

**STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM**

In Re Anonymous Attorney

PRB Decision No. 252

PROCEDURAL HISTORY

This disciplinary matter comes before Hearing Panel No. 8, Jennifer McDonald, Esq., Jonathan T. Rose, Esq., and Patrick Burke. These proceedings were initiated by a Petition of Misconduct filed by Disciplinary Counsel on June 15, 2022.

After the petition was filed, Disciplinary Counsel and Respondent submitted a proposed stipulation of facts along with jointly proposed conclusions of law. Respondent has knowingly and voluntarily agreed to waive his right to a hearing and has stipulated to the facts and violations contained herein.

The Panel hereby accepts the proposed stipulation of facts and concludes that further evidence is unnecessary.

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

FINDINGS OF FACT

1. Respondent is an attorney licensed to practice in the State of Vermont. He was admitted to the Vermont Bar in 2000.
2. This disciplinary matter arises from Respondent's representation of the defendant in a divorce proceeding in Vermont.
3. Respondent's primary defense on behalf of his client, the defendant in the divorce proceeding, was that Vermont courts did not have jurisdiction to handle the divorce and division

of property. Specifically, Respondent argued that Indian Courts retained exclusive jurisdiction over the marriage because husband and wife were married under Indian law - the Parsi Marriage and Divorce Act, 1936.¹

4. Respondent filed his first motion to dismiss for lack of jurisdiction on September 13, 2017. That motion was denied on March 22, 2018.

5. On April 20, 2018 – 29 days later – Respondent filed a Notice of Appeal with the Vermont Supreme Court appealing the denial of the motion to dismiss.

6. This appeal was made on an interlocutory basis because the denial of the motion to dismiss was not a final order.

7. The notice was submitted to the wrong court because leave to file for interlocutory appeal is filed in the first instance in superior court. V.R.A.P. 5. The notice was also untimely because it was filed outside the 14-day appeal window set forth in V.R.A.P. 5.

8. The Supreme Court denied the motion to appeal on May 4, 2018.

9. On May 7, 2018—three days later— Respondent filed a motion with the Superior Court titled “Motion for Permission to Appeal, Alternative Motion for Reconsideration, and Motion for Permission to Leave with the Minor Children.”

10. The pleading was two pages long. The discussion regarding the untimeliness of the request to appeal was as follows:

[Husband’s] counsel, thinking the Decision entered on May 22, 2018 was final, inadvertently failed to first file a Motion

¹ Husband and wife were both Parsis, an ethnoreligious group in India that descend from Persian immigrants. The two were married in India under the Parsi Marriage and Divorce Act, 1936 (the “Act”). It was husband’s contention that the Act governed their marriage and divorce. As such, husband filed for divorce from wife in India in 2017, while represented by separate Indian counsel. Likewise, wife was represented by separate, Indian counsel, in the India divorce proceeding.

for Permission to Appeal interlocutorily [sic], pursuant to V.R.A.P. 5(b)(1), within 14 days after entry of the Order with this honorable Court, resulting in the dismissal by the Vermont Supreme Court of [husband's] appeal

The pleading did not cite any case law or include any legal argument for why the missed deadline should be waived.

11. The pleading did not discuss the standard that must be met in a motion for permission to bring an interlocutory appeal set forth in Vermont Rule of Appellate Procedure 5(b) or include legal argument of the same.

12. Despite being stylized as a motion to reconsider in part, Respondent did not set forth the legal standard for reconsideration or otherwise make any legal argument that the standard was met.

13. Respondent referenced in his brief an order that had been issued by an Indian Court after the Superior Court's decision denying his motion to dismiss, holding that the Indian court had exclusive jurisdiction over the divorce. However, Respondent did not explain how that Indian decision was legally relevant to the question of jurisdiction in Vermont or articulate why the Superior Court should reconsider its prior decision in light of the Indian order.

14. On June 13, 2018, the Superior Court denied the motion as untimely, noting the "timely filing of an appeal is jurisdictional," and adding that "the issue subject to appeal has recently been considered by the Supreme Court under very similar circumstances."

