STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

IN RE: WILLIAM W. COBB
PRB FILE NO.: 2020-099, and 2020-103

Respondent's Proposed Findings of Fact and Conclusions of Law

NOW COMES THE RESPONDENT, William W. Cobb, Esq., by and through counsel, Brice C. Simon, Esq. of Breton & Simon, PLC, and hereby submits the following proposed findings of fact and conclusions of law and sanctions analysis:

Introduction

This matter arises out of Respondent's filings in a civil action, which referenced information derived from juvenile court records; the fact respondent did not view a video available through discovery in a criminal matter; the fact respondent did not file a particular motion to amend conditions of release in a criminal matter; a disclosure to co-counsel in a criminal matter of client information from another case; and respondent's reconstruction of his time devoted to a criminal matter at the request of disciplinary counsel. There is no allegation in this case that any member of the public actually learned of any of the information disclosed by the respondent. Respondent did not receive the subject juvenile records from the Court, or with any notation prohibiting disclosure, and any violation was due to negligence not rising to the level of criminal conduct. There is no allegation that the respondent's decision not to review a video had any impact whatsoever on the subject case. There is insufficient evidence to conclude that Respondent's decision not to file a second motion to amend conditions of release was due to a lack of diligence. Respondent's provision to disciplinary counsel of admittedly after-the-fact estimates as to his time devoted to a matter does not prove intentional dishonesty. Respondent

submits that the testimony and exhibits adduced at hearing do not establish violations of the applicable Rules by clear and convincing evidence. To the extent violations have been proven, the lack of actual harm, respondent's negligent rather than intentional mental states, and the absence of a selfish or improper motive warrant admonition or reprimand rather than suspension.

Proposed Findings of Fact

1. Respondent is an attorney licensed to practice in the state of Vermont, New York, and Connecticut who maintains a solo practice in St. Johnsbury and sits part time as a Probate Judge in Caledonia County (Transcript, Page 12, Line 11 - Page 13, Line 14).
2. Respondent has practiced law since 2000 and focuses his private practice on criminal defense cases, family law, and civil litigation (Id.).
3. In one legal matter, Respondent represented KH (father) in a civil action against the mother of KH's deceased child who died at the age of 2 while in the custody of the Vermont Department for Children and Families (Transcript, Pages 17 Line 16 – 21).
4. Prior to a civil case being filed, the parties had reached a monetary settlement for the death of the parties' child. However, the parties were unable to agree upon a division of those proceeds. (Id., Page 19, Lines 21-24).
5. The parties then took different positions as to the merits of the case: Mother arguing that father had abandoned the child and should therefore receive no compensation; Father, taking the position that Mother should receive no compensation since she had neglected the child which led to the child's being placed in DCF custody. (Id., Page 19, Line 24 to Page 20, Line 15, and Respondent's Exhibit A.a).

6. With no agreement as to how to divide the proceeds, Mother filed a petition in the Washington Civil Division. Father then answered the petition. (Id., Page 20, Lines 2-10).
7. In preparation for the civil hearing, Respondent communicated with Attorney Larry Myer who had previously represented KH in his juvenile cases while KH's son was still alive and in DCF custody. (Id., Page 19, Lines 10-12).
8. Respondent requested copies of the juvenile case file from Attorney Myer. (Id., Page 19, Lines 16-19) and received copies of the juvenile file from Attorney Meyer and not from the Court. (Id., Page 19, Lines 11-12)(See Also, State's Exhibit DC-5, email between Attorney Cobb and Attorney Myer dated 5/31/19 (Id., Page 21, Lines 23-24).
9. Upon receipt, Respondent noted that the records received from Attorney Myer included hand-written notes throughout the documents. (Id., Page 29, Lines 13-17).
10. Respondent sought a clean copy of the records to use as his exhibits. (Id., Page 29, Lines 18-20).
11. In addition, Respondent was unsure if Attorney Myer's file was complete. (Id., 10/15/21 Transcript, Page 50, Lines 10-17).
12. On January 8, 2020, Respondent filed a form request for juvenile records from the Washington Family Division. (Id., Page 26, Lines 17; State's Exhibit DC-4, file stamp date January 9, 2020. (Id., Page 26, Lines 20-22).
13. Respondent had never made a similar request for juvenile records at any time either as an attorney or probate judge and there is no evidence he was aware that records not provided by the juvenile court were subject to the same restrictions as those provided by the Court with a printed admonition against disclosure. (Id., Page 29, Line 25 – Page 30, Line 9).

14. Deciding that further delay of the Civil Case was not in his client's best interest, on January 10, 2020, Respondent filed a Motion for Summary Judgment with the documents received from Attorney Myer. (Id., Page 23, Lines 5-10; Page 32, Lines 7-13; see also DC-1 and DC-2, redacted versions 1-A and 2-A, Statement of Undisputed Material Facts, Motion for Summary Judgment (Id., Page 23, Lines 11-18), and Respondent's Exhibit A.a).
15. Respondent included exhibits A-L "Under Seal" but otherwise referenced the same information from the exhibits in his motion for summary judgment and statement of undisputed facts. (Id., Page 24, Lines 20-25 to Page 25, Lines 1-3); see also DC-3, Letter to Court with Motion for Summary Judgment. (Id., Page 25, Lines 7-13).
16. At all times relevant hereto, KH, respondent's client, had first-hand knowledge of the facts that were contained in the Exhibits A-L and was able to provide independent evidence of same. (Id., Page 48, Lines 5-15).
17. Respondent believed that KH's personal knowledge of all relevant juvenile information could be set forth at a civil trial even without the juvenile records. (Id.)
18. On January 16, 2020, respondent received an entry order from Judge Schoonover of the Washington Family Division, which stated: "There's no authority stated in the request. Are there any objections? If so, please respond within fourteen days." (Id., Page 31, Lines 13-25 to Page 32, Line 1).
19. Respondent did not respond with any further submissions. (Id., Page 32, Lines 1-6).

20. Respondent credibly testified that his reason for not pursuing the records request from the family division was that he already had the records from Attorney Myer and did not want the civil case to be delayed. (Id., Page 32, Lines 7-13).
21. On January 29, 2020, Katherine Kennedy, Esq., on behalf of her juvenile client, filed an objection to the records request with the Washington Family Division. (Id., Page 34, Lines 15-20).
22. Respondent received a copy of the opposition. (Id. Page 34, Lines 15-20).
23. On February 3, 2020, the Washington Family Division issued an entry order denying the records request. (Id., Page 34, Lines 24-25 to Page 35, Lines 1-3; State's Exhibit DC-4).
24. Some months later, with no decision on the Summary Judgment Motion, the Washington Civil Division scheduled a status conference. (Id., Page 47, Lines 18-19).
25. At the status conference, Judge Tomasi never stated the evidence had been improperly filed. (Id., Lines 19-20; Page 48, Lines 21-23).
26. Following the status conference, Respondent filed a Motion for Order Authorizing the Civil Division and Parents and their Counsel to Inspect the Juvenile File in the Referenced Matter and Transmit a Copy to the Civil Division. (Id., Page 48, Lines 5-25).
27. While the motion was pending (and never decided) the parties settled the case at mediation. (Id.).
28. Respondent believed that any confidentiality relative to the juvenile records had been waived by virtue of the contested issues in the civil division related to the same facts as adduced in the juvenile court matter. (Id., Page 49, Lines 5-13, and Respondent's Exhibit A.a).

29. Attorney Sheftman, counsel for Mother in the subject civil action, did not file for a protective order and the Court never issued a protective order or any order relating to whether the information from the juvenile matter was appropriately before the Civil Division. (Id., Lines 19-22).
30. In sum, the credible evidence establishes that Respondent believed that the juvenile file received from Attorney Myer Contained information that was known to both parties, was discoverable, and that any confidentiality was waived by filing the petition in the Washington Civil Division and consenting to litigate the exact same issues as were addressed in the juvenile matter.
31. Respondent's Reply to Mother's Opposition to Motion for Summary Judgment (Respondent's Exhibit A.a) sets forth in detail the reasons Respondent believed it was appropriate to raise factual issues related to neglect that had been addressed in the juvenile matter before the Civil Division.
32. Respondent's actions were further in reliance upon his then-recent experience viewing a court trial, during which he witnessed juvenile records being freely disclosed during a public hearing in the Windsor Civil Division, where DCF was being sued for neglect.
33. During the trial, Respondent observed the DCF records and all juvenile information being freely discussed in open Court.
34. Based upon respondent's observations during the Windsor Civil Division trial, he believed that his case in the Washington Civil Division dealt with similar issues, and that confidentiality had been waived. (11/1/21 Transcript, Page 133, Lines 18-25, Page 134, Lines 1-15).

35. Respondent further believed that Mother was attempting to use purported confidentiality of juvenile records to misrepresent her established neglect in the Civil Division matter, and that failure to address those facts would result in Mother committing a fraud on the court. (Id., Page 132, Lines 9-25; Page 133, Lines 1-8).
36. Respondent credibly testified that he filed the exhibits in a sealed envelope marked "Sealed", due to advice he received from another attorney. (Id., Page 143, Lines 16-21 through Page 144, Lines 1-3).
37. The credible evidence establishes that the information that is the subject of Count 1 were not received by respondent from the Court or DCF, were not marked "Confidential", contained no admonition against disclosure, were provided to respondent without condition by another attorney, and that respondent believed disclosing information regarding the Mother's established neglect was necessary to avoid the Civil Division being misled as to the true facts.
38. Respondent represented MK in a criminal case which had been filed in Windsor County in June 2019. (10/15/21 Transcript, Page 58, Lines 15-20).
39. MK was charged with Lewd & Lascivious with a child (potentially carrying a 15-year maximum sentence) and sexual assault on a minor (potentially resulting in imprisonment for life) in Windsor County. (Respondent's Exhibit B.b, Criminal Docket Sheet, Docket No. 561-6-19 Wrcr).
40. MK was also charged with Lewd & Lascivious (six counts) and sexual assault (1 count) in Caledonia County. (Respondent's Exhibit D.d, Docket No. 296-6-19 Cacr).
41. Respondent only represented MK in the Windsor case. *Id.*

42. The facts of the Windsor charge "were very simple." (Id., Lines 9-10).

43. The Windsor County charge against MK alleged an "inappropriate touching at night, a single incident." (Id., Lines 10-11).

44. The statements "were very clear. It wasn't a complicated set of facts." (Id. Lines 11-12).

45. Respondent testified he believed the recording was "mirroring" the written statements (Id., Lines 12-13) and that Respondent had no reason to believe there was anything different in the recordings than what was in the written statements. (Id., Lines 13-18).

46. The statements were not "a complicated set of statements" (Id., Lines 20-21) and the statements were "clear and unambiguous." (Id., Page 128, Lines 2-3).

47. MK indicated during respondent's representation that MK would not accept a guilty plea as he maintained he was innocent. (Id., Lines 9-11), and that MK was not willing to agree to serving three years in jail. (Id., Lines 11-12)

48. On August 22, 2019, Respondent received an offer to resolve MK's charges. (Id., Page 114, Lines 1-4; State's DC-18 offered and admitted at Page 114, Lines 9-16).

49. Respondent discussed the offer with MK. (Id., Page 114, Lines 18-21).

50. MK rejected the offer. (Id., Lines 22-23).

51. At the time the offer was received and reviewed with MK, respondent had not obtained the victim interview recordings, but they were summarized in the probable cause affidavit. (Id., Page 115, Lines 2-4).

52. Attorney Alan Franklin represented MK in the Caledonia County matters, through NEK Law the public defender for Caledonia County. (Id., Page 159, Lines 6-9).

53. Attorney Franklin confirmed that his office had received victim recorded statements. (Id., Page 160, Lines 6-9).

54. Attorney Franklin did not personally view any such videos. (Id., Page 171, Lines 3-8)(Q: "You've watched all the witness videos in this case . . . in the King case?" A: " I personally did not.").

55. Still, Attorney Franklin consulted with MK about the Caledonia County offer to settle MK's criminal charges even without having viewed the video. (Id., Page 171, Lines 9-12).

