[01-Nov-1991]

PCB NO. 20

STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

In re: Vincent Illuzzi
PCB File #89.47

This matter was heard before a Professional Conduct Board hearing panel comprised of Donald Marsh, Karen Miller, and Richard Brock, Chair. The hearings were held on November 19, 20, 1990 and January 14, 1991. Bar counsel was Wendy S. Collins. The Respondent was represented by David Putter, Esq. Based upon the evidence and documents presented, the Panel recommends to the Board that it find as follows:

1. Respondent has been a member of the Vermont Bar and has been practicing in Vermont since 1979. Respondent's practice is devoted primarily to personal injury work on behalf of Plaintiffs.

2. Lawrence Miller, Esq. has been a member of the Vermont Bar since 1962. Both Government Employees Insurance Company (GEICO) and Travelers Insurance Company (Travelers) have been clients of Mr. Miller for over 20 years. The bulk of his personal injury practice is devoted to representation of the defense. Mr. Miller was, at material times, a partner in the then law firm Miller, Cleary and Faignant.

FINDINGS RELATING TO TRAVELERS
INSURANCE COMPANY

3. Mr. Illuzzi represented Jeannine Renaudette in a personal injury case. This case arose from an automobile accident in which she was a passenger in the family automobile driven by her husband, Stanley Renaudette. The Renaudette vehicle was insured by Travelers Insurance Company.

4. Respondent sought settlement of the claim directly with Travelers in the spring of 1989. However, he and the Claims Supervisor, Linda Fritsch, were unable to agree as to the value of the claim. Linda Fritsch believed the claim was defensible on an assumption of the risk theory. Respondent demanded the policy limits.

5. Mr. Illuzzi contacted Linda Fritsch by letter dated March 28, 1989, (Exhibit 1), and again on April 19, 1989 (Exhibit 2).

6. Respondent filed a lawsuit on behalf of Mrs. Renaudette in the early summer of 1989. The Travelers retained Miller, Cleary and Faignant to represent the interests of Travelers and the insured Stanley Renaudette. Miller, Cleary and Faignant entered its appearance in the case.

7. After the lawsuit was commenced, and after Respondent had notice

that Mr. Faignant had entered his appearance, Respondent continued to contact Travelers directly regarding this case. Authorization for this contact was neither requested nor obtained.

8. At some time prior to September 26, 1989, Respondent telephoned Linda Fritsch, the assistant manager of Travelers, in an effort to settle the case. Authorization for this contact was neither requested nor obtained. He was then notified by Ms. Fritsch that the Travelers was represented by Miller, Cleary and Faignant and that Respondent should talk to the lawyers. This was Respondent's first notice that Travelers was represented by counsel.

9. Mr. Illuzzi believed that Travelers was creating a situation in which it might be susceptible to a bad faith claim. He wrote to Linda Fritsch's supervisor, Daniel Heavren, and raised that issue, acknowledging that Miller, Cleary and Faignant were involved (Exhibit 3). Authorization for this contact was neither requested nor obtained. 10. On September 28, 1989, Ms. Fritsch acknowledged receipt of the September 26th letter and advised the Respondent:

> "I have forwarded your letter to our attorneys, Miller, Cleary and Faignant, Limited. I expect that they will be in touch with you shortly to discuss this matter." (Exhibit 4)

This letter was the second notice that Travelers was represented by counsel.

11. On September 28th, Mr. Illuzzi again wrote to Daniel Heavren, apparently responding to Ms. Fritsch's letter (Exhibit 4) and ignoring the notice that the matter had been forwarded to Miller, Cleary and Faignant. Respondent stated that Travelers' view of the law regarding liability was incorrect:

> "If you want to keep the meter running on your legal costs and expenses in this case, that is a decision which is up to you." (Exhibit 5)

Authorization for this contact was neither requested nor obtained.

12. On September 29, 1989, Respondent again wrote to Mr. Heavren, transmitting to Mr. Heavren a copy of the seminal Vermont case on assumption of the risk. Sunday v. Stratton Corp, 136 Vt. 293 (1978). (Exhibit 6). Respondent stated:

> "You should review it to discuss the distinctions between comparative negligence and assumption of risk".

Also enclosed in this communication was a copy of the Satisfaction of Judgment in the Plante v. Johnson case. (Exhibit 25) The Satisfaction of Judgment indicated that Respondent had received $60,024.38 judgment in a case defended by Attorney Lawrence Miller. Authorization for this contact was neither requested nor received. 13. On October 2, 1989, Linda Fritsch again wrote to Mr. Illuzzi stating that "Miller, Cleary and Faignant are

our attorneys in this case. As such, I am at a loss to understand why you keep communicating directly with this office." (Exhibit 7). This is a clear statement that Ms. Fritsch understood Miller, Cleary and Faignant to be representing the Travelers Insurance Company, and that she did not want to be contacted by Mr. Illuzzi.

14. On October 5, 1989, Respondent sent the following letter to Ms. Fritsch (Exhibit 8):

> "I have received one reply to the most letters I have sent you.
>
> That was a three (3) sentence letter of October 2nd which you state that `I am at a loss to understand why you keep communicating directly with this office.'
>
> I think that you know very well I am communicating with your office.
>
> I believe the matter in which this case has been handled, both by your company and the law firm of Miller, Cleary and Faignant may give rise to a bad faith action directly against Travelers and a law firm which you have retained.
>
> I need one further point of clarification.
>
> Is the law firm of Miller, Cleary, and Faignant representing the interests of Travelers Insurance Company?
>
> Thank you.
>
> Sincerely
> /signed/
> Vincent Illuzzi"

Authorization for this contact was neither requested nor obtained.

15. The contacts with Ms. Fritsch ended in a telephone conversation in which Ms. Fritsch told Mr. Illuzzi to contact the Traveler's attorney and not to contact her, and he responded "why should I contact him (Traveler's attorney) he's my adversary." (Fritsch testimony 1-14-91). Authorization for this contact was neither requested nor obtained.

16. Exhibit 6 and Exhibit 25, mailed to GEICO Insurance Company relating to the Plante v. Johnson case, were mailed simultaneously and could have become confused. It is possible that Mr. Illuzzi, or his staff, inadvertently attached a copy of the Plante v. Johnson decision to the wrong letter. The panel is unable to find by clear and convincing evidence that the inclusion was deliberate or that Respondent intended to intimidate or influence Travelers by enclosing a copy of the Satisfaction of Judgment.

17. Insurers sometimes have their adjusters work with Plaintiff's attorneys even though defense counsel has been retained. (See the testimony of Larry Miller and Ann Wooten, James Hanson, Gary McQuesten, and Douglas Richards).

18. There is no evidence of a practice of Plaintiffs' attorneys talking directly to insurance adjusters once they have been told not to do so.

19. On October 11, 1989, Respondent attempted to take the deposition of the insured. Due to some confusion about the scheduling of this deposition, Mr. Faignant did not appear.

20. When Mr. Faignant did not appear, Respondent first telephoned the law firm of Miller, Cleary & Faignant, and was told that Mr. Faignant was not scheduled to take a deposition in the Renaudette v. Renaudette case that day. Respondent then telephoned the Travelers, demanding to know why Mr. Faignant was not at the deposition. As Ms. Fritsch was out of state at the time, Respondent spoke with another representative, George Larson. Mr. Larson had no familiarity with the case. It was Mr. Larson's practice not to telephone his supervisor, Ms. Fritsch, when she was out of the office unless it was an emergency. Respondent demanded to know why Mr. Faignant was not at the deposition. Because Respondent was loud, upset and demanding, Mr. Larson contacted Ms. Fritsch and advised her of the telephone call from Respondent. Authorization for this contact was neither requested nor obtained.

21. Mr. Illuzzi's continued contacts with Travelers personnel induced Travelers Insurance Company to settle the Renaudette case prematurely. The disparaging comments made by Mr. Illuzzi about Miller, Cleary and Faignant injured the attorney/client relationship of that firm with Travelers in this case.