15. On June 23, 2020, the plaintiff filed a motion requesting sole authority to sell the marital home.

16. Respondent filed an opposition to that motion on July 6, 2020. In that opposition, he asserted that defendant wished to retain the marital home and requested that the Court deny the

motion and order that defendant deposit the reasonable appraised value of the property in escrow, pending a final property division hearing.

17. On July 15, 2020, the Court granted the plaintiff's motion, noting that the "real estate taxes on the property are delinquent and there is no money remaining in the two bank accounts in the United States." The Entry Order gave the plaintiff sole authority to sell the marital home.

18. On July 28, 2020, Respondent filed a "Request to Reconsider the Court's 7/15/20 Entry Order and Motion to Appoint an Attorney for the Children."

19. The motion was two pages. It largely re-stated the factual assertions set forth in the defendant's opposition to the plaintiff's original motion.

20. The motion requested that the Court reconsider its decision granting the plaintiff the right to sell the marital home.

21. The brief cited no case law and contained no legal argument. The motion did not discuss the legal standard for reconsideration. It did not cite any rule, statute, or case law supporting the request for reconsideration.

22. The motion stated that the children had expressed an interest in retaining the marital home. The brief did not explain why this fact justified appointing an attorney for the children. The request to appoint an attorney for the children was a single sentence in the section entitled "Prayers for Relief" and was not supported by legal argument or with reference to any standard for appointment.

23. On September 2, 2020, the Court denied Respondent's motion for reconsideration.

24. On May 6, 2021, the defendant filed a motion to "clarify" the Court's July 15, 2020, entry order that granted her the right to sell the marital home. The motion was filed in response

to a request from an attorney for a prospective purchaser of the marital home, seeking a more particular order. Specifically, the request sought to modify the entry order to give the defendant “the effect of a Power of Attorney to sign all documents necessary for the sale on behalf of the Defendant.”

25. On May 11, 2021, in response to that motion, Respondent filed a “Motion in Opposition to [the plaintiff’s] Motion to Modify Entry Order (to Allow [the plaintiff] to Have a POA to Sell the Marital Residence).”

26. The “motion in opposition” was two pages. The motion restated some of the facts set forth in the defendant’s motion to reconsider filed in July 2020, but apprised the Court of new facts, including the parties’ efforts to sell the home, the defendant’s efforts to purchase the home from the plaintiff, and the plaintiff’s election to enter into a purchase and sale agreement for less than the amount the defendant previously offered for the home.

27. The motion again requested that the Court reconsider and reverse its prior decision authorizing the plaintiff’s sale of the marital home.

28. The motion included no legal citations or argument. The brief did not contain any argument or explanation why the few new facts set forth in brief justified reversal of the Court’s prior order.

29. The motion did not specifically address the plaintiff’s request for power of attorney.

30. Respondent again sought the appointment of an attorney for the children who could advocate on their behalf and pursue their desire to retain the marital home. Respondent did not include any argument regarding why this fact justified appointing an attorney for the children under the relevant standard.

31. The plaintiff opposed this “motion in opposition” on May 12, 2021.

32. The Court denied the motion to appoint an attorney for the children on May 13, 2021, noting that “[t]his issue has been addressed by the court previously and no new reason has been advanced sufficient for the court to reconsider the question of testimony from the children.” The Court issued a revised Entry Order regarding the marital home on May 18, 2021, giving the plaintiff power of attorney to execute the necessary closing documents.

CONCLUSIONS OF LAW

A. Violation Of Vermont Rule of Professional Conduct 1.1

Rule 1.1 of the Vermont Rules of Professional Conduct requires a lawyer to “provide competent representation to a client” which requires “the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”

As explained *supra*, ¶¶ 5-14, Respondent filed a Notice of Appeal after the Superior Court denied his motion to dismiss. However, the denial of the motion to dismiss was an interlocutory order and, therefore, Respondent should not have filed a Notice of Appeal. As explained clearly in the Vermont Rules of Appellate Procedure, interlocutory appeals are not permitted unless a motion has been made first to the Superior Court, within 14 days of the ruling. Respondent failed to provide competent representation when he filed a Notice of Appeal in the Vermont Supreme Court regarding an interlocutory order because that Notice was both untimely and directed to the wrong court. Assuming he was unaware of the rule that only final orders are appealable to the Supreme Court (and that a denial of a motion to dismiss is not a final order), Respondent was incompetent for failing to conduct legal research necessary to uncover and understand that rule.

B. Violation Of Vermont Rule of Professional Conduct 3.1

Rule 3.1 of the Vermont Rules of Professional Conduct provides “[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”

As set forth *infra* ¶¶ 5-14, Respondent also filed a motion for permission to appeal or for reconsideration without articulating the legal standard for seeking reconsideration or providing any argument for why that legal standard was met. As explained above, Respondent first filed a Notice of Appeal regarding the denial of his motion to dismiss. When that appeal was dismissed for being procedurally improper, Respondent filed a motion for permission to appeal or for reconsideration. That motion, however, was filed many weeks after the 14-day deadline under V.R.A.P. 5 had passed. In his brief, Respondent acknowledged that he missed the deadline and advised the Court of his misunderstanding, but he provided no good faith argument for the Court to waive the missed deadline. The brief also did not include any legal analysis of the interlocutory appeal rule or cite the standard.

The brief also did not include any legal argument for why reconsideration was appropriate. Accordingly, Respondent violated Rule 3.1 because he filed a motion that did not make a good faith legal argument for the relief sought.

Lastly, as set forth *supra*, ¶¶ 15-32, Respondent filed multiple motions regarding the sale of the marital home that had no good faith basis in law. After the Court entered an order giving the plaintiff sole authority to sell the home, Respondent filed two more motions requesting that the Court reverse its prior order and that the Court appoint an attorney for the children. These motions—each of which were less than two pages long—were not supported by legal argument.

The factual allegations were largely copies of his first motion and, to the extent new facts were offered, the briefs did not explain why those new facts should counsel the Court to reconsider its prior decision. Therefore, the filings constituted violations of Rule 3.1.

SANCTIONS DETERMINATION

When sanctioning attorney misconduct, the Supreme Court has “adopted the ABA Standards for Imposing Lawyer Discipline” which require the Board 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; *see also* ABA Standard 3.0.

“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.

A. Duty Violated

The parties stipulate, and the Panel finds that a **private admonition** may be imposed with respect to:

- The violation of Rule 1.1 for filing a Notice of Appeal in the Vermont Supreme Court that was both untimely and failed to follow the procedural rules regarding interlocutory appeals.
- The violation of Rule 3.1 for filing an untimely and procedurally improper Notice of Appeal, and a subsequent untimely motion for permission to appeal, without any good faith argument for the Court to waive the missed deadline and without any legal analysis of the interlocutory appeal rule.
- The violation of Rule 3.1 for filing two motions regarding the sale of the marital home and requesting that the Court appoint an attorney for the children, including motions requesting that the Court reverse its prior decision without discussing any good faith argument for reversal.

A private admonition is appropriate because these violations were committed negligently, and they caused either no or minimal harm to Respondent's client and the other party.

B. Mental State

"The lawyer's mental state may be one of intent, knowledge, or negligence." ABA Standards, § 3.0, Commentary, at 27. 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.* Respondent was negligent in making each of these violations.

With respect to the Rule 1.1 violation for failing to comply with the Rules of Appellate Procedure, Respondent's answer to the Petition of Misconduct indicates that he believed the Court's denial of the defendant's "Motion to Dismiss was a final judgment from which he could appeal pursuant to V.R.A.P 4(a)(1)." This is not a sufficient excuse for failing to follow the rules of appellate procedure and missing a deadline to file an appeal on behalf of his client. In fact, it demonstrates Respondent's negligence in failing to educate himself on basic rules of civil procedure. *See In re Gregory Vigue*, PRB File No. 2018-034 (holding that Rule 1.1 was violated where "respondent's understanding was clearly deficient with respect to the procedural requirements for a motion to change venue that were set forth in the immigration court's practice manual").