56. When questioned about whether he believed he had been "diligent" and had handled the offer appropriately given the fact that he had not viewed the video, Attorney Franklin stated: "Yes, but it was - - it - - the offer - - the - - the - - my memory was he just - - he had no interest in it." (Id., Lines 13-18).

57. Attorney Franklin confirmed that MK refused to consider any such offer during the relevant time period. (Id., Lines 19-22)(Q: "Right. In this case, MK said in no uncertain terms, there's no way he'd ever accept an offer or anything like that, didn't he? A: That sounds about right.").

58. Further, Attorney Franklin confirmed that in light of the fact that there was no reasonable likelihood of settlement, and the trial was far off, there was no need to view the video at that time. (Id., Page 172, Lines 12-21)("A: I don't think it would be, you know, necessary to do that." Id., Line 21).

59. Attorney Franklin acknowledged that his office did not view the video at all until November (Id., Page 173, Line 4) and the purpose at that time was to consider which, if

any, depositions to take, not for purposes of analyzing any settlement offer. (Id., Lines 3-6)(A: "We were viewing that in November to determine, you know, what depositions to take or if to take depositions at all. That sort of thing.").

60. Accordingly, the subject video(s) were completely unnecessary for Attorney Franklin to advise MK about the Caledonia offer. (Id., Lines 7-10)(Q: "So the video was not helpful for you in representing Mr. King relative to the settlement offer that involved extremely long jail time, correct? A: That's correct.").
61. MK confirmed that during the summer of 2019, he participated in a second meeting with respondent at MK's home in Lowell, Vermont. (11/1/21 Transcript, Page 12, Lines 24-25).
62. During that meeting, Respondent discussed the State's Plea offer. (Id. Page 13, Lines 7-8)(A: "He told me the plea they wanted me to plea.").
63. Respondent reviewed the offer with MK. (Id., Page 14, Lines 8-9)(Q: "And did Mr. Cobb go over that offer with you? A: Yes.").
64. MK acknowledged during the hearing that he refused the offer in no uncertain terms. (Id. Lines 14-15)("Basically, you know, he told me what the deal was and I –and I refused. And, you know, that was it.").
65. On Cross Examination, MK further confirmed that he had no interest in the State's offer. (Id., Page 18, Lines 5-13)(Q: "And in regards to your case, didn't you tell Bill under no uncertain terms you did not want to accept a deal that involved jail time? A: The particular one I had that they offered I did not want. No. Q: Yeah. You made it clear to

him that there was no way you were considering a deal like that with lengthy jail time, right? A: Right. The offer they had, yes, I did not want.")

66. In January 2020, Attorney David Sleigh replaced Respondent as MK's counsel in the Windsor County case and Attorney Franklin in the Caledonia County case. (Id., Page 59, Lines 9-15).
67. When he took over the case, Attorney Sleigh obtained recordings of the alleged victim interviews. (Id., Page 62, Lines 1-3).
68. Attorney Sleigh stated that he needed to review recordings of the alleged victim interviews to properly advise his client, and to prepare for depositions. (Id., Page 66, Lines 2-4 and 10-12).
69. Attorney Sleigh was not aware of the State's offers in either Caledonia or Windsor Counties when he took both cases over. (Id., Page 68, Lines 23-25).
70. Attorney Sleigh acknowledged that both dockets had "significant exposure." (Id., Page 75, Line 25).
71. Attorney Sleigh confirmed that Respondent's representation of MK had no negative impact on MK, regarding the video or otherwise. (Id., Page 87, Lines 16-20)(Q: So, Mr. Sleigh, isn't it accurate that whatever Mr. Cobb did or didn't do has, in your view, made no difference in how you handled or the ultimate outcome of [MK]'s case? A: Right, I agree that what he did had no impact on the case at all.")
72. Attorney Charlie Martin, expert for Respondent, is a lawyer who resides in Montpelier and practices law in Barre, Vermont. (Id., Page 92, Line 7).

73. Attorney Martin has practiced law for fifty years (Id., Line 14) and has practiced in the areas of appellate practice, trial practice, criminal law, civil law, family law, probate law, and administrative law. (Id., Lines 17-20).

74. While in the public defender system, Attorney Martin devoted 100% of his time to criminal practice. (Id., Lines 23-25).

75. Attorney Martin testified credibly how plea offers are communicated, both at arraignment and post arraignment, and acknowledged that frequently attorneys have to advise clients relative to plea offers with only the probable cause affidavit or summaries of victim statements. (Id., Pages 94-95).

76. Regarding the standard of care relative to viewing a purported victim's interview recording prior to consulting with a client about an offer to settle, Attorney Martin stated that there are times that watching the video is not necessary. (Id., Page 96, Lines 17 to Page 98, Line 5).

77. Attorney Martin advised that one factor is how much of an impact the video will have based upon other available information. (Id., Lines 21-25 to Page 97, Line 1 ("It depends on how much of an impact that video would have. For example, you have an affidavit of probable cause. You also have a lot of information in the statements, the written statements that are provided.")

78. Attorney Martin stated that the written information may be sufficient. (Id., Page 97, Lines 23-25)("From the information you have in a written statement and the affidavit of probable cause, you can make a determination if that's the way you want to go.")

79. Attorney Martin additionally confirmed that a Plea Offer may dictate whether it is necessary to watch such a video at all. (Id., Page 98, Lines 2-5)("So, first of all, you've got to make the decision whether or not even looking at the video is going to be worthwhile in light of the –of the offer that you've gotten to resolve the case quickly.")
80. As to the standard of care, Attorney Martin opined that watching a video to consult with a client about a plea offer may not have been necessary, provided that there was sufficient information available at the time. (Id., Page 99, Lines 19-25 to Page 100, Lines 1-13).
81. Respondent credibly testified that the settlement proposal was not a good offer. (Id., Page 119, Lines 6-12).
82. Respondent additionally testified that 3 years to serve was the same amount of time that one of respondent's other clients received from Heidi Remick during a prior case, where Respondent's client pled guilty to Sexual Assault. (*Id.*)
83. MK's Windsor County case alleged a single incident involving a single child, whereas the Caledonia County case involved multiple counts and multiple children. Therefore, the Caledonia case had more exposure to MK than the Windsor docket. For these reasons, respondent reasonably believed that an early settlement in the Windsor County case would not have been in MK's best interest. (Id., Lines 6-20).
84. In other words, even a good resolution in MK's Windsor County case, if he pled guilty, could have made MK's situation in Caledonia County worse, due to the similarity of the charges involving inappropriate conduct with minors. (Id., Page 119, Lines 22-25 to Page 120, Lines 1-5).

85. Regardless, it is undisputed that MK advised he was not going to plead guilty to something that he didn't do, and that MK was not interested in even considering the offer. (Id., Lines 14-16), and page 126, Line 25).

86. Respondent credibly testified that, under the circumstances described above, and the information available to him at the time, it was unnecessary for respondent to view the video in order to consult with MK regarding the Windsor County offer. (Id., Page 127, Line 9).

87. Respondent acknowledged that he would have watched the video prior to taking a deposition and/or for the purpose of preparation. (Id., Lines 14-18).

88. Regarding the felony stipulation, the respondent planned to amend the felony stipulation and get extensions of time, which in his (uncontroverted) experience are routinely granted, especially where the case is pending for under a year, the defendant is not incarcerated, there is no prejudice to the State, and there is any basis for the extension. Here, discovery was not complete, depositions had not been taken. Respondent believed an extension would have been granted. This is true even if the State had objected. (Id., Pages 130-131).

89. In Respondent's experience, which was confirmed by Attorneys Franklin and Sleigh, serious cases such as MK's would typically take at least two years or more to reach trial. (Id., Page 132).

90. At the time of the first pre-trial conference in MK's Windsor County case, the matter had been pending for only seven months. (Respondent's Ex. B.b.).

91. Alan Franklin, representing MK in Caledonia as MK's public defender, testified that he works for Northeast Kingdom Law (PRB Merits Hearing Transcript, October 15, 2021, Page 158, Lines 1-2), and that he joined the office in June 2019 (Id., Page 158, Line 25 to Page 159, Line 1).

92. Prior to that he worked for the Agency of Transportation from 2015 to 2019 (Id., Lines 1-2).

93. Prior to that Attorney Franklin was the Orleans County State's Attorney from 2011 to 2015, and a deputy State's attorney from 2005 to 2011. (Id., Lines 2-5).

94. Attorney Franklin represented MK in Caledonia and Respondent represented MK in Windsor on similar charges. (Id., Page 159, Lines 6-15).

95. Attorney Franklin testified that there were identical conditions of release in Windsor and Caledonia Counties and that both Counties would need to be amended if there was going to be a change in whether MK was allowed to have direct contact with his minor children. (Id., Page 165, Lines 16-22).

96. At no time relevant hereto did Attorney Franklin file a motion to amend conditions of release. (Id., Lines 23-25 to Page 166, Line 1).

97. Attorney Franklin could not recall if MK requested any changes to his conditions of release. (Id., Page 166, Lines 5-8).

98. However, Attorney Franklin acknowledged that he had a "fairly heavy" case load of over a hundred cases at the time. (Id., Page 167, Lines 6-11).

99. Attorney Franklin confirmed that the filing of a motion to modify conditions of release in Windsor would not have amended the Caledonia conditions of release without a similar motion being filed in Caledonia County. (Id., Page 168, Lines 12-17).

100. Attorney Franklin further confirmed that he does not file a motion to amend conditions of release every time a client asks him to do so. (Id., Page 169, Lines 5-9)("It might not be feasible. It might not be in the client's best interest. There's any number of reasons why we wouldn't do it, just because someone asked us to.")

101. Attorney Franklin further acknowledged that filing opposed motions to amend conditions can be negative for a client. (Id., Page 170, Lines 17-21)("Q: It can bring issues to the attention of the prosecutor. It could make them feel - - less inclined to deal with you. There's lot of reasons it can hurt the client, right? A: Yes, that's fair to say.")

102. Attorney Franklin had no reason to disagree with Respondent's decision not to file a contested motion to amend conditions of release in the Windsor County case. (Id., Page 170, Lines 22-25 to Page 171, Lines 1-2)(Q: "So Bill's taking the position in this case that he thought while it was useful to try to do it by agreement, he thought it would not be useful to try to do it by a contested motion. Do you have any reason to disagree with his analysis? A: No.")

103. Attorney Thomas Paul, a Caledonia County Deputy State's Attorney, was representing the State in MK's Caledonia County case. (Id., Page 71, Lines 10-13).

104. Attorney Paul stated that he met with Respondent in October 2019.

105. The purpose of the meeting was to discuss MK's Caledonia Conditions of Release. (Id., Page 72, Lines 3-10).

106. Respondent asked Attorney Paul how he felt about amending conditions of release to allow direct contact between MK and his minor children. (Id., Page 73, Lines 12-13)("Bill asked me how I felt about modifying conditions of release.")

107. Respondent provided information to Attorney Paul. (Id., Lines 14-22)("I asked him, what the case about, because I really wasn't that familiar with it. He explained to me it was an L&L case involving minor kids and that he was representing [MK] down in Windsor. He wanted to try and see if we could agree to a global modification of the conditions.")

108. Attorney Paul did not agree to modify the conditions in Caledonia County. (Id.)("And I told him, gee, Bill, given those kind of charges with young kids I said, I don't think I'm going to go along with that. . . And that was it.")

109. Attorney Sleigh acknowledged that conditions of release needed to be modified in both Windsor and Caledonia Counties in order to be effective. (Id., Page 73, Lines 4-9).

110. Attorney Sleigh represented MK in both Caledonia and Windsor counties, Attorney Sleigh filed and litigated a contested motion to modify in Windsor County, and when that was granted Attorney Sleigh convinced the prosecutor in Caledonia County to allow the same modification. (Id., Lines 15-22).

111. MK testified that there were conditions of release that limited his contact with his children. (Id., Page 13, Lines 14-17)

112. MK testified he hoped that the conditions could be changed, and that Respondent could assist with that. (Id., Page 14, Lines 2-3).

113. MK testified that Respondent had previously filed a motion to modify conditions initially so he could have phone contact with his children, which was successful. (Id., Page 19, Lines 5-8, and Respondent's Exhibit C.c.

114. MK was aware that Respondent had met with the Caledonia State's Attorney to discuss conditions of release, although he was not sure with whom Respondent had met. (Id., Lines 21-24).

115. MK understood that both courts had identical conditions of release and that both would need to be modified in order for any modification to be effective. (Id., Page 20, Lines 8-12).

116. MK's wife, ESK, testified that she engaged in a majority of the communications with the Respondent. (Id., Page 38, Lines 24-25).

117. ESK further testified that much of the communication was by text messages. (Id., Page 39, Lines 22-23; State's Exhibit DC-9).

118. Regarding modifying conditions of release, ESK stated that she and Respondent had discussed the issue on a number of occasions. (Id., Page 43, Lines 7-19).

119. ESK knew that Respondent only represented MK in Windsor and that Respondent could not get the conditions modified in Caledonia unless the State's Attorney handling the case in Caledonia also agreed to modify the conditions. (Id., Page 49, Lines 7-10).

120. ESK testified that Respondent had advised MK that it wasn't a good idea to file another motion to amend conditions unless by agreement. (Id., Page 50, Lines 2-7).

121. ESK confirmed at least one conversation during which Respondent had advised that filing a second motion to amend conditions may be negative for MK since one motion to

amend conditions had already been granted. (Id., Page 50, Lines 22-25 to Page 51, Page 1).

122. MSK's testimony further confirmed that Respondent advised that the passage of time could benefit MK. (Id., Page 51, Lines 18-25)(Q: And isn't it true that Bill was pretty clear with you guys that his strategy here was to try to let some time pass and some of the furor to kind of settle down a little bit and try to eventually reach a global settlement in both counties? A: Yes, he did definitely mention that the more time that passed the better it would be.")

123. Respondent testified that he spoke with MK and ESK during the summer of 2019 regarding modifying conditions of release a second time. (Id., Page 121, Lines 24-25 to Page 122, Line 1).

124. Respondent discussed with MK various issues that were important to consider if there was no agreement to modify conditions. (Id.)

125. One issue respondent discussed with MK regarding avoiding a contested hearing on a motion to modify conditions of release was that a motion in Windsor alone would not be enough to modify the conditions in both counties. (Id., Page 122, Lines1-3).

126. Another issue respondent discussed with MK relative to avoiding a contested hearing on a motion to modify conditions of release was that doing so could result in negative publicity. (Id., Lines 4-8).

127. A third issue respondent discussed with MK relative to avoiding a contested hearing on a motion to modify conditions of release was the chance of losing such a motion since

MK had recently had his conditions of release modified to permit phone contact and facetime contact with his children. (Id., Lines 9-16).

128. A fourth issue respondent discussed with MK relative to avoiding a contested hearing on a motion to modify conditions of release was that a contested motion would give the prosecutor a reason to meet with the victim and prepare the case for the contested hearing, which could ultimately have a detrimental impact on MK's settlement position or even success at trial. (Id., Lines 17-25).

129. Finally, respondent additionally discussed with MK the fact that the more onerous conditions of release arguably had a punitive component. With MK's strict conditions and limited contact with his children, Respondent advised that the restrictive conditions could benefit the overall effort to resolve the charges more favorably by way of an eventual plea agreement. (Id., Page 145, Lines 22-25 to Page 146, Lines 1-12).

130. Attorney Charles Martin, respondent's expert, opined that filing a motion to modify conditions of release in Windsor would not be effective if the same conditions existed in Caledonia and where MK was represented by separate counsel. (Id., Page 103, Lines 21-25 to Page 104, Lines 1-12).

131. Attorney Martin also credibly testified that the attitude of the prosecutors is important to consider before filing motions to amend conditions. (Id., Page 103, Lines 10-20).

132. Attorney Martin further credibly testified that it is the attorney who makes the decision whether or not to file a particular motion. (Id., Page 104, Lines 13-24) Clients decide how to plead – "do I plead guilty or not?" (Id., 20-22) "That is the client's

decision." (Id., Lines 21-22) "What motion to file. . . That is a decision that the lawyer makes." (Id., Lines 23-24).

133. According to Attorney Martin, ". . .It is the role of the attorney to make the tactical decisions because the lawyer has the training and experience to know what impact a motion decision will have on the overall direction of the case." (Id., Pages 104, Line 25 to Page 105, Lines 1-3).

134. Attorney Martin reflected on how this applies to Vermont attorneys: "So in my experience and in my training and in the way criminal law is practiced in the state, it is the lawyer who makes the decisions as to motions, and in tactical decisions, it is the attorney. It is the client who makes the strategic, the overall decisions regarding the directions of the case." (Id., Page 105, Lines 4-9).

135. Regarding respondent's alleged disclosure of confidential information, BA testified he is incarcerated at Northern State Correctional Facility (10/15/21 Transcript, Page 83, Lines 24-25).

136. Attorney Jessica Burke represents BA relative to his current criminal charges. (Id., Page 84, Lines 1-3).

137. There was a short period of time during which Respondent represented BA for a single hearing, because Attorney Burke was on vacation and respondent stood in for the hearing. (Id., Lines 4-9, and 12-15).

138. BA discussed details of his case with respondent, which BA expected to be kept confidential. (Id., Lines 16-20).

139. When attorney Burke returned from vacation, she took the case over again. (Id., Lines 21-23).

140. BA learned from his attorney, who learned from disciplinary counsel, about the disclosure at issue in this matter. (Id., Page 84, Lines 24-25 to Page 85, Lines 1-2, and Page 87, Lines 3-7).

141. BA's criminal case was listed on the public docket and was respondent appeared with BA in open court. (Id., Lines 15-17).

142. BA did not testify that he was negatively impacted by the disclosure. (Id., Page 88, Lines 2-4).

143. BA did not testify that there were any third parties who were aware of the disclosure. (Id., Lines 7- 9).

144. BA learned only that the disclosure was in an email. (Id., Lines 22-24) and that it was between two lawyers who represented the same client, which facts are uncontroverted. (Id., Page 88, Line 25 to Page 89, Lines 1-2), and Exhibit 19 and 19-A (Id., Page 90, Line 25 to Page 91, Lines 1-3).

145. Regarding the Freshbooks summary respondent provided to disciplinary counsel, respondent credibly testified that the summary was generated in response to Disciplinary Counsel's request for respondent's file and what work was performed for the fees charged. Respondent agreed that there were errors, mostly with dates, but that the summary accurately reflected the services performed on behalf of MK. (Id., Page 66, Lines 1-25; Page 67, Lines 1-10).

146. Respondent further confirmed that State's Exhibit DC-15, Freshbooks Billing Summaries, were prepared after his representation of MK and were created for the sole purpose of showing the work he had performed on MK's behalf. (Id., Page 62, Lines 1-2).

147. Because respondent handled MK's case on a flat fee basis, the only documents related to the fees charged for the representation generated during the time of representation were the emails from Respondent to MK's family members, their replies, and the copies of the checks received by Respondent. (Id., Page 62, Lines 4-17).

148. As for the Freshbooks summary, Respondent confirmed that he created the Freshbooks summary on or about May 20, 2020, the date stated at the top of the summary (Id., Page 63, Lines 16-23.

149. It is undisputed that the Freshbooks summary was created after-the-fact by referencing MK's file, including notes, calendar entries, pleadings and other documents that provided Respondent with the necessary information to re-create his timeline and work performed on behalf of MK. (Id., Page 62, Lines 18-25).

150. Respondent credibly testified that the Freshbooks summary was just used to organize the information relative to respondent's work on behalf of MK. (Id.)

151. Respondent knew MK from his home-town residence in Peacham, Vermont. (Id., Page 58, Lines 2-3).

152. MK and Respondent's children went to school together (Id., Lines 3-4) and MK was Respondent's assistant coach in little league baseball. (Id., Line 4).

153. Respondent had helped find employment for MK at Eagle Eye Farm (residential treatment facility for persons with TBI where Respondent was the Director. (Id., Lines 5-7).

154. Respondent had assisted MK with other legal matters previously. (Id., Lines 9-10).

155. Respondent was retained by MK in June 2019 to represent MK in the criminal matter in Windsor. (Id., Page 58, Lines 15-20).

156. The fee agreement was for a monthly flat fee of $1000 a month for the first eight months and $400 a month thereafter. (Id., Lines 21-25).

157. The fee agreement was confirmed in writing via email. (Id., Page 59, Lines 1-13; State's Exhibit DC-11).

158. Respondent credibly testified that flat fees are a regular part of his practice, that he prefers them since they are easier to manage and easier than having to keep detailed billing records. (Id., Page 59, Lines 24-25 to Page 60, Lines 1-11).

159. MK's family members made payments by check to respondent. (Id., Page 60, Lines 12-19; State's Exhibit DC-17 admitted at Page 61, Lines 4-18).

160. The Freshbook summary (DC-15) outlined Respondent's general summary of work performed on behalf of MK and generally the time spent. (Id., Page 62, Lines 4-17).

161. Respondent prepared the Freshbook Summary in response to Disciplinary Counsel's request after Respondent's counsel advised that Disciplinary Counsel was seeking to find out what time Respondent had spent on MK's case. (Id.)

162. Respondent then recreated most of his time from his notes, calendar and his file so that he could give a general accounting of what he had done. (Id.)

163. Respondent created the Freshbooks Summary to give Disciplinary Counsel a detailed explanation of what he had actually done for MK. (Id.)

164. Rather than summarizing the work into narrative form, Respondent provided the Freshbooks summary because it was a good way to organize the information. (Id.)

165. Respondent confirmed that there was no billing document generated during his representation of MK other than the initial emails that set forth the terms of the fee agreement. (Id., Page 63, Lines 3-5).

166. Further, Respondent used his Freshbooks software to summarize his work on behalf of MK, since Freshbooks would "do the math" and compute the approximate hours worked. (Id., Lines 7-10).

167. Respondent intended to provide the summary to show that the fees were reasonable. (Id., Lines 11-15).

168. The date that the Freshbooks Summary was generated was May 20, 2020. (Id., Lines 20-23; State's DC-15 offered into evidence and admitted at Page 63, Lines 24-25 to Page 64, Lines 1-6).

169. Regarding an entry dated 10/31/19, Respondent confirmed that he had met with MK in Lowell, and had also met with Tom Paul, Deputy State's Attorney to discuss parent-child contact. (Id., Page 64, Line 13-25 to Page 65, Line 1).

170. Respondent met with Tom Paul to discuss the Caledonia County conditions of release, since MK had conditions of release in both Windsor and Caledonia Counties. (Id., Page 65, Lines 5-25 to Page 66, Lines 1-10).

171. Regarding travel time to Windsor and meetings with the State, Respondent testified that he had included time involving Windsor Court appearances and meetings with the State even though the dates may not have been accurate. (Id., Page 93, Lines 1-10)("I may have had the number of times I was down there without necessarily remembering exactly which day I was down there.")

172. Further, Respondent credibly testified that he had other matters in Windsor and there might have been "overlap" with these other matters. (Id., Page 95, Lines 8-10).

173. Respondent credibly testified that he had put together his time summary through a review of his calendar, notes, text messages and other documents in his file. (Id., Page 94, Lines 17-21).

174. Since MK's case was handled on a flat fee basis, Respondent had not tracked his time as the case progressed. (Id., Lines 22-24).

175. Regarding jury draw preparation, Respondent testified credibly that there was a status conference scheduled for August 19, 2019 in Windsor County (Id. Page 102, Lines 12-13; State's DC-12, felony stipulation) and that he had done jury preparation on August 4 and 5 for a possible jury draw in September, 2020 which never took place.

176. Respondent stated that he prepared for the draw in the event that he believed MK would benefit from a speedy trial. (Id., Page 102, Lines 15-17)("that would have been requested at the status conference had we chosen to go in that direction."); Lines 22-24)("I did not need a jury draw date in August in order to request a trial if we had thought that a speedy trial or anything like that was necessary.")

177. Regarding phone calls with Alan Franklin on October 4, 15, and 31, 2019, Respondent advised that he had communicated with Attorney Franklin about parent-child contact issues and his meeting with Deputy State's Attorney Tom Paul. (Id., Pages 118-119), and there was no testimony to the contrary.