FINDINGS REGARDING GEICO INSURANCE COMPANY

22. Frank Illuzzi and Vicki Plante were injured when the car they were riding in was struck by a car driven by Nancy Johnson. Johnson was under the influence of alcohol at the time of the collision, having recently imbibed alcohol at a bar owned by Cheers, Inc. and at a second bar.

23. Government Employees Insurance Company (GEICO) insured Johnson, as driver of the car involved in the collision, against the claims of both Frank Illuzzi and Vicki Plante.

24. Respondent brought an action on behalf of Vicki Plante against Johnson and Cheers, Inc. in Windham Superior Court (hereinafter Plante v. Johnson).

25. Later, Respondent brought a separate action on behalf of Frank Illuzzi against Johnson and Cheers, Inc. in Windham Superior Court (Illuzzi v. Johnson).

26. After the litigation was filed, GEICO hired Lawrence Miller of the firm of Miller, Norton and Cleary to represent Nancy Johnson and GEICO in both Plante v. Johnson and Illuzzi v. Johnson.

27. On the first morning of the Plante v. Johnson trial, an employee of Respondent called Richard Semcken of GEICO to discuss settlement. Subsequently, when Mr. Miller learned of that contact, he asked that all settlement negotiations be with him. Mr. Illuzzi agreed.

28. Later, during the trial, Mr. Miller called GEICO to advise GEICO of the progress of the case. GEICO informed Mr. Miller that Respondent had just telephoned GEICO and had informed GEICO that the trial was going badly. During that telephone conversation, Respondent had urged GEICO to settle the case.

29. Mr. Miller was shocked that Respondent had communicated directly with his client, having never run into such conduct before. Mr. Miller asked to confer with Respondent privately which they did. Mr. Miller confronted Respondent and asked him if it was true that he had telephoned GEICO.

30. Respondent acknowledged that he had contacted GEICO. Mr. Miller informed Respondent that such direct communication with Mr. Miller's client was inappropriate. Respondent countered that, since GEICO was not a named party to the lawsuit, he did not realize that direct communication was prohibited.

31. Mr. Miller informed Respondent that he represented GEICO as well as the named Defendant. He also stated that he did not believe Respondent could circumvent the requirements of the Code of Professional Responsibility by communicating directly with GEICO when Respondent knew full well that Mr. Miller was representing GEICO in this case. Mr. Miller instructed Respondent to cease communicating directly with GEICO. There was no evidence to contradict Mr. Miller's assertion that he represented GEICO.

32. Respondent asked Mr. Miller if he were going to report the incident to the PCB. Mr. Miller assumed that Respondent was being truthful when he stated that he did not understand that GEICO was an adverse party represented by Mr. Miller. Based upon that assumption, Mr. Miller told Respondent that he would not report this matter.

Mr. Illuzzi denied this conversation relating to possible report to the PCB, but the panel finds his testimony not credible on this point.

33. The case proceeded to a verdict in favor of Respondent's client. Mr. Miller appealed, filing his brief in the Spring of 1988.

34. On June 2, 1989, while the case was still pending before the Vermont Supreme Court, Respondent sent a letter to Richard Semcken at GEICO. The letter states (Exhibit 10):

> "It has been just over two years since the Windham Superior Court jury returned a $50,000 verdict against your insured, Nancy Johnson, following a four-day trial in Newfane.
>
> At the legal rate of interest, 12 percent, on judgments in Vermont, I calculate that you owe at the present time nearly $63,000. In addition, there were court costs of between

$1,100 and $1,400.

Ms. Plante would be interested in waiving the court costs in exchange for your company

paying the judgment plus interest. I am somewhat surprised that you would allow a case of this nature to continue for this long, given the amount of interest which is accruing on behalf of Ms. Plante.

Please get back to me at your convenience.

Thank you.

Sincerely
/signed/
Vincent Illuzzi

Authorization for this contact was neither requested nor obtained.

35. Respondent did not send a copy of this letter to Mr. Miller, although Mr. Semcken promptly forwarded it on to Mr.Miller. (Exhibit 11).

36. Moreover, Mr. Miller had no knowledge that Respondent was communicating directly with his client until Mr. Semcken forwarded a copy of Respondent's letter. Mr. Miller would not have consented to this letter being sent to his client. (Exhibit 12).

37. Upon learning that Respondent was again communicating with GEICO without Mr. Miller's knowledge or consent, Mr. Miller notified the Chairman of the Professional Conduct Board of Respondent's conduct.

38. Mr. IllUzzi continued to be in contact with GEICO, (Exhibits 13, 14, and 16). These discussions concerned the decision of the Supreme Court and the details of paying the judgment. Respondent sent no copies of these letters to Mr. Miller. Mr. Miller did not learn of their existence or their contents until they were shown to him during his testimony at the hearing on this matter. (Transcript p. 238 11-19-90)

PRIOR INFRACTIONS

39. Mr. Illuzzi has a series of prior infractions, including a private reprimand under Docket No. 80.40 for violation of this same Canon--DR-7-104(a)(1). This was issued on November 19, 1980.

CONCLUSION

Regarding the Renaudette claim, it is clear that Mr. Illuzzi was notified not to contact representatives of the Travelers. On the Plante litigation, it is clear that he was told specifically not to talk to GEICO in 1987.

It is clear that in 1989, Mr. Illuzzi recommenced discussions with GEICO. Respondent introduced evidence that Mr. Semcken of GEICO initiated those discussions, but we do not believe that a simple approach by another attorney's client is sufficient to waive the provisions of 7-104. The

Panel believes that, once having been told not to contact "my client" by the attorney of record Lawrence Miller, Mr. Illuzzi was under a duty not to have discussions with GEICO until it was clear that GEICO and its attorney consented. For better or for worse, once an attorney, is retained, he or she is the agent of the client and can speak for the client. This agency is, we believe, under Rule 7-104, essentially exclusive. Once the attorney/client relationship is established, Mr. Illuzzi was not free to discuss the matter with GEICO even though GEICO might have consented.

This rule might appear harsh where the client is a sophisticated insurance company. The adjusters' role, after all, is partly to talk to attorneys. Nevertheless, we do not believe that the Rule sets forth an exception in this circumstance. We believe that the purposes of the Rule are, generally:

1. To prevent overbearing by attorneys and the oppression or discomforture of nonattorneys.

2. To formalize the lines of communications in adverse and disputed matters and to avoid confusion and misunderstanding.

3. To protect the attorney/client relationship by helping the client not to make statements without considering all the legal ramifications.

4. To prevent one attorney from undercutting another attorney.

5. To protect persons who are clients and who have chosen to hire an attorney from having to respond on the disputed and contested matters, the presumption being that the attorney they have hired is more comfortable with the conflict and less likely to be emotionally or personally involved.

These purposes continue to apply even if the communication is initiated by the client.

The Respondent's attorney argues that 7-104(a)(1)'s stricture of no communication with "a party he knows to be represented by a lawyer in that matter" really only has to do with litigation and that "party" means a party in the sense of the person who is a named party in a lawsuit.

We decline to read 7-104 so narrowly. We believe that 7-104 uses the term "party" in a more general sense. We believe that the term "party" relates to "in that matter" and that "matter" is broader than "litigation". Therefore, any person who is represented by a lawyer to deal with a particular problem is covered by Rule 7-104 with regard to that particular problem, whether or not it is a litigation. Therefore, even though neither Travelers nor GEICO was a named party in the lawsuits relating to Renaudette or Plante v. Johnson, they had retained attorneys to advise them "in that matter" and they were covered by 7-104.

The Panel does not place any time limit on 7-104. It believes that, once the attorney/client relationship has arisen with re- gard to "that matter", the Rule becomes self-executing. There- fore, Mr. Illuzzi was not allowed to contact GEICO after his conversation with Mr. Miller unless it became clear that (1) Mr. Miller consented or (2) GEICO was no longer represented by Mr. Miller in that matter.

The Panel is unable to find that either of those two situations

existed.

Even if Mr. Semcken of GEICO had contacted Mr. Illuzzi in 1989, we believe Mr. Illuzzi was responsible for clearing his discussions with Mr. Semcken with the attorney for that party-- Lawrence Miller.

With regard to Travelers and the Renaudette case, the correspondence raises the clear inference that Travelers was relying on the advice of Miller, Cleary and Faignant in the matter. The Panel concludes that Mr. Illuzzi should have refrained from continuing to contact the Travelers until the matter of contact was clarified.

Respondent claims that to make his bad faith argument, he needed to contact Ms. Fritsch's supervisor to be certain that the failure of the company to properly settle was a policy made at executive levels of the company. We believe that the attorney (in this case, Miller, Cleary and Faignant) would, as agent of Travelers, have been equally able to speak for the company on this matter.

Respondent argues that this result will seriously impede the public policy favoring the settlement of cases. The Panel is not so persuaded. The Panel is convinced that the public policy relating to the settling of cases may be served by the direct contact of insurance adjusters with Plaintiff's attorneys. The Panel is also persuaded that those who adjust insurance claims are not in need of protection--they are seasoned business people who understand what they are doing when they deal with attorneys.

However, the Panel feels that 7-104 necessarily makes this the choice of the client and its attorney. That is, once the insurance company or adjuster client has chosen to seek the advice of an attorney "in that matter", and Plaintiff's counsel is on notice of such representation, then that defense attorney must give prior consent for the client to be contacted by Plaintiff's attorney. This may be simply a communication in which the defense attorney notifies the Plaintiff's attorney that he or she consents to discussions between the adjuster and the Plaintiff's attorney.

For those whose memories are good enough to be certain, it is nothing more than a phone call from the defense attorney to the Plaintiff's attorney. At most, it is a letter.

Therefore, we conclude that Mr. Illuzzi violated DR-7-104.

The Respondent cites cases to support its claim that "party" must be strictly construed. Some of these cases appear to relate to situations in which the defense counsel has to decide with whom to speak when an adverse interest arises between the insurance company and the insured. This is not the situation here. We believe that Miller, Cleary, and Faignant "represented" GEICO and Travelers Insurance Company within the meaning of DR-7-104 and EC7-18, absent any controlling authority to the contrary.

We believe that the attorney is the agent of the client and responds to the directions of the client. Where a client insurance company wishes to talk directly to the attorney for the Plaintiff, we believe the insurance company should be free to do so. However, having retained an attorney, it should either obtain the consent of its attorney or it should obtain another attorney. We find it difficult to believe that defense attorneys will not acquiesce in the wishes of insurance companies.

Respondent argues that because there is no Vermont precedent directly on point, he cannot be held responsible for contacting these insurers. The fact that there is no specific Vermont decision on point does not create a due process claim. Lack of specific Vermont caselaw is a common situation. DR7-104(A)(1) is sufficiently clear as to give reasonable notice of the prohibited conduct.

There was also considerable evidence as to the practice in Vermont when Plaintiff's counsel contacts adjusters after defense counsel is retained. That is not the issue in this case. The issue is unauthorized contact between Plaintiff's counsel and insurance adjusters after Plaintiff's counsel has been told not to contact the adjuster.

The standard of proof in these matters is clear and convincing evidence. The panel concludes that it has been shown by clear and convincing evidence that Respondent's conduct violated DR-7- 104(A)(1) by, communicating With persons of adverse interest. It finds that Respondent violated DR-1-102(A)(7) proscribing conduct adversely reflecting on a lawyer's fitness to practice law, when he disparaged Mr. Miller with the suggestion to the client that he was "running the meter." The Panel finds that the Respondent violated DR-1-102(A)(5) proscribing conduct that is prejudicial to the administration of justice by this repeated pattern of contact.

Mitigating factors were considered and none were found.

Factors in aggravation are that Mr. Illuzzi had been told by Lawrence Miller not to talk to "my client", that representatives of Travelers told him to stop contacting them and that he has a prior sanction for violation of the same section of the Code, as well as several other prior infractions.

The Panel was disturbed by the suspicion that Mr. Illuzzi may have made further attempts to disparage Miller, Cleary and Faignant in the eyes of its client. It is not clear to the Panel that this occurred.

The Respondent made three motions to dismiss during the course of the trial. For the reasons recited above, they are denied.

Dated 11-1-91

/s/
Richard L. Brock, Chair

/s/
Donald Marsh

/s/
Karen Miller

APPROVED BY THE PROFESSIONAL
CONDUCT BOARD NOVEMBER 1, 1991

The sanction recommended to the Supreme Court is six months suspension and successful passage of the MPRE.

/s/

J. Eric Anderson

/s/
Anne K. Batten

/s/
Nancy Foster

/s/
Rosalyn Hunneman

/s/
Leslie Black

/s/
Donald Marsh

/s/
Nancy Corsones

/s/
Karen Miller

/s/
Shelley Hill

/s/
Christopher Davis

No. 91-515

In re Vincent Illuzzi, Esq. Supreme Court

Original Jurisdiction

June Term, 1992

Wendy S. Collins, Bar Counsel, Montpelier, for petitioner-appellee

David Putter of Saxer, Anderson, Wolinsky and Sunshine, Montpelier, and Edwin H. Amidon of Roesler, Whittlesey, Meekins & Amidon, Burlington, for respondent-appellant

PRESENT: Allen, C. J., Gibson, Dooley, Morse and Johnson, JJ.

PER CURIAM. Respondent-attorney appeals the Professional Conduct Board's conclusion that he violated three provisions of the Code of Professional Responsibility and the Board's recommended sanction of a six-month suspension from the practice of law. We conclude that the Board failed to adhere to the requirements of its procedural rules when it adopted a second hearing panel report that had not been submitted to respondent. We therefore remand the case to allow respondent to brief and argue before the Board on the basis of the second panel report.

Respondent was charged first with violating DR 7-104(A)(1) (a lawyer shall not communicate with an adverse party known to be represented by counsel without the consent of the party's attorney) for communicating with two insurance companies after they had retained counsel to defend personal injury claims. The second charge against respondent alleged a violation of DR-1-102(A)(7) (a lawyer shall not engage in conduct that adversely reflects on the lawyer's fitness to practice law) for making a disparaging remark about an insurer's defense counsel. Finally, respondent was charged with a violation of DR 1-102(A)(5) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice) for a pattern of improper contacts that resulted in an insurer relinquishing a legal defense.

A three-member panel heard this matter pursuant to A.O. 9, Rule 8(C) and issued its report with findings and recommendations to the full Board in July 1991. Based on this report, respondent and Bar Counsel filed Rule 8(D) briefs and the Board heard oral arguments in early August 1991. The panel then issued a new report, in November 1991, that contained substantially different findings and recommendations than the initial report. For example, the first report contained the following: "Regarding the Renaudette claim, it is not clear that Mr. Illuzzi was ever told not to talk to Travelers." In the second report, without the introduction of new evidence, the language "it is not clear" became "it is clear." Although the first report found only a violation of DR 7-104(A)(1), the second report concluded that respondent had also violated DR 1-102(A)(7) and DR 1-102(A)(5). The Board adopted the second report, which emphasized that respondent communicated with the companies after being advised not to do so. Respondent contends that the Board violated A.O. 9, Rule 8(C) and thereby deprived him of the opportunity to brief and argue the revised finding and conclusions to the Board. We agree.

Rule 8(C) directs the hearing panel to issue a report containing its findings and recommendations and requires that "[a] copy of each report shall be submitted to bar counsel and the respondent." A.O. 9, Rule 8(C). Once a report is issued, Rule 8(D) directs the Board to set dates for the submission of briefs and for oral arguments. A.O. 9, Rule 8(D). The Board then may "affirm or modify the recommendations of the hearing panel, remand the matter for further proceedings before the hearing panel, or dismiss the petition." Id. Thus, the facts found by the panel provide the foundation for the proceedings before the Board. Any changes that the panel makes in its findings must be disclosed to the parties pursuant to Rule 8(C), which triggers the opportunity to present briefs and arguments under Rule 8(D), prior to the Board's issuance of its final report. After final submission of the matter, the Board makes its own findings of fact and conclusions of law, which respondent may then challenge before this Court.

In this case, the panel drafted a second report,* containing findings substantially different than those contained in the initial report. The new panel report eliminated the mitigating factors contained in the earlier report and recommended sanctioning respondent. This second report of the panel was not issued until after the parties' oral argument to the Board. Thus, respondent was denied the opportunity, expressly provided for by Rule

8, to respond to the panel's changed findings and conclusions.

Bar Counsel contends that, in this instance, strict adherence to the rules would exalt form over substance. We disagree. Attorneys appearing before the Board on charges of violations of the Code of Professional Responsibility should be accorded the full measure of procedural safeguards provided by the rules. See In Re Ruffalo, 390 U.S. 544, 550 (1968)(lawyers subject to punishment or penalty are entitled to procedural due process).

---

* In her brief, Bar Counsel characterizes the panel's initial report as an "incomplete working draft due to numerous errors and omissions." This characterization does not aid her case because respondent is certainly entitled to the panel's final report before arguing his case to the full Board.

Inherent in Rule 8 is the principle that a respondent is entitled to knowledge of the material upon which the Board is acting, so that, as the Supreme Court of New Jersey has stated, respondent has the opportunity "not only to refute but . . . to supplement, explain, and give different perspective to the hearer's view of the case." Mazza v. Cavicchia, 15 N.J. 498, 515, 105 A.2d 545, 555 (1954) (agency denied the parties their right to a fair hearing when it relied upon a hearing officer's report that had not been disclosed), see also Tulsa Classroom Teachers Ass'n v. Board of Evaluization, 601 P.2d 99, 102 (Okla. 1979) ("It is essential to fair play and to minimize the risk of fundamental error that, prior to the submission of the examiner's report, it be made available to the parties.") Failure by the Board to follow the requirements of Rule 8 deprived respondent of the opportunity to address the Board concerning the issues raised by the subsequent findings of the panel, and placed evidentiary issues before this Court that should have been addressed by the Board. Therefore, this matter must be remanded to provide respondent with an opportunity to address the second panel report.

In the interest of judicial economy, we address one other issue raised by respondent that likely will confront the parties on remand. Respondent argues that DR 7-104(A)(1) should not be applied to prohibit contact between plaintiffs' lawyers and insurance company adjusters, claiming that (1) such application would be contrary to accepted practice by Vermont attorneys and would therefore violate respondent's due process rights, (2) insurance companies are not named parties in suits between automobile accident plaintiffs and defendants, and the rule, therefore, does not apply in this case, (3) direct contact between plaintiffs' attorneys and insurance adjusters promotes judicial economy and the public interest, and (4) direct contact is necessary to prepare and prove bad faith refusal-to-settle claims against insurance companies.

Due process, in the attorney discipline context as elsewhere, requires notice that an act is punishable at the time it is committed. See Sexton v. Supreme Court Committee on Professional Conduct, 295 Ark. 141, 143-44, 747 S.W.2d 94, 95-96 (1988) (due process violated where state suspended attorney for violation of Model Rules of Professional Conduct, which were not in effect when act committed). DR 7-104(A) of the Code of Professional Responsibility states, in part:

> During the course of his representation of a client a lawyer shall not: (1) [c]ommunicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Respondent does not argue that DR 7-104 was not in effect at the time of the conduct at issue, but rather that the Board applied the rule in a manner contrary to accepted Vermont practice. Given the absence of ambiguity in the rule, we find irrelevant respondent's contention that it is the common and accepted practice for Vermont attorneys to have direct contact with insurance companies whose defense counsel have not consented to such contact. Moreover, we note that the testimony on the practice of insurance attorneys in Vermont is in conflict. The Board did not, then, adopt a novel standard under DR 7-104, apply that standard retroactively to respondent, and thereby deprive him of his due process rights. It simply applied the rule as written.

Despite respondent's arguments to the contrary, we have no trouble concluding that the definition of "parties" under the rule is not restricted to named parties in a lawsuit. The language of the rule suggests no limitation on the word "party." Instead, the rule prohibits communication "on the subject of the representation" with a party that is represented by a lawyer "in that matter." The use of the words "subject" and "matter," rather than "lawsuit," indicates that DR 7-104 applies to all transactions for which lawyers are hired and cannot be construed to imply that its application is limited to cases where suit is filed. See United States v. Galanis, 685 F. Supp. 901, 902 (S.D.N.Y. 1988) ("[DR 7-104(A)(1))] applies to persons retained to handle real estate transactions, administer estates for an executor, seek legislative relief, or any other of the myriad of tasks for which lawyers are employed.") Moreover, we have previously held that, for the purposes of DR 7-104(A)(1), those arrayed on opposite sides of an issue are adverse parties. In re C.I., 155 Vt. 52, 56, 580 A.2d 985, 987-88 (1990). Here, the insurance companies has interests opposed to those of respondent's clients. The rule clearly prohibits direct contact without defense counsel's prior consent.

Other courts have specifically held that DR 7-104(A)(1) precludes a plaintiff's attorney from communicating directly with an insurance company without the prior consent of defense counsel. See Waller v. Kotzen, 567 F.Supp. 424, 426-27 (E.D. Pa. 1983) (DR 7-104 makes it clear that counsel for plaintiff should not discuss settlement directly with insurance company without obtaining consent of defense counsel that insurance company retained for insured defendant); Estate of Vafiades v. Sheppard Bus Service, 192 N.J. Super. 301, 314, 469 A.2d 971, 978 (N.J. Super. Ct. Law Div. 1983) (absent evidence of consent from defense attorney, plaintiff's attorney violated DR 7-104 by conducting settlement negotiations with insurance company).

Because DR 7-104 interposes no meaningful obstacle to direct settlement negotiation between plaintiff's attorneys and insurance adjusters, we need not assess the merits of respondent's argument that policy considerations favor such communication. One can fully adhere to the rule and yet receive the benefits of direct communication by contacting the insurance company's counsel and obtaining prior consent. If consent is not granted, requires that all negotiation be conducted with defense counsel. Further, the rule provides no exception for contacts with insurance companies for purposes of preserving bad faith settlement claims. Therefore, such claims must and can be pursued through defense counsel in the absence of consent to communicate directly with the company.

Remanded for proceedings not inconsistent with this opinion.

BY THE COURT:
/s/

_____
Frederic W. Allen, Chief Justice

/s/

Ernest W. Gibson III, Associate Justice

/s/

John A. Dooley, Associate Justice

/s/

James L. Morse, Associate Justice

/s/

Denise R. Johnson, Associate Justice

ENTRY ORDER

SUPREME COURT DOCKET NO. 92-602

MARCH TERM, 1993

In re Vincent Illuzzi

APPEALED FROM:

Professional Conduct Board

DOCKET NO. 89.47

In the above entitled cause the Clerk will enter:

The decision of the Professional Conduct Board is adopted and its recommendation for discipline is approved. Vincent Illuzzi is suspended from the practice of law for the period of six months, beginning September 1, 1993, during which time he shall successfully complete the multi-state professional responsibility examination.

BY THE COURT:

/s/

Ernest W. Gibson III, Associate Justice

Dissenting:

/s/

John A. Dooley, Associate Justice

/s/

Frederic W. Allen, Chief Justice

/s/

James L. Morse, Associate Justice

/s/

Denise R. Johnson, Associate Justice

No. 92-602

In re Vincent Illuzzi

Supreme Court

Original Jurisdiction

March Term, 1993

Wendy S. Collins, Special Bar Counsel, Montpelier, for petitioner-appellee

David Putter of Saxer, Anderson, Wolinsky and Sunshine, Montpelier, for respondent-appellant

PRESENT: Allen, C.J., Gibson, Dooley, Morse and Johnson, JJ.

PER CURIAM. This case is before us a second time. In In re Illuzzi, ___ Vt. ___, ___, 616 A.2d 233, 236 (1992), we held that DR 7-104(A)(1) (lawyer shall not communicate with a represented party without consent of party's attorney) prohibits lawyers for plaintiffs from communicating directly with defendant insurance companies without the consent of the companies' counsel. We remanded the case to the Professional Conduct Board because the Board "failed to adhere to the requirements of its procedural rules when it adopted a second hearing panel report that had not been submitted to respondent." Id. at ___, 616 A. 2d at 234; see Administrative Order 9, Rule 8C, 8D. That procedural deficiency was remedied when respondent was given an opportunity to address the panel's second report, which the Board again adopted. Respondent appeals anew on the grounds that there are procedural errors in the Board's decision; that the recommended sanction is too harsh because it is based upon an erroneous conclusion that he violated DR 1-102 (A) and DR 1-102(A) (5); and that the Board failed to acknowledge certain mitigating factors, while considering inapplicable aggravating factors. Bar Counsel responds by contending that the recommended sanction is too lenient in light of respondent's long history of unethical conduct and repeated violations of the Code. She recommends that respondent be disbarred or, at minimum,

suspended from practice for three years as provided in A.O. 9, Rule 7A(2). We adopt the Board's recommendation that respondent be suspended from the practice of law for six months.

I.

We begin by chronicling respondent's prior disciplinary record and the incidents that led to the present petition. Respondent was admitted to the Vermont bar in 1979. Shortly thereafter, he received his first reprimand for a disciplinary infraction. In re Illuzzi, 138 Vt. 621, 622, 413 A.2d 1220, 1220 (1980). Then a deputy state's attorney, he was cited for a traffic violation en route to work. The next day, his employer, the Orleans County State's Attorney, wrote a letter to the Washington County State's Attorney's office falsely stating that his deputy was responding to an emergency call regarding a homicide investigation when he was stopped for speeding. This Court publicly reprimanded respondent for requesting that his employer fabricate a story aimed at persuading another prosecutor to dismiss the ticket, or for acquiescing in the false account, in violation of DR 1-102(A) (4) (lawyer shall not engage in conduct involving dishonesty or deceit) and DR 1-102(A)(5) (lawyer shall not engage in conduct prejudicial to administration of justice). Respondent admitted to the falsity of the story and stipulated to the infraction after it became apparent that the story had been fabricated. Less than a year later, respondent received a private reprimand after he stipulated to violating DR 7-102(A)(1) (concealing or knowingly failing to disclose that which attorney is required to reveal), DR 7-103(B) (failing to disclose existence of exculpatory evidence to counsel of criminal defendant), and DR 7-104(A)(1) (communicating with party known to be represented by counsel). In that instance, respondent, still a deputy state's attorney, was sanctioned after the Board found he should have known that a criminal defendant was represented by counsel, but nevertheless allowed the police to interview the accused without counsel present. Not only did respondent fail to seek permission for the interview from the defendant's attorney, he also failed to inform the attorney that the interview had occurred or to furnish the attorney with a copy of the supplementary investigation report that recounted the interview.

In 1983, respondent received another private reprimand for knowingly concealing facts, or making a false statement of fact, when he suggested to the court that his client, who had been released pending trial on other charges, remained incarcerated on the other charges. This conduct constituted another violation of DR 7-102(A)(3). Although a majority of the Board recommended a private reprimand, some members felt stronger action should have been taken. The Board warned respondent that the violations were serious, that he had not acted within the standards of character and behavior expected of members of the bar, and that he must strictly adhere to the ethical standards set forth in the Code of Professional Responsibility.

In August 1987, respondent received yet another private reprimand after the Board accepted a stipulation between respondent and bar counsel stating that he had committed acts prejudicial to the administration of justice, in violation of DR 1-102(A)(5). In that incident, respondent had taken over a case from another attorney. Despite the fact that he knew his client's former attorney claimed part of any future settlement as payment for

services rendered, respondent failed to notify the attorney when the case settled or to resolve the issue of attorneys' fees before disbursing the settlement funds.

The present allegations against respondent resulted from his representation of two plaintiffs in separate personal injury actions. In one case, respondent represented a woman injured in an accident while a passenger in a car driven by her husband. Respondent contacted the insurance company covering the vehicle, Travelers Insurance Company, and attempted to settle the matter with its claims Supervisor, Linda Fritsch. When they could not agree on the value of the claim, respondent filed a lawsuit on behalf of the plaintiff in the Summer of 1989, and Travelers retained a law firm to defend the claim. Respondent continued to communicate directly with Travelers, despite being told by Fritsch that the law firm had entered an appearance and that respondent should speak with counsel rather than the company. He sent letters on September 26 and 28, suggesting that Travelers' counsel had not expeditiously handled the case or made the company aware of the relevant law. In the second letter, respondent made the following statement: "If you want to keep the meter running on your legal costs and expenses in this case, that is a decision which is up to you.

When respondent did not cease direct contact with Travelers, Fritsch faxed him a letter on October 2, in which she reiterated that the company was represented by counsel and stated, "As such, I am at a loss to understand why you keep communicating directly with this office." Three days later, respondent replied:

> I think you know very well why I am communicating with your office. I believe the manner in which this case has been handled both by your company and the law firm . . . may give rise to a bad faith action directly against Travelers and the law firm which you have retained. I need one further point of clarification. Is the law firm . . . representing the interests of Travelers Insurance Company?

Respondent telephoned Fritsch once again and was again told to contact Travelers' attorney. The last direct contact occurred on October 11, 1989, when respondent called Travelers and angrily demanded to know why the company's counsel had failed to show up for a deposition. Shortly thereafter, Fritsch advised the company's attorney to settle the bodily injury portion of the claim for the $20,000 policy limit.

The second incident giving rise to this disciplinary action again concerned respondent's representation of a plaintiff in a personal injury case. Government Employees Insurance Company (GEICO), which was represented by the same law firm that represented Travelers in the other action, insured the defendant in this second case. During the course of the trial in May 1987, defense counsel Lawrence Miller telephoned GEICO's claims representative, who informed him that respondent had just called and had suggested the company settle the case because the trial was going badly. Miller confronted respondent, expressed his dismay that respondent had called the insurer, and stated that both the defendant driver of the car and the insurance carrier were his clients and that respondent should not call GEICO. Respondent told Miller

that he did not know that Miller also represented GEICO, and that had he known, he would not have called. He asked whether Miller was going to report him for an ethical violation. Miller responded that he "would accept his explanation at face value" and would not file a complaint with the Professional Conduct Board. Approximately two years later, while the case was pending on appeal, respondent again contacted GEICO by letter without Miller's permission. Miller then filed a complaint with the Board.

Based on these two incidents, the Board adopted the second panel's determination that respondent violated DR 7-104(A)(1), DR 1-102(A)(7) (engaging in conduct adversely reflecting on lawyer's fitness to practice law), and DR 1-102(A)(5). In the first appeal, we rejected respondent's argument that DR 7-104 (A)(1) should not be applied to prohibit contact between plaintiffs' lawyers and insurance company adjusters, holding that "the definition of 'parties' under the rule is not restricted to named parties in a lawsuit. The language of the rule suggests no limitation on the word 'party.' . . . The rule clearly prohibits direct contact without defense counsel's prior consent." Illuzzi, ___ Vt. at ___, 616 A.2d at 236.

II.

The hearing panel found that respondent violated DR 1-102(A)(7) "when he disparaged Mr. Miller with the suggestion to the client that he was `running the meter.'" Respondent argues that the petition did not provide adequate notice of a violation of this rule, that the rule is unconstitutionally vague as applied to the alleged misconduct, and that the Board's conclusion that he violated the rule is not supported by the evidence. We reject each of these arguments.

The petition cited a violation of DR 1-102(A)(7) with respect to both counts. Count II of the petition, on which the Board based the violation, states that respondent communicated directly with the insurer several times after the company specifically told him to direct his communications to its counsel for that particular matter. The petition alluded to the September 28, 1989 letter on which the violation was founded, noting that in the letter respondent challenged the insurer's legal position and insinuated that the company was wasting money on defense of the case. A copy of the letter was attached to the petition.

Given these factual allegations, respondent received adequate notice of the charge against him. Rule 8C of A.O. 9 requires that the petition alleging misconduct be "sufficiently clear and specific to inform the respondent of the alleged misconduct." Attorney disciplinary proceedings, like other legal actions, require only that notice "inform the lawyer of the nature of the charges . . . in sufficient detail to permit the lawyer to prepare a defense." C. Wolfram, Modern Legal Ethics 3.4.2 (1986); see In re Wright, 131 Vt. 473, 487-88, 310 A.2d 1, 8-9 (1973) (complaint in disbarment proceeding sufficient "if it fairly informs [respondent] of the nature of the misconduct"). Further, while basic due process rights regarding notice apply in disciplinary proceedings, In re Ruffalo, 390 U.S. 544, 550 (1968), the standard for what constitutes sufficient notice of the charge is generally lower than in criminal proceedings. ABA/BNA Lawyer's Manual on Professional Conduct 101:2201 (1984).

Here, notice was not inadequate merely because the petition did not specifically allege that the statements made in the September 28 letter violated DR 1-102(A)(7). The panel found violations based on the conduct

described and the disciplinary rules cited in the petition. We find no violation of due process.

Nor is DR 1-102 (A)(7) unconstitutionally vague or overbroad. The generality of the phrase, "conduct that reflects on fitness to practice law," does make the rule susceptible to varying subjective interpretations. ABA/BNA Lawyer's Manual on Professional Conduct 101:1001 (1987). Nevertheless, the rule has survived due process challenges not only because of the impossibility of enumerating every act that might constitute a violation of professional standards, but because "the everyday realities of the profession and its overall code of conduct provide definition for this type of phrase and thus give adequate notice of which behavior constitutes proscribed conduct." Id. We are not persuaded by respondent's argument, and his brief cites no case law in support of his constitutional challenge to DR 1-102(A)(7).

Respondent also claims that the evidence does not establish that he disparaged attorney Miller by making the "running the meter" comment in the September 28 letter. We agree that this isolated comment, in and of itself, does not clearly disparage Miller. In isolation, the comment appears to be nothing more than a self-serving statement advising Travelers to stop spending time and money defending against the claim. The Board's finding that respondent disparaged attorney Miller, however, is supported by the letter in its entirety and by an earlier letter. Respondent states in the September 28 letter that he felt the company "should be aware of" statutory and case law in Vermont relevant to the then pending case, including the repeal of a statute that might have favored the insurer. The letter warns the insurer that it is "charged with the responsibility of knowing the law in the state," and Suggests that the company was wasting money by "keep[ing] the meter running on . . . legal costs." Respondent also mentions that he had given notice of a deposition to "your legal counsel." The letter was a "follow-up" to another letter respondent had written to the insurer two days earlier, in which he stated (1) he was not aware of any legal authority supporting the insurer's position, (2) attorney Miller's law firm had filed an answer to the complaint without even contacting the insured motorist it represented, and (3) "well after" filing the answer, the firm finally interviewed the insured, who provided information that undermined the insurer's position.

Thus, examined in its entirety and in light of the previous letter, the September 28 letter directly suggested that the insurer's law firm had failed to apprise the insurer of the law governing the case; that this failure had exposed the company to a bad faith claim; and that, given the state of the law, the company's legal expenses were a waste of resources. The thinly veiled insinuation in the letter was that the law firm was profiting from its failure to fully inform the insurer of the state of the law governing the case. We conclude that there was sufficient evidence for the Board to find that respondent disparaged attorney Miller.

III.

Respondent also argues that the evidence does not establish that he violated DR 1-102(A)(5) (conduct prejudicial to the administration of justice). Respondent was charged with violating this disciplinary rule only as to Count II, the matter concerning Travelers. The panel concluded that he violated the rule by his unauthorized direct contact with the insurer. The panel based the violation on respondent's "repeated pattern of conduct," not merely one isolated incident. Following the commencement of the Travelers lawsuit, Ms. Fritsch found it necessary to inform respondent, both orally and in writing, that the insurer had obtained counsel, who would handle further settlement negotiations. After making this point both

indirectly and directly, to no avail, Fritsch wrote, "I am at a loss to understand why you keep communicating directly with this office." Nevertheless, respondent continued to contact the insurer directly, without consent or notice to counsel. The Board's conclusion that respondent's actions demonstrated a "pattern" of misconduct was supported by the evidence and sufficient to establish that he violated DR 1-102(A)(5).

IV.

Next, respondent argues that the Board improperly considered his prior disciplinary infractions in determining the recommended sanction. According to respondent, the Board's reliance upon the prior infractions as an aggravating factor violated due process and the prohibition against retrospective laws because, at the time he "incurred" the prior reprimands, A.O. 9 § 3(e) permitted the Board to consider only prior infractions filed in the previous three years. AS amended, effective January 1, 1982, former A.O. 9 § 3(e) read:

> A record of the issuance of a public reprimand, public censure or admonition shall be maintained by the Professional Conduct Board for a period of three years from the date of its filing. If during that period of time the Board conducts new proceedings involving an attorney who has been publicly reprimanded, publicly censured or admonished, the Board may consider that previous public reprimand, public censure or admonition as evidence of a continuing pattern of misconduct so as to support a recommendation of discipline in the proceeding then pending and to support the discipline recommended.

This provision was deleted by an order, effective July 1, 1989, generally amending the rules governing the operation of the Board. Since July 1989, there has been no limit on the Board's, or this Court's, consideration of prior violations. See A.O. 9, Rule 7B ("Prior findings of misconduct may be considered by the Board or the Court in imposing sanctions.").

We conclude that the Board properly considered the prior infractions in determining the appropriate sanction. First, respondent incorrectly states that 3(e) was in place at the time he "incurred" each of the four prior reprimands, and that all four of the prior infractions predated the instant proceedings by more than three years. The first two infractions were found in February and November of 1980, while the first version of the three-year rule became effective on June 4, 1981. Respondent contends, however, as stated in his affidavit presented to the Board, that the then bar counsel induced him to stipulate to the November 1980 reprimand by representing that an impending rule change would preclude consideration of infractions more than three years old. This contention, which was refuted by the bar counsel, was not pursued before the hearing panel; therefore, we will not consider it here. See A.O. 9, Rule 8D ("The record created before the hearing panel shall be the record submitted to the Board.").

Moreover, respondent's assertion is incorrect because the stipulation that led to the 1987 reprimand was accepted in August 1987, before any formal petition was brought. Accordingly, the Board could have considered it, even assuming the three-year rule applied here, because the petition in the present proceeding was filed in March 1990, less than three years after the 1987 stipulation. Thus, the 1983 infraction is the only prior offense that was both found while the three-year rule was in place and filed more than three years before the present petition.

Apparently, respondent would have the Board apply the three-year rule retroactively to cover the two 1980 reprimands, but not apply A.O. 9, Rule 7B retroactively to cover the 1983 and 1987 reprimands. To justify this position, he claims that allowing the 1989 amendment to expand a jeopardy

period that had already run would impair his "vested" right to the limited three-year jeopardy period guaranteed by the former A.O. 9 § 3. Thus, he argues, this situation is distinguishable from Carpenter V. Department of Motor Vehicles, 143 Vt. 329, 333, 465 A.2d 1379, 1382 (1983), where the plaintiff had argued that the penalty for refusal to submit to a breath test was improperly enhanced, pursuant to an amended statute, because the commissioner had considered DUI convictions that preceded the amended statute. We held that as long as the triggering act, in that case the refusal, occurred after the effective date of the amended statute, consideration of the prior convictions for enhancement purposes was not improper because there would have been no impact on the plaintiff absent the triggering act. Id.; see Erno v, Commissioner of Motor Vehicles, 156 Vt. 62, 65-66, 587 A. 2d 409, 412 (1991) (applying same rationale).

We conclude that Carpenter permits retroactive application of A. O. 9, Rule 7B because A.O. 9 § 3 never precluded the Board from considering prior disciplinary offenses as an aggravating factor in determining the appropriate sanction for current violations. Section 3 provided that, during a three-year period following the issuance of a reprimand, the Board "may consider that previous public reprimand, public censure or admonition as evidence of a continuing pattern of misconduct so as to support a recommendation of discipline in the proceeding then pending and to support the discipline recommended. " (Emphasis added.) Certain violations of the disciplinary rules may be grounded on a "pattern of misconduct," as was the case here regarding DR 1-102(A)(5). See State v. Dixon, 664 P.2d 286, 289-90 (Kan. 1983) (violation of rule proscribing neglect of client matters may be grounded on pattern of conduct with single client or consistent practice involving multiple clients). Thus, on its face, the three-year rule prohibited the use of prior offenses only insofar as those offenses demonstrated, when considered in conjunction with conduct that triggered the current petition, that the respondent's actions constituted a "pattern of misconduct" in violation of one of the disciplinary rules.

The rule, however, does not prohibit the consideration of prior offenses as an aggravating factor in determining the appropriate sanction for the current violations. Cf. In re O'Dea, ___ Vt. ___, ___, 622 A.2d 507, 513 (1993) ("The Board, by agreeing not to charge respondent with a pattern of misconduct, did not waive consideration of the transcripts from noncharged cases as aggravating factors in determining the severity of the charged violations and the proper sanction."). In O'Dea, we distinguished between using prior misconduct for the purpose of showing a pattern of misconduct and using it to enhance the sanction for the cited violations. Id. at ___, 622 A.2d at 513. We noted that, aside from its role in demonstrating a pattern of behavior, prior misconduct is important to consider in disciplinary proceedings in order to tailor the sanction to the individual offender and the administration of justice. Id. at 22. Here, the Board considered the prior infractions as an aggravating factor in determining the appropriate sanction for the current violations, not as constituting a separate violation based on "a pattern of misconduct," when considered in conjunction with the conduct that led to the instant petition. Therefore, it violated neither A.O. 9 § 3 nor due process.

Further, assuming the three-year rule precluded the Board not only from considering prior offenses in finding a current violation based on a pattern of misconduct, but also from considering prior offenses as an aggravating factor demonstrating a pattern of misconduct, we still conclude that the

Board did not violate the rule here. In its Standards For Imposing Lawyer Sanctions (1991) (ABA Standards), the American Bar Association considers "prior disciplinary offenses" and "a pattern of misconduct" to be distinct aggravating factors. Standard 9.22(a) and (c); see Standard 8.0 (in addition to warranting special attention that may result in severe sanctions, engaging in previously sanctioned conduct "may also demonstrate a pattern of misconduct that will serve as an aggravating factor").

This interpretation of the three-year rule makes sense. In considering whether certain incidents constitute a pattern of misconduct, it is appropriate to limit the time frame in which those incidents occur. The administration of justice and the protection of the public are not served, however, by limiting consideration of prior offenses, regardless of when they occurred, for the purpose of determining the proper sanction of the current violation. See People v. Barber, 799 P.2d 936, 941 (Colo. 1990) (four prior disciplinary violations issued from 1973 to 1981 were not so remote in time that grievance committee was precluded from considering them in aggravation of violation arising from conduct occurring in 1984 and 1985). To the contrary, as noted, it is important to consider prior infractions in order to tailor the sanction to the individual engaging in the misconduct to protect the proper administration of justice.

We also reject respondent's argument that because the factual situation underlying the instant infraction differs from that of prior ones, it was improper to consider those previous transgressions, and thus the sanction is unwarranted. The similarity of infractions may affect the weight given to them, but any disciplinary history is relevant to the lawyer's general fitness to practice law. Finally, we are not foreclosed from publicly disclosing prior misconduct merely because it resulted in a private sanction. In re Clark's Case, 619 A.2d 220, 220 (N.H. 1992).

V.

We need not address in detail respondent's arguments that (1) the Board erred, on remand from the first appeal, by "readopting" the findings in the second panel report rather than making further findings and conclusions, and (2) the inconsistency between the findings of the panel's first and second reports demonstrates that the findings were not supported by clear and convincing evidence. We find no error in the Board "readopting" the panel's second report after respondent was given an opportunity to address that report. In any case, it is unclear what remedy respondent seeks. He states in his brief that he wishes this Court to address the legal issues not addressed by the Board, without further remand. Even if we were to conclude that on remand the Board should have made findings and conclusions concerning the issues raised by respondent, respondent essentially has conceded the lack of prejudice.

Regarding the second argument, respondent does not claim that the hearing panel violated the rules by issuing a second report. The fact that the findings in the second report differed from the findings in the first report does not demonstrate, in and of itself, that the amended findings were not proved by clear and compelling evidence.

VI.

Respondent contends that the Board should have considered as a mitigating factor that direct contact between attorneys and adjusters, even if unethical, is the standard custom and practice in the insurance business in Vermont. Respondent points out that in its first report, the hearing panel stated that "there is a clear practice in the Plaintiff's and defense bar in

Vermont of allowing such contact," and that in its second report, the panel again acknowledged that the practice occurs in Vermont, stating that there was "considerable evidence" of its existence. We find little merit to this argument. As we stated in the previous appeal,

> Given the absence of ambiguity in the rule, we find irrelevant respondent's contention that it is the common and accepted practice for Vermont attorneys to have direct contact with insurance companies whose defense counsel have not consented to such contact. Moreover, we note that the testimony on the practice of insurance attorneys in Vermont is in conflict.

Illuzzi, ___ Vt. at ___, 616 A. 2d at 236.

More importantly, as the hearing panel stated in its second report, this case concerns "unauthorized contact between Plaintiff's counsel and insurance adjusters after Plaintiff's counsel has been told not to contact the adjuster," not merely the practice of direct contact between plaintiff's counsel and insurance adjusters. Respondent did not simply follow what he perceived to be Vermont Custom and negotiate directly with the insurer. Rather, he purposely bypassed opposing counsel, despite requests by the insurer and its counsel that negotiations be through counsel only. This fact alone distinguishes respondent's behavior from direct communication with the insurer early on, before defense counsel has entered an appearance.

We are not persuaded by respondent's argument that his honest ignorance of an ambiguous rule should be a mitigating factor. Not only was he repeatedly told by at least one adjuster and one attorney to communicate directly with the company's counsel, but he was also warned that his conduct in that regard might constitute a violation of the ethical rules. Further, some of his actions and comments suggest his awareness that his conduct was unethical. For example, the panel found that respondent asked attorney Miller whether Miller was going to report him to the Board for calling the insurer during a trial and trying to procure a settlement, despite the fact that he had agreed to negotiate directly with Miller. Moreover, respondent's ignorance-of-the-law argument carries little weight in light of the Board's prior warnings that he must familiarize himself with the ethical rules.

Nor do the circumstances leading up to respondent's last contact with GEICO constitute a mitigating factor. Even assuming a representative of GEICO initiated the contact and Miller knew about that contact, given the prior history of the case, respondent was obligated to make a call or write a letter to attorney Miller to confirm that the contact was permissible.

VII.

Finally, respondent contends that a six-month suspension from practice exceeds the gravity of his violations. He bases this contention on his claim that the violations were unknowing and that there was no actual or potential injury. We conclude the Board's recommended sanction is appropriate under the circumstances of this case.

First, as noted above, we are not persuaded by respondent's claim that the violations were unknowing. Given his past experience, his prior disciplinary history, the Board's prior admonitions concerning his need to

review the disciplinary rules, the repeated signals respondent received that his conduct was improper, and his own actions and communications, his characterization of his lapses in this case as negligent understates his culpability.

Regarding the actual or potential harm, we recognize that respondent directly contacted relatively sophisticated insurance adjusters rather than vulnerable litigants who might be more susceptible to manipulation. We also acknowledge that, despite the testimony of attorney Miller and his partner that respondent's conduct had damaged the firm's reputation and adversely affected their business with GEICO and Travelers, the evidence on this point was disputed. Nevertheless, we cannot conclude that respondent's conduct did not cause, at minimum, potential injury to a party or interference with a legal proceeding. Indeed, regardless of whether he was successful, as some witnesses believed, his conduct was aimed at interfering with a pending legal proceeding by circumventing defense counsel.

Even assuming respondent's conduct was merely negligent and there was little or no injury to the client, a public reprimand would be the appropriate sanction, absent mitigating or aggravating circumstances. Standard 6.3 of the ABA Standards governs violations for "improper communications with individuals in the legal system." According to the commentary of Standard 6.33, most courts impose reprimands on lawyers who negligently, but unknowingly, engage in improper communications. The commentary cites In re McCaffrey 549 P.2d 666, 668 (Or. 1976), where the court imposed a public reprimand on a lawyer who unknowingly communicated with a party represented by counsel. Moreover, if we were to conclude that respondent's conduct violated only "duties owed to the profession," see ABA Standards 7.O, a public reprimand would be the proper sanction, absent aggravating or mitigating circumstances. According to the commentary of Standard 7.3 of the guidelines,

> Reprimand is the appropriate sanction in most cases of a violation of a duty owed to the profession. Usually there is little or no injury to a client, the public, or the legal system, and the purposes of lawyer discipline will be best served by imposing a public sanction that helps educate the respondent lawyer and deter future violations.

Had this been respondent's first violation of the ethical rules, a public reprimand would have been an adequate sanction. But given respondent's numerous prior disciplinary offenses, suspension from practice is necessary. See In re Rosenfeld, 157 Vt. 537, 547, 601 A.2d 972, 978 (1991) (lawyer's misconduct warranted suspension because this Court had "already imposed the highest non-suspension sanction for other misconduct"); Florida Bar v. Glick, 397 So. 2d 1140, 1141 (Fla. 1981) (attorney who exhibits cumulative misconduct must be dealt with more severely). The fact that we have now sanctioned respondent five times is particularly disturbing, considering the number of attorneys in this state and the relatively few number of sanctions imposed by thiS Court in past years. In 1980, the year respondent received two separate sanctions, the only other sanctions imposed by this court were three private admonitions. The sanction respondent received in 1983 was the only one imposed that year. In 1987, only four other attorneys were disciplined. Only one other attorney in this state has been disciplined five times since 1968.

Not only has respondent been disciplined on four prior occasions, but he has previously violated DR 7-104(A)(1) and DR 1-102(A)(5). See ABA Standards 8.2 (suspension is appropriate when lawyer has been reprimanded

for same or similar acts and engages in further acts that cause real or potential injury). Although the circumstances of the two violations are not identical, the underlying provisions have remained the same. Respondent's repeated violations make it apparent that he has failed to familiarize himself with the profession's code of conduct and to conform his behavior to that expected of the profession. His cumulative disciplinary record demonstrates a cavalier attitude toward the profession's ethical practices and warrants suspension from the practice of law.

The decision of the Professional Conduct Board is adopted and its recommendation for discipline is approved. Vincent Illuzzi is suspended from the practice of law for the period of six months, beginning September 1, 1993, during which time he shall successfully complete the multi-state professional responsibility examination.

No. 92-602

In re vincent Illuzzi, Esq.

Supreme Court

Original Jurisdiction

March Term, 1993

Wendy S. Collins, Special Bar Counsel, Montpelier, for petitioner-appellee

David Putter of Saxer, Anderson, Wolinsky and Sunshine, Montpelier, for respondent-appellant

PRESENT: Allen, C.J.. Gibson, Dooley, Morse and Johnson, JJ.

ALLEN, C.J., dissenting. I dissent from the sanction imposed because I believe it to be too severe. We have said that the purposes of sanctions are to protect the public from persons unfit to practice, to maintain public confidence in the bar and to deter others from similar conduct. In re Berk, 157 Vt. 524, 532, 602 A. 2d 946, 950 (1991). The infractions found do not reflect upon respondent's fitness to practice law. They resulted from his erroneous belief that it was not improper to make direct contact with insurers that had retained counsel to represent their insureds. While we proscribed such contact in In re Illuzzi, ___ Vt. ___, ___, 616 A. 2d 233, 236 (1992), the line had not been clearly drawn before that decision and

respondent's belief was not totally unfounded. Indeed, we were able to find support for the holding only from a United States District Court and a state intermediate appellate court.

The relationship between an insurer, insured, and counsel retained for the insured by the insurer is confusing at best. At the outset, the insurer and insured usually have a shared interest to successfully resist or settle a claim. This common interest permits the retained lawyer to represent ethically both the insurer and the insured in litigation. Difficulties arise when conflicts develop between the interests of the insurer and of the insured, such as a claimed lack of cooperation, claims made in excess of the policy limits, or receipt of information by the attorney that might relieve the insurer of the obligation to defend. When such conflicts arise, the attorney's sole loyalty and duty is to the insured.

The potential for conflict was great in the Travelers case because the policy limits were low and a wife was suing her husband. Respondent's inquiry as to whether the attorneys retained to represent the insureds were also representing the Travelers is understandable and should bear on the question of whether the conduct was knowing under the American Bar Association Standards and should also be considered in mitigation.

The offending letter in GEICO was sent after GEICO had contacted respondent in an attempt to settle a companion case being defended by Mr. Miller and arising out of the same accident. During these negotiations, GEICO was also attempting to dispose of the earlier case that had gone to judgment. Although I agree that under the circumstances respondent should have obtained Mr. Miller's consent to discuss settlement of the earlier case directly with GEICO, I don't believe the conduct was so egregious as to warrant the sanction of suspension.

I also do not believe that public confidence in the bar is undermined by wholly private contacts between attorneys and employees of insurance companies. The practice exists and undoubtedly will continue. Our determination that the disciplinary rule requires that such contact be consented to does not imply that public confidence in the bar is undermined where contact is made without consent. The duty owed was to the profession, not the public.

Respondent was disciplined by the Board for violations of three rules; DR 7-104(A)(1), "by communicating with persons of adverse interest"; DR 1-102(A)(7), "proscribing conduct adversely reflecting on a lawyer's fitness to practice law, when he disparaged Mr. Miller"; and DR 1-102(A)(5), for "conduct that is prejudicial to the administration of justice by this repeated pattern of contact." With respect to the latter violation, the contacts arguably were not misconduct when committed. Their repetition adds nothing to the discussion. The majority has concluded, and I agree, that Mr. Miller was not disparaged by the "meter running" letter.

I also do not agree that Standard 6.33 of the American Bar Association Standards applies to the violations found. This standard applies to violations for "improper communication with an individual in the legal system." American Bar Association, Standards for Imposing Lawyer Sanctions (1991) (ABA Standards) (emphasis added). It is intended to punish attempts to influence a judge, juror, prospective juror, witness or other official, and does not apply to the

facts before us. The appropriate sanctions for improper communications are set forth in 7.O of the ABA Standards. "Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the lawyer's conduct violates a duty owed to the profession, and causes little or no actual or potential injury. ABA Standard 7.4. Suspension is generally appropriate when a lawyer knowingly engages in such conduct with resulting or potential injury. ABA Standard 7.2. Thus, the issues are whether respondent acted knowingly or negligently and the magnitude of any injury. "Negligence" is defined as "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." ABA Standards at 7. "Knowledge" is defined as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." Id. The respondent failed to heed the risk, and his conduct more closely fits the negligence definition.

In determining an appropriate sanction we should consider, in addition to the duty violated and the lawyer's mental state, the potential or actual injury and the existence of aggravating or mitigating factors. ABA Standard 3.O. The only injuries suggested are that the Travelers paid the policy limit on a claim that the adjuster thought could be successfully defended because respondent had intimidated the adjuster and that respondent's direct contact had a "chilling effect" on the law firm's relationship with two insurers. The adjuster, Linda Fritsch, testified that at the time she advised the attorney employed by Travelers to settle the case, she "wasn't as sure as I might have been originally that we would have been successful," and she was questioning the decision to deny liability. The adjuster was an experienced assistant manager handling property and casualty claims. There is no claim, or even suggestion, by the insurer that it paid more than the claim was worth. The evidence established and the hearing panel found that insurers routinely have their adjusters contact plaintiffs' attorneys after they have retained defense counsel. It is difficult to comprehend how the insurer is not injured by this practice while at the same time is injured simply because retained counsel for the insured has not granted permission for the contact. Although attorney Miller testified that he thought there had been a chilling effect on his firm's relationships with the two insurance carriers after the contact by respondent, there was no testimony from the insurers that this was the case. At the time of the hearing in this matter, attorney Miller had been handling cases for both carriers for twenty-five years. He is an experienced and competent trial attorney. His firm continues to handle cases for the carriers, including the unresolved pieces of the case from which the complaint arose. It is inconceivable that an ethics violation by another attorney could impact on this relationship. In short, actual or potential injury is virtually non-existent. The absence of a knowing violation, combined with the absence of actual or potential resulting injury, suggests the sanction of admonition under the ABA Standards, absent aggravating factors. ABA Standard 7.4. