Disciplinary Counsel argues, the evidence clearly and convincingly establishes that Respondent put himself first at the

expense of the duties he owed to Former Client and Wife. The entire course of his misconduct was aimed at ensuring that he collected a fee from Former Client.

Disciplinary Counsel's argument focuses on Respondent's selfish motivation "in collecting a past debt." The panel agrees but is struck by the Respondent's associated dishonesty. The evidence clearly and convincingly establishes that after being instructed to do so by Respondent's employee, Husband contacted Respondent. The evidence further establishes that Respondent told Husband that "someone" had filed a lien against the proceeds of the sale of the Springfield property. In other words, Respondent's dishonest statement is clear and convincing evidence of the extent to which selfishness motivated his conduct.

Respondent's decision to commence the action in Superior Court without informing Wife further demonstrates the extent of his selfish motive. It should have been obvious to an attorney with Respondent's years in practice that filing the lawsuit to request lien posed a substantial risk of limiting the duties he owed to Wife. Nevertheless, with his own interests in mind, Respondent put Wife's interests at risk. The panel concludes that Respondent's failure to consult with Wife prior to commencing the action in Superior Court is clear evidence of a selfish and dishonest motive that should aggravate the ultimate sanction.

In addition, ABA Standard 9.22(g) states that a lawyer's refusal to acknowledge the wrongful nature of the lawyer's conduct can be an aggravating factor. The panel finds that particularly relevant here. To be clear, the panel is not penalizing Respondent for holding Disciplinary Counsel to her proof. Rather, the panel notes that Attorney Polidor repeatedly urged Respondent to consider his actions. Attorney Polidor did so without bluster or threat. Yet, in the face of what might have served as a "wake up" call from a colleague, Respondent remained undeterred. He insisted on linking the closing on to the Springfield property to Former Client's

unpaid bill. That his position at the disciplinary hearing remained unchanged only magnifies the extent to which Respondent fails to appreciate how wrong it was to put his own interests ahead of Wife's.

Given such clear and convincing evidence of both a selfish motive and a failure to acknowledge the wrongful nature of the conduct at issue, the aggravating factors predominate. They do not, however, warrant disbarring Respondent instead of suspending his law license. Rather, the aggravating factors call for a longer suspension than might have been imposed if they were not present.

7. Sanction.

The presumptive sanction is suspension. The aggravating factors outweigh the mitigating factors. Therefore, the panel suspends the Respondent's license to practice law for 3 months.

8. Proportionality Analysis

The Supreme Court consistently looks beyond the ABA Standards to prior opinions when imposing disciplinary sanctions. *See Robinson,* 2019 VT 8, ¶ 74 ("we have looked to sanctions imposed in other cases to aid us in measuring out a sanction."). The panel notes that doing so promotes consistency and fairness. Of course, the panel also recognizes that, "[i]n general, meaningful comparisons of attorney sanction cases are difficult as the behavior that leads to sanction varies so widely between cases." *Strouse*, 2011 VT 77, ¶ 42 (Dooley, J., dissenting).

The panel is not aware of the Court having to address conduct like the Respondent's. This does not mean that the body of law is devoid of guidance.

Disciplinary Counsel contends that suspension is appropriate in cases where a respondent's conduct is knowing or intentional. In support, Disciplinary Counsel cites to *In Re Andres,* 2004 VT 71, 177 Vt. 511, 857 A.2d 802. The panel agrees that the case resulted in a

two-month suspension. However, unlike here, it involved a respondent with a prior disciplinary history who engaged in conduct that a hearing panel concluded was intentional: a conclusion that the respondent did not challenge, and the Court did not disturb on appeal. *Andres 2004 VT 71, ¶ 15.* Further, conduct that is knowing or intentional does not always result in suspension. *See, Obregon,* 2016 VT 32 (respondent reprimanded after stipulating to "intentionally and/or knowingly" failing to file income tax returns); *Strouse*, 2011 VT 77 (lawyer reprimanded for misconduct that was knowing and intentional). Still, the panel concludes that a short suspension is appropriate, consistent with both the ABA Standards and other decisions not cited by the parties.

Respondent's misconduct falls somewhere along the continuum of misconduct that has most recently resulted in disciplinary suspensions. For instance, in *Adamski*, the Court suspended a lawyer for 15 days after concluding that, while representing her spouse, the lawyer intentionally attempted to conceal a settlement from her law firm. *Adamski,* 2020 VT 7. Imposing the sanction, the Court noted the respondent violated "her fundamental obligations to be forthright, loyal, and honest with her colleagues." Id., ¶ 58. This case is different. Unlike Attorney Adamski, Respondent violated a lawyer's two most fundamental duties to *clients*. Again, the goal of discipline is to protect the public (clients) and maintain confidence in the profession's unique privilege to self-regulate. *See, Obregon,* 2016 VT 32, ¶ 19. There might be no surer or swifter path to put the public at risk and risk losing its confidence in the profession than to treat knowing breaches of the duties of loyalty and confidentiality that result in actual harm to clients and former clients less seriously than misconduct that caused potential financial harm to a law firm and that never put a client at risk. Thus, Respondent's misconduct merits more than a 15-day suspension.

Respondent's misconduct, however, does not warrant a suspension of 6 months or longer. Requiring Respondent to petition for reinstatement following a period of suspension would only serve to punish Respondent. *See Obregon,* 20016 VT 32, ¶ 19 (purpose of disciplinary sanctions is not to punish); *A.O. 9, Rule 22(B)* (lawyer suspended for 6-months or longer must petition for reinstatement before resuming practice). In addition, Respondent's misconduct is not as egregious as the misconduct that has resulted in suspensions longer than 6 months.

For instance, two years ago, the Court adopted as its own a decision in which a hearing panel had suspended a lawyer for 9 months. *In re McCoy Jacien,* 2018 VT 35, 207 Vt. 624, 186 A.3d 626 (mem). The suspension followed a lawyer's failure to comply with the terms of a disciplinary probation previously imposed as a result of the lawyer's failure to file income tax returns. The panel noted both that the original misconduct was a crime and that the Respondent had "repeatedly disregarded Disciplinary Counsel's requests" for proof of compliance with probation order. Id., PRB Decision No. 212, at 17. In a similar case, a hearing panel suspended a lawyer for 6 months after concluding that the lawyer violated the terms of a disciplinary probation. *In re Adams,* PRB Decision No. 225-A (Dec. 31, 2019). The Respondent had a prior disciplinary history and failed to cooperate with Disciplinary Counsel's investigation of the probation violation. Id. In an Entry Order dated February 4, 2020, the Court adopted the hearing panel's decision as its own. Many years earlier, the Court imposed a 2-year suspension in response to a lawyer's criminal convictions for offenses that included "giving false information to a law enforcement authority and impeding a public officer" after "leaving the scene of a car accident and then falsely reporting that his wife had caused the accident." *Neisner*, 2010 VT 102, ¶ 1.

Here, Respondent did not commit a crime, did not ignore Disciplinary Counsel, and, lacking a disciplinary history, did not violate the terms of a prior disciplinary order. Thus, Respondent's misconduct does not warrant as significant a sanction as was imposed in *Adamski, Adams, and Neisner.*

Finally, the panel is guided by the Court's reasoning in *In re McCarty,* 2013 VT 47, 194 Vt. 109, 75 A.3d 589. Representing a landlord, the respondent concocted a scheme to circumvent the normal eviction process. More specifically, the respondent purposefully drafted an eviction notice that was designed to appear as if it was a court document that required a tenant to vacate the landlord's property immediately, even though "by law and agreement" with the landlord, the tenant did not have to leave until later in the month. *McCarty*, 2013 VT 47, ¶ 29. The Court described the conduct as "manipulation of the legal system [that] created dire consequences" and that evinced a disregard for his professional obligations. Id.

For reasons that are not clear, McCarty's misconduct was not brought before a hearing panel until 11 years after it happened. The Court afforded great weight to the lengthy passage of time and the fact that the respondent had not had any disciplinary charges brought against him in the interim. Id., ¶ 34. Considered in conjunction with the principle that sanctions are not intended to punish, the Court concluded that the mitigating factors warranted reducing to 3 months the 6-month suspension that the panel had recommended. Id. In other words, but for the fact that the disciplinary hearing took place more than a decade after the misconduct, the panel's sanction would not have been reduced.

That is critical here. Respondent's misconduct is not as egregious as Attorney McCarty's. Still, like McCarty, Respondent's misconduct involved manipulation of the legal process and an utter disregard for his professional duties. *McCarty,* 2013 VT 47, ¶ 34. Thus,

suspension is appropriate. Moreover, Respondent's misconduct is not nearly as remote in time as McCarty's. Therefore, Respondent merits no such reduction in sanction as resulted from the 11-year delay in McCarty.

In sum, Respondent's misconduct is more serious than was at issue in *Adamski*, not as egregious as the conduct at issue in *Adams, McCoy Jacien, or Neisner*, and similar to misconduct that resulted in a 3-month suspension in a case that involved mitigating factors of substantially greater weight than here. On balance, and consistent with the ABA Standards, a 3-month suspension is an appropriate response to Respondent's misconduct.

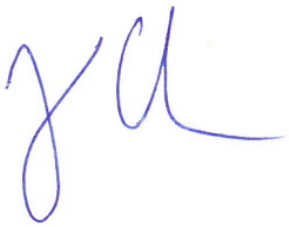
IV. Order

1. Respondent violated Rules 1.8(b) and 1.9(c)(2) of the Vermont Rules of Professional Conduct.

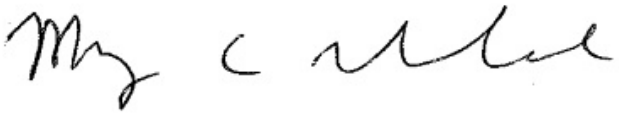
2. Respondent's license to practice in the State of Vermont is suspended for three (3) months.

Dated May 7, 2020.

Hearing Pane 10.



Jonathan Cohen, Esq., Chair



Mary Welford, Esq.

Kelley Legacy