178. Regarding phone calls in general, Respondent stated that his phone records were limited since and only included his cell phone records because his landline provider could not provide a detailed summary of phone calls. (Id., Page 126).

179. Regarding phone conferences, Alan Franklin testified that he "had no memory" regarding specific phone calls on 10/4/19, 10/15/19 and 10/31/19. (PRB Merits Hearing Transcript, October 15, 2021, Page 163, Lines 2-12).

180. Attorney Franklin acknowledged that he had just joined the office in June 2019 (Id., Page 158, Lines 24-25 to Page 159, Line 1), and had a "heavy caseload" with "more than 100 cases" (Id., Page 167, Lines 6-11).

181. Attorney Franklin did not testify that the phone calls proffered by respondent did not take place; rather Attorney Franklin's testimony was that he could not recall those caslls. (Id., Page 165, Lines 7-11)(Q: "Is it possible that during those time frames that you discussed the King case with Mr. Cobb but do not today, sitting here today, recall those discussions?" A: "I do - - I do not recall any of those discussions. . ."

182. Regarding Attorney Remick's meetings with Respondent, Attorney Remick testified that she could not recall any in-person meetings with Respondent (Id., Page 182, Line 13).

183. However, Attorney Remick stated that Respondent was in Windsor County at that time handling other matters, and she might have seen Respondent at Court. (Id., Page 182, Lines 14-18).

184. There is no evidence of record that Respondent ever represented his Freshboooks summary to constitute a record of events that was created at the time the events occurred, and to the extent his Answer characterizes the records as "contemporary" it is ambiguous and is not the sworn statement of respondent.

Proposed Conclusions of Law and Findings

Count 1

Disciplinary Counsel has failed to prove by clear and convincing evidence that Respondent engaged in conduct prejudicial to the administration of justice, by mishandling and unlawfully disclosing confidential juvenile court information, such that his conduct was so extreme as to be considered prejudicial to the administration of justice in violation of Vermont Rule of Professional Conduct 8.4(d) or criminal in nature.

To prove this charge, the State has the burden of proving by clear and convincing evidence that the juvenile information respondent discussed in his civil motion papers was in fact "confidential" under the circumstances, and that respondent was prohibited from disclosing the facts related to Mother's neglect even if doing so was necessary to prevent a fraud on the Court. If the Panel concludes that the juvenile information was in fact confidential and impermissible to disclose even to ensure the Court was not misled, even though the same information was available directly from respondent's own client, then the State has the burden to prove by clear

and convincing evidence that respondent's use of the information was so impermissible or unlawful in the context of the civil case that including those references in the civil proceeding was prejudicial to the administration of justice contrary to Rule 8.4(d). In addition, if it finds the Rule was violated, it is relevant to the Panel's determination of an appropriate sanction whether the respondent knew it was impermissible to disclose the information in the context of his client's civil case.

Discussion/Conclusions of Law

The State has offered no evidence, statutory authority or case law that contradicts respondent's legal memorandum, Exhibit A.a before the panel, which was submitted in the civil action to show that the subject records were no longer confidential. Respondent's Exhibit A.a. The Board should conclude, therefore, that the State has not met its burden of proving that the records were in fact confidential. However, even assuming, arguendo, that the information was "confidential" the State has the burden to prove by clear and convincing evidence that respondent "mishandled" or "unlawfully disclosed" the information such that he committed an act contrary to the administration of justice, and for the most severe sanctions that doing so was potentially criminal. Again, the State has not presented any statutory support, caselaw or evidence to establish that presenting in a civil filing relevant facts established in a juvenile proceeding constitutes "mishandling" or "unlawful disclosure" of that information when such disclosure is necessary to prevent another party from making misrepresentations of fact to the tribunal.

The only authority relied upon by the State relative to the confidentiality of the records in question is 33 VSA §5117. That statute, according to its terms, relates only to records kept by

the Court and marked "Unlawful Dissemination of this Information is a Crime Punishable by a Fine up to $2,000.00." 33 VSA §5117(2). Moreover, 33 VSA §5117(e) applies, according to its terms, only to records "prepared by or released by the Court or the Department for Children and Families" and provided to "receiving persons or agencies" pursuant to Section 5117. There is no other statutory basis for such records to be considered "confidential" once obtained outside of the auspices of Section 5117, or when the information is available (as here) directly from a party. Nor is there any support in the criminal statutes for the Section 5117 admonition that dissemination is a crime punishable by a fine up to $2,000.00. More importantly, the record is bereft of evidence establishing that respondent included the subject information in his motion papers intending to impermissibly disclose juvenile records or contrary to the administration of justice. At most, respondent's disclosures, if deemed impermissible by the Panel, were negligent and based upon his own good faith interpretation of the law applicable to such records in the context of his client's contested civil case. See Respondent's Exhibit A.a (Reply Memorandum to Opposition to Motion for Summary Judgment), see also *D.C. v. Schatz*, 2015 Vt. Super. LEXIS 16, *3 (quoting *State v. Madison*, 163 Vt. 390, 395, 659 A.2d 124 (1995) for the proposition that "Confidentiality [of juvenile records] should not serve as a shield to consideration of the facts necessary to carry out the judicial function" [in *Madison* relative to bail review].

In Exhibit A.a, Respondent sets forth case law and legal arguments establishing that he believed any confidentiality of the subject records was waived by the necessity for the Civil Division to learn the true facts related to Mother's neglect and "carry out its judicial function). Respondent's Exhibit A.a, Pages 21-39, which provides:

Legal Standard

Although confidentiality generally applies to juvenile proceedings since juvenile proceedings are closed proceedings, there are exceptions which apply in this case. Since Vermont does not have extensive case law on this topic, an overview of the legal standard is set forth below.

i. The Need to Keep Juvenile Records Confidential is to Protect the Juvenile.

It is axiomatic that every state has enacted statutes which provide for confidentiality in juvenile proceedings. Vermont also has statutes which aim to protect juveniles and to keep such juvenile records and files confidential and not open to the public. 33 VSA §§ 5110, 5117. As the Vermont Supreme Court has held, the purpose of confidentiality is to protect the juvenile and to ensure that the juvenile does not suffer prejudice by having the proceedings open to the public. See State v. Madison, 163 Vt. 390, 395 (1995)("The purpose for confidentiality of juvenile records is protection of the child from the prejudice generated by public scrutiny."). Other jurisdictions support keeping juvenile cases closed and confidential to protect the juvenile. Davis v. Alaska, 415 U.S. 308, 319(1974)("We do not and need not challenge the State's interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender."); Smith v. Harold's Supermarket, Inc., 685 S.W.2d 859 (Mo.Ct. App. 1985)("It cannot be disputed that the overall purpose and intent of [the confidentiality statute] is to protect and safeguard the best interests of the juvenile, and from such a purpose and intent our state at large derives a benefit and its best interests are served."); Herget v. Circuit Court for Waukesha County, 84 Wis.2d 435 (1978)("Confidentiality is essential to the goal of rehabilitation, which is in turn the major purpose of the separate juvenile justice system.")

ii. The Right to Keeping Juvenile Records Confidential is a "Privilege" not an "Absolute Right."

Courts that have addressed the issue about whether juvenile records may be discoverable in a civil proceeding, have concluded that such a right to keeping juvenile records confidential is based upon "privilege" and not an "absolute right." State ex rel. Rowland v. O'Toole, 884 S.W.2d 100 (1994); State ex rel. Herget v. Circuit Court for Waukesha County, 84 Wis.2d 435, 449 (1978)("Although the juvenile records which are the subject of [the Statute] are privileged records by virtue of [the Statute], they are not absolutely privileged and hence are discoverable in limited circumstances."); In re: William H., 88 Conn. App. 511, 519 (2005)(juvenile records not absolutely privileged); Doe v. D'Angelo, 154 A.D.3d 1300, 1301 (2017)(NY Fourth Department).

iii. The Privilege to Keep Juvenile Records Confidential Belongs to the Juvenile, Not Third Parties.

However, since confidentiality statutes are intended to protect the juvenile, the right to keeping juvenile records confidential is a privilege afforded the juvenile, and not third parties. Smith v. Harold's Supermarket, Inc., 685 S.W.2d 859 (Mo.Ct. App. 1985)(confidentiality statute's protections are privileges exclusively accorded the juvenile); State ex rel. Rowland v. O'Toole, 884 S.W.2d 100 (1994)("Thus it is clear the privilege is that of the juvenile plaintiff and not of the plaintiff parents.")

iv. Privilege May be Waived.

Further, courts hold that this privilege may be waived. See, e.g., In re: William H., 88 Conn. App. 511, 519 (2005)("Our Supreme Court has recognized that the provisions of the [confidentiality statute] can be waived.") or due to his own actions by filing a civil suit which places his juvenile record at issue); State ex rel. Rowland v. O' Toole, supra (juvenile plaintiff in underlying action waived Judicial Code's privilege against use of juvenile court reports and records by bringing civil action which placed his juvenile arrest and juvenile court proceedings at issue); Doe v. D'Angelo, 154 A.D.3d 1300, 1301 (2017)(NY Fourth Department)(where court held that juvenile waived his right to keeping his juvenile records sealed where, having been sued by a party for personal injuries, he filed a cross claim against a school district seeking indemnification).

In a Missouri case, State ex rel. Rowland v. O'Toole, supra, the issue before the Court was whether to permit disclosure of juvenile records during the discovery phase of the case where the defendants claimed that the documents were relevant, and where the plaintiff claimed that while they might be relevant, they were confidential and that he was invoking his privilege to keep them confidential. In that case, the plaintiff was a juvenile who claimed that another person had falsely accused the juvenile of burglarizing a home. Plaintiff juvenile had gone to juvenile court and after a hearing the case had been dismissed. Plaintiff juvenile then filed a civil action against another juvenile, who had made the false report, and his family seeking damages for being, inter alia, falsely arrested and assaulted due to the improper identification. In response to the civil action, the defendants requested a copy of the juvenile records to which plaintiff juvenile had been a party. Id. The Court ultimately concluded that the records were relevant and that the juvenile waived any privilege he had in maintaining confidentiality with the juvenile records by filing the civil action. The Court first held that the privilege was limited to plaintiff juvenile only and not to his parents:

> Use of [the confidentiality statute] are privileges exclusively accorded the juvenile. (Citations omitted). The privilege "does not extend to any other person or proceeding which is neither occasioned by or brought against the juvenile." Thus it is clear the privilege is that of the juvenile plaintiff and not of the juvenile parents. Id. at 102.

The Court further held that the privilege extended only to any juvenile statements made against himself, and that third parties had no privilege:

The statutory protection applies only to the use of a child's statements and court records and reports against the child. Statement made by others in a juvenile court proceeding and court records and reports may be used against others. (Citations omitted) Thus, those juvenile court records and reports which do not relate to the juvenile's own statements against himself are not subject to the privilege. Id. at 102-103.

The Court concluded that the juvenile alone had the privilege to keep his files confidential. However, the juvenile had waived his privilege by filing the civil action:

If, however, a juvenile places his juvenile arrest and juvenile court proceedings in issue by voluntarily filing suit against the victims and complaining witnesses in that case, the question becomes whether the juvenile has waived his privilege. It is well-established that a patient waives the physician-patient privilege when that patient files a lawsuit putting the patient's physical condition in issue. Likewise, the accountant-client and attorney-client privileges may be waived where the client places the subject matter of the privileged communication in issue. The rationale of these cases is that permitting a plaintiff to use the privilege to conceal until trial facts relating to the very issue the plaintiff had originated for submission to judicial inquiry would permit the plaintiff to use the privilege as "a shield and a dagger at one in the same time" (which we do not believe the legislature intended.).(citations omitted). Id.

Therefore, the juvenile records, if relevant, were admissible:

For the same reasons we do not believe the legislature intended to allow a juvenile to place his juvenile arrest and detention in issue in a civil case and then prevent discovery of the records pertaining to those events by invoking the privilege created by the statute. A juvenile's right of confidentiality as to juvenile court records is a "qualified" and not an "absolute" privilege. A statutory privilege relating to confidentiality of juvenile delinquency proceedings, as well as constitutional privileges generally, may be waived. People v. Johnson, 90 Misc. 2d 777 (N.Y.Sup.Ct. 1977). By voluntarily filing this civil suit the juvenile plaintiff waived the protection of the statute. A waiver under these circumstances does not thwart the overall purpose an intent of [the Statute]. The records are properly discoverable in the civil action to the extent they are relevant. Id.

v. Courts Can Strike the Privilege, Even If Asserted, By Necessity.

There are also variety of instances where the privilege can be overcome by necessity, and where a person's juvenile records are made available even over the person's objection. See State v. Madison, 163 Vt. 390 (1995)(Court may review a defendant's juvenile record for purposes of bail review over defendant's objection to keep his juvenile records confidential); State ex rel. Herget v. Circuit Court for Waukesha County, 84 Wis.2d 435 (1978).

In State ex rel. Herget v. Circuit Court for Waukesha County, 84 Wis.2d 435 (1978) a Wisconsin case, the Supreme Court had to address whether disclosure of a juvenile's court record should be permitted where the juvenile had committed acts of vandalism. In that case,

the juvenile's acts of vandalism had been addressed in the juvenile court. However, the victims of his vandalism commenced a civil action against the juvenile for his intentional torts, and the juvenile's parents for their negligent supervision of the juvenile. As the civil action progressed, the victims requested release of the juvenile records and the ability to conduct discovery related to their civil claims against the juvenile and his parents. The juvenile objected, arguing that the information concerning a crime allegedly committed by a juvenile is privileged withing the meaning of the state statutes and thus not discoverable. Id. At 438. He argued "that he cannot be ordered to disclose any information relating to the vandalism alleged in the plaintiff's complaint because any such information would duplicate his testimony in the juvenile court proceeding." Id. at 443-444.

The Court acknowledged the importance of having juvenile records kept confidential:

Confidentiality is essential to the goal of rehabilitation, which is in turn the major purpose of the separate juvenile justice system. In theory, the role of the juvenile court is not to determine guilt or to assign fault, but to diagnose the cause of the child's problems and help resolve those problems. The juvenile court operates on a 'family' rather than a 'due process model.' Confidentiality is promised to encourage the juvenile, parents, social workers and others to furnish information which they might not otherwise disclose in an admittedly adversary or open proceeding. Confidentiality also reduces the stigma to the youth resulting from the misdeed, an arrest record and a juvenile court adjudication. Id. at 451.

The Court responded that the purpose of confidentiality in a juvenile case is not to create

an obstacle for parties in a civil case who are seeking damages against a juvenile for his tortious acts where the conduct was also part of a juvenile proceeding. Id. At 444 ("The Children's Code was not intended to thwart the processing of a civil claim arising out of conduct which was also made the subject of a juvenile proceeding.") The Court went on to note that the Supreme Court had previously in another case (Sandford v. State, 76 Wis. 2d 72 (1977)) permitted a witness to testify at trial about a defendant who had previously committed an act that had been part of a juvenile proceeding. Id. ("This Court rejected the contention that [the Statute] restrains a witness from testifying at trial as to an alleged prior act of the defendant committed while the defendant was a juvenile, if that act gave rise to a juvenile court proceeding.")

The Court ultimately decided that notwithstanding the statutes that allow for confidentiality of juvenile records, the circumstances warranted disclosure: "Although the juvenile records which are the subject of [the Statute] are privileged records by virtue of [the Statute], they are not absolutely privileged and hence are discoverable in limited circumstances." Id., at 449.

The Court concluded: "We hold that the circuit court is justified in ordering the discovery of all or any part of. . . the records only when the court has reviewed the records in

camera and has made a determination that the need for confidentiality is outweighed by the exigencies of the circumstances." Id. At 452.

vi. Juvenile Records May Be Used for Impeachment Purposes.

Juvenile records may also be made available to adverse parties in a civil or criminal hearing to allow the adverse party to use the records for possible impeachment purposes. Davis v. Alaska, 415 US. 308 (1974); Ward v. Goodwin, 345 S.W.2d 215 (1961); State v. Russell, 625 S.W.2d 138 (Mo. Banc 1981).

In Davis v. Alaska, supra, the U.S. Supreme Court had to consider whether a juvenile record should be disclosed as part of criminal matter, where the juvenile, now an adult, was testifying at a trial as a witness against the defendant who had been charged with robbery. At issue was whether the 6th Amendment Confrontational Clause would allow the defense attorney to question the witness about his juvenile record for impeachment purposes. Id. The Trial Court did not permit the juvenile record to be used. Id. After the defendant was convicted of the crime, he appealed, arguing that his 6th Amendment rights were violated by not being allowed to question the witness about possible bias since the trial court had denied the defense attorney the right to access the witness's juvenile records. Id.

On appeal, the Supreme Court overturned the verdict and held that the Trial Court violated the defendant's right to confront witnesses: "The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." Id. at 320. It further added that the State essentially waived this right to keeping the record confidential by calling the witness to the stand: "The State could have protected Green from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records." Id.

Therefore, when a witness is testifying at a trial, his juvenile records are deemed available for impeachment purposes.

vii. Wrongful Death Cases Involving a Deceased Juvenile Permit Discovery of the Juvenile Records by Proper Parties.

Wrongful death cases involving juveniles permit the juvenile documents to be deemed discoverable and disclosed. Daniels v. National Fire Insurance Company of Hartford, 394 So. 2d 683 (1981)(Court of Appeal of Louisiana); Smith v. Harold's Supermarket, Inc., 685 S.W.2d 859 (Mo. Ct. App. 1985),

In Daniels v. National Fire Insurance Company of Hartford, supra, the Court held that a party in a wrongful death action is entitled to transcripts of juvenile adjudication hearing which arose out of the wrongful death. Id.

In Daniels, the plaintiff, a father, was seeking damages for the wrongful death of his child. The wrongful death involved acts committed by a juvenile who had participated in a

juvenile hearing, and the matter had been adjudicated in the juvenile court. Plaintiff father requested a copy of the juvenile adjudication hearing transcript. The Civil Court denied the request citing confidentiality of juvenile proceedings. On appeal, the Court of Appeals held that the father was a "proper" party to make the request for the transcript even though he was not present at the juvenile hearing:

> The legislative limit upon admission protects the juvenile from the eyes of persons whose only interest is curiosity, but not persons whose interests are "proper." A parent whose child has been killed, accidentally or intentionally, has a proper interest, if anyone does, in observing the adjudication hearing. That parent equally has the right, in a civil action arising out of the death of the child, to impeach a witness's testimony that conflicts with that witness's testimony in the juvenile proceeding. One hardly need point out that a civil trial witness, juvenile or not, is solemnly bound to tell the truth including truth that was shielded from public view in the juvenile case. The shield of confidentiality was not designed and cannot be permitted to fraudulently defeat civil reparation of juvenile wrong. The juvenile could therefore not successfully object to the introduction of his or her prior inconsistent statement, whether in the form of an extract from the transcript of the juvenile court testimony or in the form of testimony by plaintiff who heard the juvenile court testimony. Much less could an adult who testified at the juvenile court proceeding claim any confidentiality under the statute to defeat introduction of his or her prior inconsistent statement." Id. at 683-684.

viii. Juvenile Records are Discoverable in Wrongful Death Cases Where The Records are Relevant to the Civil Case, Where Juvenile is Deceased, and Where Protection is for the Juvenile.

In Smith v. Harold's Supermarket, Inc., 685 S.W.2d 859 (Mo. Ct. App. 1985), the Missouri Court of Appeals considered whether juvenile records of a decedent should be admitted at trial in a civil case where the pecuniary losses of the decedent were at issue, particularly with respect to his expected earnings potential. Id. At the trial, the parents of the decedent sought damages for wrongful death of their son. Id. at 861. They called an expert to testify about the future earning potential of their son. Id.. Defendants moved to have the decedent's juvenile record admitted into evidence so that they could show that the decedent had been in trouble for most of his life and had not worked much. Id. The parents objected to the introduction of the juvenile records claiming confidentiality. The Court admitted the records stating that they were relevant and that the parents had no privilege of confidentiality since the confidentiality provision was for the juvenile and not third parties: "It is evident to this court that the prohibition against the use of juvenile court reports is for the *exclusive* protection of the juvenile, and does not extend to any other person or proceeding which is neither occasioned by or brought against the juvenile." Id. at 864.

The Court further acknowledged defendant's arguments that plaintiffs had waived any alleged privilege under the statute or any applicability of the statute, because plaintiff, both by her pleadings and her evidence, placed in issue the value of the decedent's services.

From this defendants declare, 'It has and often been held in this state that if one party has the right to or does inquire into a certain area or present evidence of certain facts at trial, the other party is entitled to inquire into the same area and develop those facts as might be beneficial to his side of the case, regardless of whether or not in the first instances the first party was immune from having the evidence presented.' Defendants then cite to this court several cases involving the waiver of the physician-patient privilege, and ask this court to adopt the rationale therein by analogy in the instant case. This court agrees with defendants' contention. Id. at 865.

In conclusion, the Court held the protection of the confidentiality statute "affords exclusive protection and is hence a privilege exclusively granted to the juvenile." Id. at 861.

ix. Court May Inspect The Relevant Records *In Camera* and Then Decide Which Documents Should be Released.

In Grantz v. Discovery for Youth, 2005 WL 406211 (2005), the Ohio Court of Appeals decided on a three-part test for a judge to decide after an in camera review whether juvenile records should be disclosed in a case where a juvenile, while at a state living facility, sexually assaulted one of his tutors. The Court stated that an in camera review of the documents should take place to determine: (1) whether the records were necessary and relevant to the pending action; (2) whether good cause had been shown by the person seeking disclosure; and (3) whether the admission outweighed the statutory confidentiality considerations."

Here, if necessary, the Court could inspect the juvenile records *in camera* and then decide which documents should be admitted for discovery or to the Civil Division for a hearing.

A. Mother Has No "Privilege" Rights Since She is a Third Party.

First, any privilege towards keeping juvenile records confidential may only be asserted by the juvenile and not third parties (Smith v. Harold's Supermarket, Inc., 685 S.W.2d 859 (Mo.Ct. App. 1985)). Therefore, Mother, as a third party, has no standing to assert any such privilege.

B. Mother Waived any Rights She Had by Filing This Civil Action.

Second, even if she had privilege, which she does not, Mother waived such privilege by

filing this civil action which put the issue of her neglect and abuse of her children at issue. Id.

Here, Mother took an offensive position by filing the civil action which requires the trial court to consider the relevant information regarding Mother's parenting of her two children, and AJ in particular. State ex rel. Rowland v. O'Toole, 884 S.W.2d 100, 103 (1994)(". . . permitting a plaintiff to use the privilege to conceal until trial facts relating to the very issue the plaintiff had originated for submission to judicial inquiry would permit the

plaintiff to use the privilege as "a shield and a dagger at one in the same time")(citation omitted)

C. The Juvenile Records, Including Court Orders, Are Relevant and Necessary for the Civil Action.

The juvenile records are necessary and relevant in this case since both 14 VSA § 1492(a) and (b) and 14 VSA § 1492(C)(4) the issues to be decided in this case, put both Father and Mother's parenting of AJ and their relationship with him at issue. It is up to the court to decide which documents should be admitted after reviewing all juvenile documents *in camera*. Grantz v. Discovery for Youth, 2005 WL 406211 (2005),(Ohio Court of Appeals)

It should be noted that if this case came to a trial, the Court would need to take evidence and consider 14 VSA § 1492(b) the statutory language which states that pecuniary losses are to be awarded in an amount "as under all the circumstance of the case, may be just." Obviously, the facts contained and litigated at the juvenile hearing would be necessary and relevant since the Civil Division would need to consider "all the circumstances" of the case to render a just decision.

What is clear is that AJ's life – and the care he was provided by his parents, as well as his relationship with his parents, during the 2 ½ years of his life - is relevant to this action. In turn, the factual record that was adjudicated in the juvenile court is relevant since it goes to the heart of the case, i.e., the facts that support awarding a percentage of the proceeds to each party is based upon, to a large extent, the facts that were litigated in the juvenile cases. The first DCF case was opened in September 2015 and then subsequently dismissed in early 2016. The second DCF action was commenced in November 2016 and continued until AJ's death on July 5, 2017. The allegations contained in the affidavits and the facts presented at the juvenile hearings, including the orders that came from those hearings, are relevant and necessary for the civil action.

D. The Juvenile Documents are Admissible for Impeachment Purposes.

At the very least, it is clear that the law provides the records to be available for impeachment purposes. Davis v. Alaska, 415 U.S. 308 (1974); Ward v. Goodwin, 345 S.W.2d 215 (1961); State v. Russell, 625 S.W.2d 138 (Mo. Banc 1981)

E. By Enacting 14 VSA § 1492, the Legislature Created a Statute Which Must Include the Production and Use of Juvenile Records.

14 VSA § 1492(C)(4) would be meaningless if the parties could not access the juvenile records since the issues to be decided in this civil case are based upon many of the same issues that were decided in the juvenile case.

By enacting 14 VSA § 1492 – and 1492 (c)(4) - the legislature clearly intended such juvenile records to be part of a civil action where a parent's neglect is at issue. If such juvenile documents and information were not admissible or discoverable in this civil case, then 14 VSA § 1492(c)(4) would be unenforceable. This is true since almost every case involving 14 VSA § 1492(c)(4) involves a situation where a parent has lost custody to DCF.

If the juvenile records could be excluded from any civil action involving enforcement of 14 VSA § 1492(c)(4), then there could be no enforcement of the statute since anyone could defend themselves by claiming that the juvenile records are confidential and cannot be disclosed.

Further, if Mother's argument is taken to its extreme, that all juvenile information may not be considered by the Civil Division, then parties could not even use prior juvenile orders to argue that collateral estoppel applies in a civil case. However, the use of juvenile records – and orders - for such proceedings is universally acknowledged. See e.g., In re: PJ, 185 Vt. 606 (2009)(discussing use of CHINS findings and Orders in later proceedings for purposes of Collateral Estoppel).

Therefore, the use of juvenile records and information is discoverable and admissible pursuant to the legislature's enactment of 14 VSA § 1492(c)(4).

F. None of the Juvenile Records or Information is Actually Confidential.

Further, the information contained in Father's civil action was fully known to him. Father and Mother are parties in the civil action and were the parties in the juvenile cases. As stated, the juvenile cases involving both of Mother's children had been consolidated. Therefore, all information related to both children was provided to Father at the time of the juvenile proceedings. Father therefore was aware of and/or had personal knowledge of all the facts contained in any filings that he made. Nothing set forth in his filings was from information that he only learned through the Court documents themselves. Mother's abuse and neglect of her children was an issue between the parties while the proceedings were going on in the Family Division. The sum and substance of the documents is the same as Father's own memory of the events.

G. The Civil Action Prevents the Information From Remaining Private or Confidential.

However, a trial in the civil action will include the same witnesses and parties – and the same factual allegations - that were litigated in the juvenile case. Father expects to call many of the same witnesses in the civil action who appeared in the family action. Mother may do the same. As stated above, developing the factual record of AJ's short life is critical so that the Civil Division has a full and complete understanding of not only AJ's life, but of the care provided by each of his two parents during his life as each party makes respective arguments for an appropriate percentage of the wrongful death proceeds.

H. Father Took Reasonable Steps to Safeguard the Juvenile Records.

Notwithstanding the argument that Mother waived confidentiality by filing this action,

Father took reasonable steps to maintain the confidentiality of the records themselves. Upon filing his motion in the Civil Division, Father filed the motion with all juvenile records "sealed" and unavailable for public inspection.

I. The Statute – 33 VSA § 5117 - Provides for Disclosure.

The Statute 33 VSA § 5117, which governs the records of juvenile judicial proceedings, sets the terms of disclosing the records. According to the Statute, a number of parties are permitted "inspection" of the records, including the courts (33 VSA § 5117(b)(1)(A)), certain officers (33 VSA § 5117(b)(1)(B)), court personnel (33 VSA § 5117(b)(1)(D)), the child (33 VSA § 5117(b)(1)(E), as well as the "child's parents." (Id.)

Further, the Family Division may designate any other person who has a need to know. 33 VSA § 5117(b)(1)(F) states: "any other person who has a need to know may be designated by order of the Family Division of the Superior Court." Id.

As for other means of disclosing the information, the Statute begins:

"Except as otherwise provided . . ." 33 VSA § 5117(a). This general catchall phrase leaves the door open for a court to allow juvenile documents to be disclosed and released under certain circumstances. Such circumstances would be too numerous for the legislature to state in the Statute which is why it begins the Statute with this phrase.

Here, the Statute provides inspection of the records to both Mother and Father. (33 VSA § 5117(b)(1)(E). It further provides that both parents could be "designated" on a need to know basis. 33 VSA § 5117(b)(1)(F). Finally, either side could argue that full disclosure is warranted under the general catchall opening phrase of the Statute: "Except as otherwise provided. . ." Father submits that our laws provide for disclosure, and release of all information, where both parties have waived any right to confidentiality by, inter alia, submitting this case to the Civil Division.

For these reasons the Vermont Statute provides for records to be disclosed in this case.

Mitigation

For mitigation purposes, respondent acted in good faith while representing KH in a civil matter involving the wrongful death of his 2-year-old son. Respondent had never had a similar case where juvenile records were connected to a civil case. He researched the issues and included his research in a Reply Memorandum (Respondent's Exhibit A.a). Respondent included information in his motion that overlapped with the juvenile records, but information that was also known to KH, a party to the juvenile case. Respondent did not intend to undermine the due administration of justice. Prior to filing his motion, Respondent received advice from a fellow

lawyer regarding the proper filing. He followed that advice. When the Motion for Summary Judgment was filed (January 10, 2020) there was no adverse court decision putting respondent on notice of any possible violation. The first Washington Family Division entry order was dated January 16, 2020; the second decision was issued February 3, 2020.

From the totality of the circumstances, if Respondent made a mistake regarding the filing of the Motion for Summary Judgment, where certain information related to the juvenile proceedings was disclosed, he did so with good intentions and not with the intention of subverting the legal process. Moreover, respondent admitted during the hearing that, considering what he has learned through these proceedings, he would approach a similar issue differently in the future. Accordingly, respondent has taken responsibility for his actions and should not be punished with the severe sanction of suspension from the practice of law. Instead, as discussed more fully below, admonition is appropriate if any sanction is imposed relative to Count 1.

Count 2

Disciplinary Counsel has not proven by clear and convincing evidence that Respondent failed to provide competent representation to criminal client MK., in violation of Vermont Rule of Professional Conduct, 1.1, when during his limited period of representation respondent did not believe he needed to obtain or review a recording of an alleged victim's interview.

In order to meet its burden of proof by clear and convincing evidence, the State must establish a standard of care applicable to obtaining or reviewing recordings of alleged victim interviews during the early part of a case, and that respondent breached that standard of care. The State has not established a standard of care by clear and convincing evidence, or that respondent violated that standard of care in this case. The State offered no expert testimony contrary to the

respondent's expert testimony from Attorney Charlie Martin, or any support for the contention that viewing the victim interview was incompetent under the facts and circumstances of MK's case.

Discussion/Conclusions

Respondent credibly testified that he handled MK's case during the relatively early stages of the litigation - the first seven months. Attorneys Martin, Sleigh and Franklin all agreed that such a case as MK's would generally take more than two possibly three years to get to trial or resolve. It is undisputed that the content of the victim interview was restated (and even quoted) in the probable cause affidavit respondent reviewed with MK. The only issues the respondent had time to meaningfully address in the case were bail/conditions of release (Cobb Ex. B.b, C.c and D.d) and the first plea offer made by the State.

As Attorney Martin opined, whether it is necessary to view a video to assess a plea offer depends on the available information, and that considering the facts of MK's case viewing the video was not necessarily required to meet the standard of care. In MK's case, the documentation, affidavit of probable cause, and written statements were more than adequate for the Respondent to assess the strength of the State's case at that stage of the litigation. Moreover, it is uncontested that MK was not willing to even consider a jail sentence or guilty plea at the time, so respondent considered the written excerpts of the victim interview sufficient relative to advising MK at that time. Respondent did not believe the State's plea offer including 3 years to serve was a good offer, and MK summarily rejected it. MK maintained his innocence, and due to the uncontested delay expected in such serious criminal cases it was reasonable for respondent not to view the video until, as Attorney Franklin testified, it was time to determine which

depositions to take. Attorney Sleigh viewed the video apparently in that light, not relative to any consultation regarding the rejected settlement offer.

In addition, it is undisputed that plea offers are often presented and considered absent any evidence other than the affidavit of probable cause. During the early stages of a case, prior to depositions even being scheduled, such as the first seven months during which the respondent represented MK, it is clearly unnecessary to view videos the contents of which are set forth in written material provided by the State. It is undisputed that MK's case was not impacted whatsoever by respondent's decision not to view the subject videos. It is undisputed that respondent's case has indeed continued to be pending for over two years and has still not resolved. It is undisputed that MK's attorney appointed to represent him in Caledonia County also chose not to review the victim(s)' videoed statements while consulting with MK regarding the State's early plea offers in that county, and Attorney Franklin justifiably considered his own representation to be competent. Thus, there is no factual or legal basis upon which the Panel could conclude that respondent violated Rule 1.1, or failed to provide competent representation, simply by choosing not to view a video that was not necessary to watch during respondent's limited period or representation.

Mitigation

Here, even if the Board were to conclude that respondent's duty of competence compelled him to watch the video during his period of representation, despite MK's insistence that he would not accept a plea deal requiring an admissions and three years incarceration, the State cannot show that MK suffered any harm. As Attorney Sleigh stated during his testimony, respondent's work had no negative impact on the case. As discussed more fully below, the lack

of harm or potential harm in this instance warrants a private reprimand relative to Rule 1.1 if a violation is found.

Count 3

Disciplinary Counsel has not proven by clear and convincing evidence that Respondent failed to provide diligent representation to his criminal defendant client MK, in violation of Vermont Rules of Professional Conduct 1.3, by not filing a second motion to amend MK's conditions of release in Windsor County arguing that MK should have in-person contact with his children after respondent's prior filing resulted in telephone contact only.

Discussion/Conclusions

Respondent's expert, Charlie Martin, as well as the testimony of Attorney Franklin, provides expert guidance establishing that respondent did not breach his duty of diligence. Attorney Martin, an experienced criminal defense lawyer, has set forth the standard that governs attorney's actions on behalf of their clients. According to Attorney Martin, lawyers are in charge of making tactical decisions, such as whether to file a particular motions, and the clients make the more general decisions such as whether to accept a particular plea agreement.

The State has not offered any expert testimony contradicting Attorney Martin's opinion, nor has there been any presentation of facts or law to explain away the Rule 1.2(a) allocation of responsibility upon the attorney to determine the means of meeting clients' goals. It is undisputed that the respondent met with and communicated with MK regularly, that MK expressed his desire to see his minor children in person but that respondent counseled against filing a contested motion. Respondent took those actions he believed appropriate under the circumstances to meet MK's goals. As demonstrated by MK's termination of respondent's

representation and hiring Attorney Sleigh, when such a disagreement arises between attorney and client it is appropriate to change counsel. It is not appropriate for the replaced attorney to face disciplinary conduct sanctions because their view of the proper means of pursuing the client's goals differed from replacement counsel's.

The record discloses no evidence whatsoever that MK ever directly asked Respondent "to file another motion" to amend conditions of release, much less that there were multiple requests to that end. MK voiced his goal, and asked the respondent to help MK to be permitted to see his children in person. However, it is undisputed that respondent could only file a motion to amend conditions of release in Windsor County, and that even if such a motion were granted Attorney Franklin would have had to file a similar motion in Caledonia County for the goal to be achieved. Respondent testified credibly that he repeatedly advised MK that the best way to achieve the goal of having in-person contact with his children was by agreement by the Caledonia and Windsor County prosecutors. Respondent undertook efforts to achieve such an agreement, but was unsuccessful. Such a lack of success in negotiations, or preference as to the means of achieving a client's goals, should not be grounds for a professional conduct violation. Reasonable minds may clearly differ as to the appropriateness of litigating a contested motion in the context of the matter before the Panel. Here, there were multiple reasons respondent believed his approach was appropriate, which he communicated to MK:

First was respondent's above-noted limitations relative to representing MK in Windsor County only. Second, Respondent believed it could work against MK to file a contested motion in Windsor, which was supported by the testimony of Charlie Martin relative to the "attitude" of prosecutors. In addition, as respondent testified, forcing the Windsor State's Attorney to meet

with the victim to review the case and thus having the State to become more familiar with the facts in order to prepare for such a motion hearing could be damaging to MK's case. Such a motion posed the risk of creating more "news" about the case and keeping the criminal conduct current in the news cycle; further a denial by the Judge - since the conditions of release had already been modified once in June 2019 to permit the Facetime/Phone contact with MK's children - was a justified concern, regardless of the ultimate outcome of Attorney Sleigh's later motion. Respondent was concerned about creating a more adverse atmosphere contrary to respondent's goal of trying to "lower the temperature" of the case so that he could try and work with both counties on a global resolution.

Respondent did undertake specific efforts to obtain consent to amending MK's conditions of release. Respondent indisputably met with Caledonia Deputy State's Attorney Tom Paul in October 2019 to try and reach an agreement and Attorney Paul was unwilling to agree to such an amendment. Counsel communicated this result to MK. However, respondent also advised MK that this could be revisited after more time had passed (respondent counseled MK to show the State he could comply with conditions of release, was not a danger to anybody, and the issue could be revisited at a later time), which was successfully done later by Attorney Sleigh.

Finally, there were other considerations that impacted respondent's strategy relative to conditions of release in MK's case. MK was on 24-hour curfew and was not seeing his children in person. Respondent discussed these conditions as being punitive in nature. Respondent further advised MK that punitive conditions can be a benefit in the long run when attempting to negotiate a global plea agreement. Had the conditions not been further amended and respondent remained counsel of record, then respondent could have later argued that MK had been

effectively punished with a 24-hour curfew, during which he was not allowed to see his own children. Attorney Sleigh's successful motion, while it may have met MK's short-term goal of seeing his children in person, arguably made settlement more difficult in the long run. If MK ultimately is found guilty or pleads guilty and receives a sentence of approximately three years to serve (or more) then perhaps it will be Attorney Sleigh's strategy, and not respondent's, that is viewed in retrospect as lacking. Certainly, if respondent were allowed to see his children in person and an allegation of further criminal conduct resulted, respondent's strategy would have been prescient. Regardless, respondent was entitled to take the view that the conditions of release served a strategic purpose, and that amending them through further contested litigation was not the best means of achieving MK's long-term goals. That MK disagreed and found alternative counsel willing to pursue a contested motion is of no moment as to whether respondent violated Rule 1.3, and the only expert opinion presented on the issue is in respondent's favor. Therefore, no lack of diligence in violation of Rule 1.3 can be established on the record before the Panel.

The lack of evidence establishing a violation of Rule 1.3 in this case is thus demonstrated by the information that is not known relative to the amendment of MK's conditions of release. Did the filing of the motion make the Windsor prosecutor more hostile to MK? Did the Windsor prosecutor meet with the victim because of the motion and prepare for the contested hearing? And, by doing so, did the Windsor prosecutor better prepare the victim for an ultimate trial, which would have gone less favorably for the State had the motion never been filed? Did the "victory" of winning the motion and getting the Conditions modified after the State opposed the motion, harden the State's position and make the State believe that MK was no longer suffering

any real punitive sanction? Did the filing of the motion put the whole case back in the news cycle and breathe new life into a case that was for the most part dormant up until the filing of the motion to modify Conditions of Release? In the long run, will MK having normalized his contact with his children actually result in a harsher sentence than could have otherwise been negotiated? These are all issues that were considered by respondent and were reasons that respondent attempted to achieve the goal of allowing MK to see his children without doing anything to jeopardize the overall goal of achieving the best possible outcome in the case, i.e, avoid jail time and reach a reasonable global agreement.

It is undisputed that respondent had frequent contact with MK and discussed the issues related to amending conditions of release, both on the phone and in person with MK. It is therefore reasonable to infer that the tactical decision about how to achieve the goals related to amending the conditions was well thought out and was not neglected. Certainly, there is insufficient evidence to prove by clear and convincing evidence that respondent's approach to MK's conditions of release was the result of a lack of diligence - instead it was the result of a disagreement between client and attorney as to the best means of achieving MK's goals. Such a difference in strategy is not, however, a violation of Rule 1.3.

Mitigation

As more fully discussed below in the event the Panel finds a violation, considering MK's conditions were amended within a month of terminating respondent, and further considering the importance of allowing attorneys to determine the means by which they believe their work should be directed to meet their clients' goals, only a private reprimand is warranted on this count.

Count 4

The State has not proven by clear and convincing evidence that Respondent impermissibly disclosed confidential client information to a third-party who did not share the attorney-client privilege, in violation of Vermont Rule of Professional Conduct 1.6, bassed on an email addressed to MK's newly engaged attorney while respondent still represented MK, although the email contained details about BA's criminal case.

The subject email and its contents are of record, but the record does not establish that the subject information was actually shared by respondent. If it was shared, the disclosure occurred between respondent while he was still counsel of record for MK, and Attorney Sleigh who was also representing MK at the time. It is critical that lawyers to be permitted to speak freely about matters relating to their common client. Although Vermont caselaw is lacking in this area, the Ninth Circuit's exposition of the joint defense privilege is instructive:

> [T]he joint defense privilege is "an extension of the attorney-client privilege." *United States v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000) (explaining that a JDA had established an implied attorney-client relationship between the codefendants and their counsel); *see also United States v. Austin*, 416 F.3d 1016, 1021 (9th Cir. 2005) (recognizing joint defense privilege as extension of attorney client privilege that "protects not only the confidentiality of communications passing from a party to his or her attorney but also 'from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and [**8] undertaken by the parties and their respective counsel'") (quoting *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989)). The privilege is also referred to as the "common interest" privilege or doctrine, because it has not been limited to criminal defense situations or even situations in which litigation has commenced:
>
> Whether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential litigation is civil or criminal, the rationale for the joint defense rule remains unchanged: persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims. *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990).

United States v. Gonzalez, 669 F.3d 974, 978 (9th Cir. 2012). In this case, where two attorneys represent the same client, the joint defense privilege rationale should be viewed as entitling respondent to rely upon Attorney Sleigh to maintain confidences shared in the context of the joint representation.

In addition, the record in this case does not establish that Attorney Sleigh received the subject communication, much less that MK was ever privy to the information contained therein. The document introduced into evidence was addressed to Attorney Sleigh and his legal secretary, Jennifer Cleveland. During his testimony, Attorney Sleigh never stated that he had received the email from Attorney Cobb, reviewed it, or that he was familiar with its contents. The State has the burden to show that there was a communication from respondent that was actually received by a third party. Here, the State has shown that there was an email generated by respondent, which lists Attorney Sleigh as a recipient. However, there was no evidence adduced at the hearing establishing by clear and convincing (as opposed to the preponderance) of the evidence that Attorney Sleigh or any other third-party ever actually received the subject communication. For this reason, and in reliance on the principles underlying the joint defense privilege as stated above, the State has failed to prove the essential element of publication to a third party who did not share the attorney-client privilege.

Mitigation

Finally, as discussed below, for mitigation purposes, if a violation is found respondent submits that there was no harm caused to BA. The communication was made to another attorney during the representation of MK, whom both respondent and Attorney Sleigh represented at the time. The communication did not disclose sensitive information related to BA for some purpose

related to him; rather, the communication was meant to provide context to the respondent's reasoning that MK's criminal case should be transferred from Caledonia County for global resolution. There was no improper or selfish motive, and the respondent did not benefit from the communication.

Count 5

Disciplinary Counsel has not proven by clear and convincing evidence that Respondent intentionally engaged in conduct involving dishonesty or misrepresentation relative to the substance and circumstances of his reconstructed Freshbooks record, in violation of Vermont Rule of Professional Conduct 8.4(c).

Discussion/Findings

The summary of Respondent's work is outlined in State's DC-15. As reflected in the summary, the uncontroverted testimony of record establishes that respondent had worked diligently for MK during the seven months of his representation. Respondent was first notified of MK's charges through a family member, and traveled to St. Albans to meet with the State and to review the Information and Affidavit of Probable Cause. However, the State did not have any documents from Windsor at that time. The next day, Respondent returned for the arraignment. At the arraignment, respondent reviewed the initial discovery, met with MK, and appeared on his behalf to enter not guilty pleas. MK remained in custody at that time. Thereafter, Respondent entered his appearance in Windsor County and filed a Motion to Review Bail and Conditions of Release. The Windsor Court scheduled a hearing and the respondent appeared with MK. The Court agreed to release MK and modified conditions of release to permit him to have

phone/facetime contact with his children. MK was released to his residence in Lowell, Vermont where he lived with his fiancée, ES, and his mother.

Over the following several months, Respondent met with MK at his residence to discuss the case and to discuss various options on multiple occasions. The State had offered a plea agreement which would involve a guilty plea to Lewd & Lascivious with a child, 3 years to serve, and then probation (3-15 years split to serve 3 years). MK refused to consider any such plea agreement, as he maintained his innocence and was unwilling to agree to an incarcerative sentence. Respondent ultimately had the goal of extending dates and allowing time to pass to try and either (1) consolidate the Windsor and Caledonia cases, or (2) get one or more of the dockets transferred to Washington County. Respondent and MK communicated about the importance of the "passage of time" to MK's case, and the benefit of allowing time to pass so that the case was less newsworthy and not at the forefront of the prosecutors' minds.[1] Further, there was discussion about showing that MK could comply with conditions of release for an extended period of time that would assist with plea negotiations. Finally, there was discussion about the punitive component – e.g. 24 hour curfew and no in-person contact with his children – that could further help with plea negotiations.

While some of the dates provided in respondent's Freshbooks summary were not accurate, the events and overall work he performed was generally accurate. Respondent repeatedly acknowledged at hearing that the Freshbooks summary was a reconstruction of his work, and disciplinary counsel's misunderstanding of that fact based on the document (which itself indicates the date it was created) does not mean respondent committed a professional

[1] The original prosecutor handling MK's case indeed left the Windsor County State's Attorney's Office (due arguably from MK's perspective only to the passage of time) during MK's case and will not be the prosecutor handling the case when it is ultimately resolved by way of plea agreement or trial.

conduct violation by providing that document upon disciplinary counsel's request. The summary constitutes a good faith effort to provide information to elucidate the work respondent undertook on MK's behalf. Further, there is no evidence that respondent's mistakes or errors were intentional, or that respondent intended to deceive or misrepresent the facts. Instead, respondent did the best he could to recreate the time he devoted to MK's matter, based on his calendar, notes and a portion of his phone records. The fact that some of the information in the summary was inaccurate does not mean it was presented dishonestly. Instead, the obvious errors suggest that respondent simply made mistakes when reconstructing his time, and he should not be sanctioned for those unintentional errors. Respondent's answer was not sworn, and there is no evidence of record that respondent actually intended his Freshbooks summary to be presented as a record that was kept during the performance of his work on behalf of MK. Instead, the summary was clearly intended to show that the flat fee respondent charged was reasonable, which it would be even just for the undisputed court appearances and documented communications. Therefore, no violation of Rule 8.4(c) was established on the record before the Panel.

Sanctions Analysis - Aggravating and Mitigating Factors

Aggravating factors under ABA Standard 9.22

The panel may consider eleven enumerated factors in aggravation when determining an appropriate sanction. The evidence supports the following conclusions relevant to these factors.

a. Prior disciplinary offenses: Respondent has no prior disciplinary history, so this factor does not apply.

b. Dishonest or selfish motive: This factor does not apply. Respondent did not seek to benefit from any of the conduct alleged, met with disciplinary counsel and provided full disclosure of

the information available to him, as well as reconstructing his time devoted to MK's case to the best of his ability. To the extent there are mistakes in respondent's Freshbooks summary those were unintentional errors, and respondent's fee was so low considering the significant time he spent just traveling to court and meeting with MK that there is insufficient basis to find that the Freshbooks summary was presented due to a dishonest or selfish motive, rather than as a result of not keeping track of time on a flat fee matter then attempting to imperfectly reconstruct that time based on available information.

c. Pattern of misconduct: This factor does not apply as all of the allegations are disparate.

d. Multiple offenses: This factor does not apply considering the absence of evidence to establish violations of multiple offenses.

e. Bad faith obstruction of the disciplinary proceeding: This factor does not apply. Respondent participated with counsel in the disciplinary proceeding in good faith.

f. Submission of false evidence, false statements, or other deceptive practices during the disciplinary process: This factor does not apply, considering any inaccuracies in the Freshbooks summary provided by respondent were the result of mistake rather than intentional deception.

g. Refusal to acknowledge wrongful nature of conduct: This factor does not apply relative to Count 1, where respondent acknowledged that considering what he has learned during the disciplinary process he would approach things differently in the future. Likewise, regarding Count 5, respondent testified that he now keeps track of his time devoted to legal work as it is performed so he may avoid having to undertake such an error-prone process of explaining his work retrospectively in the future. Regarding Counts 2, 3 and 4, for the reasons stated above, respondent at the time the work was performed respondent thought he was conducting himself

appropriately. He was not asked at the hearing whether he would take a different approach relative to those counts in the future, but if ultimately found in violation of the Rules respondent has demonstrated a willingness to acknowledge his mistakes.

h. Vulnerability of victim: This factor does not apply, because there was no actual harm caused to the putative victims. In addition, MK demonstrated an ability to hire alternative counsel when he deemed appropriate.

i. Substantial experience in the practice of law: Respondent has practiced law for more than 10 years.

j. Indifference to making restitution: This factor does not apply to the circumstances of Respondent's matter, as no restitution has been sought relative to the alleged violations.

k. Illegal conduct, including that involving the use of controlled substances: This factor does not apply, because only Count 1 raises the spectre of potentially illegal conduct, and there is insufficient evidence to establish that even if a violation occurred any criminal statute was violated.

Mitigating factors under ABA Standard 9.32

The panel may consider thirteen enumerated factors in mitigation when determining an appropriate sanction. The evidence supports the following conclusions relevant to these factors.

a. Absence of a prior disciplinary record: This factor applies, because respondent has no prior disciplinary record.

b. absence of a dishonest or selfish motive: This factor certainly applies to Counts 1 - 4, and regarding Count 5 respondent submits this factor applies because any inaccurate information

provided was due to inadvertence or mistake, not an intent to deceive. None of the counts related to any pecuniary motive.

c. Personal or emotional problems: This factor does not apply.

d. Timely good faith effort to make restitution or to rectify consequences of misconduct: Regarding Count 1, respondent did file a Motion with the Civil Division to order the subject juvenile records to be provided, but the case settled before that motion was heard. Regarding Counts 2, 3 and 4, no such action was available. Regarding Count 5, respondent promptly acknowledged that his Freshbooks summary was a general reconstruction of the work he performed on behalf of MK, and that he had not kept records of his work as it was performed, in an effort to clarify the process by which the summary was created.

e. Full and free disclosure to disciplinary authority or cooperative attitude toward proceedings: This factor applies, because respondent provided all information requested of him to disciplinary counsel, and was cooperative and forthcoming with the Panel during the hearing.

f. Inexperience in the practice of law: This factor does not apply.

g. Character or reputation: This factor does not apply.

h. Physical disability: This factor does not apply.

i. Mental disability or chemical dependency: This factor does not apply.

j. Delay in disciplinary proceedings: This factor nominally applies due to the delays caused by the COVID-19 global pandemic.

k. Imposition of other penalties or sanctions: This factor applies, because respondent was disciplined in his role as a judge for the same email that forms the basis of Count 4.

l. Remorse: This factor applies relative to respondent's acknowledgment to the Panel that he would approach the issue of juvenile records differently in the future, and that this matter has caused him to keep more careful track of the time he spends devoted to each legal matter he handles.

m. Remoteness of prior offenses: This factor does not apply.

Sanctions Analysis for Each Count and Cumulatively:

Private Admonition or Public Reprimand is the Appropriate Sanction(s)

The purpose of sanctions imposed under the Rules of Professional Conduct is "to protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar." In re Berk, 157 Vt. 524, 532 (1991). See also, In Re PRB Docket No. 2016-042, 154 A.3d 949, 15 955 (Vt. 2016) ("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.") (quotations omitted). In determining a sanction for misconduct, the panel looks to the ABA Standards for Imposing Lawyer Sanctions and prior case law. In re Andres, 2004 VT 71, ¶ 14. Under the ABA Standards, the panel considers (1) the duty violated; (2) the lawyer's mental state; and (3) the extent of the injury caused by the violation. Based upon these considerations, the ABA Standards indicate a "presumptive sanction," which then may be modified by aggravating or mitigating factors. See ABA Standards, Theoretical Framework at xviii; § 3.0 at 125 (2019).

Here, private admonition or public reprimand is the appropriate sanction(s) under the ABA Standards for Imposing Lawyer Sanctions.

In the context of sanctions, "knowledge" is "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." ABA Standards at xxi. "Negligence" is "the failure of a lawyer to heed 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's mental state relative to any violation found by the Panel was negligence. Respondent's memorandum in the juvenile matter and his testimony at hearing establish that he believed that the subject information related to juvenile matter was permitted to be presented to the Civil Division, in particular to prevent the opposing party from making unfettered misrepresentations to the Court that were demonstratively false based on the facts established in the juvenile case. There is insufficient evidence that respondent knew he was violating any rules, or that he intended to frustrate the due administration of justice. Instead, the respondent's conduct was at most negligent. Regarding Counts 2 and 3, respondent could only have been at most negligent, as he had sufficient experience to handle MK's case and was pursuing a defined strategy. If any violation occurred as to competence or diligence, it was due to differences between attorney and client as to the best means of achieving the client's goals, and the appropriate work that should be conducted relative thereto. Regarding Count 4, respondent's email proffered as having been sent to Attorney Sleigh was at most a mistake in the context of a joint representation, and was not intended to disseminate confidential information. Regarding Count 5, as discussed more fully above, while respondent made errors in his summary of work performed for MK, those errors were not intentional and he did not knowingly or intentionally set out to deceive.

Regarding the extent of injury, the extent of injury is defined by "the type of duty violated and the extent of actual or potential harm." ABA Standards § 3.0 at 138. Here, there is either no actual harm, or the actual harm is only minimal. There is no evidence any member of the public actually learned of the disclosures contained in respondent's memoranda to the Civil Division. MK's replacement counsel testified that respondent's work had no impact on the outcome of the case whatsoever, and respondent only represented MK for the early stage of a case pending in one county where other multiple charges were pending in another county, so MK could not have been harmed by respondent's alleged lack of diligence or competence. Respondent indisputably provided substantial work for MK, traveled to St. Albans, Lowell and White River Junction on MK's behalf, and assisted MK with modifying his bail/conditions of release so MK could return home and have phone contact with his children. Respondent's email purportedly received by Attorney Sleigh, containing confidential information, was not disclosed to anyone (the record does not even support the contention it was ever received and the confidential information reviewed by Attorney Sleigh), and the client only learned of the disclosure due to disciplinary counsel's communications in that regard. Regarding Count 5, respondent readily acknowledged at hearing that he had retrospectively compiled an exposition of the work performed for MK (because he was charging a flat fee he did not need to keep track of time as the work was performed) and no harm was caused to any person by the inaccuracies in the subject Freshbooks summary.

Respondent acted negligently relative to alleged violations of duties to two (2) clients, limited third parties who were (and probably still are) unaware of the issues, and regarding Count 5 allegedly to the profession. There was no actual injury, and any potential injury (other than

concerning perception of the public) is highly speculative and likewise minimal. Regarding aggravating and mitigating factors, they are not significant in this case on either side of the ledger and the following ABA presumptive standards relative to negligent violations are appropriate:

Count 1 - Under ABA Standards, Section 5.14 Admonition is generally appropriate when a lawyer engages in any other conduct (not criminal) that reflects adversely on the lawyer's fitness to practice law. Alternatively, under Section 5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct (not criminal) that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law. Similarly, under ABA Standards, Section 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. Alternatively, under 6.14 Admonition is generally appropriate when a lawyer engages in an isolated instance of neglect in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding.

Count 2 - Under ABA Standards, Section 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.

Count 3 - Under ABA Standards, Section 4.44 Admonition is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client.

Count 4 - Under the ABA Standards, Section 4.24 Admonition is generally appropriate when a lawyer negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes little or no actual or potential injury to a client.

Count 5 - Under the ABA Standards, Section 6.14 Admonition is generally appropriate when a lawyer engages in an isolated instance of neglect in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party. Alternatively, under Section 6.13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

When considering the issue of sanctions, panels also generally look to prior cases to compare the sanction and violations in those cases to the case before it, with the objective of achieving proportionality and consistency within the body of attorney discipline law. See, e.g., In re Neisner, 2010 VT 102, ¶ 26.

Regarding Count 1, the Panel's analysis if it finds a violation will likely turn on whether the alleged conduct is perceived as potentially criminal. Respondent submits that there is no statute criminalizing respondent's disclosure of information that he did not obtain directly from

the Court or DCF. The documents he received were not marked as confidential and his client had knowledge of the same matters. Respondent's mental state was negligent, and he had no selfish or improper motive, but instead extensively briefed his reasons for believing the subject information was appropriately before the Superior Court, indicating that he had a good faith belief that he was complying with the law of waiver applicable due to the contested litigation and the importance of providing the Civil Division of the Superior Court with information consistent with the established findings in the juvenile matter.

However, even if the Panel finds a knowing violation, suspension is not appropriate. This case does not involve as serious a violation as recent cases where suspension was imposed. In In re Adamski; 2020 VT 7, the respondent received a fifteen-day suspension for engaging in intentionally dishonest conduct towards her law firm, which involved hiding a settlement check that could potentially benefit her financially. The conduct was intentional and was intended to financially benefit the attorney or those close to her. In In re Bowen, 2021 VT 7, the respondent received a three-month suspension for using information relating to the representation of a client to the disadvantage of the client in a property transaction and for disclosing confidential client information for the attorney's own financial benefit. In each of these recent cases, the respondent-lawyer was a highly experienced practitioner who engaged in knowing violations of the rules of professional conduct, but for their own financial benefit. Because respondent in this case did not take the actions complained of for his own financial benefit, but instead his purpose was to ensure that the Civil Division was not misled and the confidentiality of juvenile records would not be used as an improper shield to commit a fraud on the Court, this case should be addressed with less severity than Adamsky or Bowen.

Regarding Counts 2 and 3, the case In Re: Carolyn Adams, PRB Decision 225 sets forth a reasonable explanation of when a public reprimand is appropriate for violations of Rules 1.1 and 1.3. The reasoning of that case applies similarly to the case before the Panel if Rule 1.1 and/or 1.3 violations(s) are found. There, as here, there was little actual harm to clients (although in that case there was reason for the clients to experience extreme anxiety due to the failure of the respondent to attend hearings), but due to the negligent nature of the conduct suspension was found not to be warranted. Likewise, Count 4 - although it involved the disclosure of confidential information - involves a similar level of culpability and little or no actual harm to the client.

The case of In Re: Kenneth Merritt, PRB Decision 231, provides useful guidance as to Count 5. There, the Hearing Panel concluded public reprimand was appropriate where the respondent knowingly made false statements, but there was no discernable injury to any person.

In summary, the ABA Standards and analysis of recent PRB decisions indicate admonition or reprimand, not suspension, is warranted even if violations are found relative to all counts in this case. As less violations are found, less severe sanctions are warranted. A private admonition or public reprimand (depending on the violations established by clear and convincing evidence) would reflect the seriousness of the violations, deter future misconduct, preserve the public's confidence in the bar and fall in line with applicable standards and prior cases.

DATED at Stowe, Vermont on January 3, 2022.

RESPONDENT:

By: 

Brice C. Simon, Esq., his attorney