After the Notice of Appeal was dismissed by the Supreme Court, Respondent then filed an untimely motion for permission to appeal and motion for reconsideration. These papers included no legal citation and no argument as to why the Court should waive the missed deadline or reconsider its prior decision. The standard for interlocutory appeal and reconsideration was

not stated or discussed. Respondent was negligent in failing to understand that this motion had no good faith basis in law or fact.

The motions regarding the marital home and the appointment of an attorney for the children were also filed without citation to any case law or legal argument and, with respect to the attorney for the children, without any factual argument. Having lost the motion regarding the sale of the marital home the first time, Respondent filed a similar pleading requesting the same relief he was denied the first time. While those motions may have referenced some allegedly “new” facts, the briefs did not explain why those new facts should counsel the Court to reconsider its prior decision. Respondent was negligent in filing the motions because the filings did not offer any legal or factual basis for the Court to reconsider its decision.

C. Injury

With respect to the Rule 1.1 violation for filing an improper Notice of Appeal, there was arguably no harm. Respondent’s client did not lose his right to appeal the decision denying his motion to dismiss; the defendant could have chosen to appeal the decision when the Court issued a final order.

With respect to the Rule 3.1 violation for filing motions regarding the marital home and seeking appointment of an attorney for the children, there was potential injury to the plaintiff because she likely incurred legal fees to respond to these motions. Plaintiff noted in her complaint that she was exhausted financially and emotionally from having to respond to duplicate frivolous filings.

D. Presumptive Sanction under the ABA Standards

Section 4.5 of the ABA Standards describes the sanctions that apply for a violation of Rule 1.1 of the Vermont Rules of Professional Conduct because it implicates the lawyer’s lack of

competence. When the lawyer's mental state is negligence, the ABA Standards indicate the presumptive sanctions are reprimand or admonition:

§ 4.53 Reprimand is generally appropriate when a lawyer:

- (a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or
- (b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client.

§ 4.54 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether he or she is competent to handle a legal matter, and causes little or no actual or potential injury to a client.

Here, the presumptive sanction for violation of Rule 1.1 of the Vermont Rules of Professional Conduct is admonition. Respondent's actions demonstrated a lack of understanding of the rules of appellate procedure, involved a single appeal, and caused no actual or potential injury to the client.

The violation of Rule 3.1 of the Vermont Rules of Professional Conduct falls within ABA Standard 6.2 for Abuse of the Legal Process. When the lawyer's mental state is negligence, the presumptive sanction under the ABA Standards is either reprimand or admonition:

§ 6.23 Reprimand is generally appropriate when a lawyer: negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

6.24 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in complying with a court order or rule, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with a legal proceeding.

The presumptive sanction for violation of Rule 3.1 of the Vermont Rules of Professional Conduct is a reprimand. Respondent's actions demonstrated a lack of understanding of the rules

of procedure. However, there was no injury to the client and little or no actual or potential injury to the other party.

E. Aggravating and Mitigating Factors

Next, the Panel considers any aggravating and mitigating factors and whether they call for increasing or reducing the presumptive sanction of a public reprimand.

The Panel is also required to assess all mitigating factors. The Panel concludes that the following mitigating factors under ABA Standards are present:

§ 9.32(a): absence of a prior disciplinary records. Respondent has no prior disciplinary record.

§ 9.32(e): cooperative attitude toward proceedings. Respondent has been cooperative throughout the disciplinary proceedings.

The Panel concludes that the following aggravating factors under the ABA Standards are present:

§ 9.22(c): a pattern of misconduct.

§ 9.22(i): substantial experience in the practice of law.

Accordingly, the mitigating factors and aggravating factors do not weigh in either direction.

Taking into account the mental state, injury, and aggravating/mitigating factors, and the fact that the parties have worked cooperatively and have stipulated to the findings above, the Panel concludes that the appropriate discipline for these violations under ABA Standards 4.5 and 6.2 is a private admonition.

Accordingly, and based on the foregoing findings and conclusions of law, Respondent is admonished for violating the Vermont Rules of Professional Conduct.

Hearing Panel No. 8

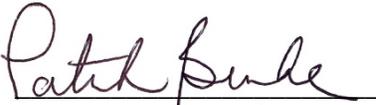
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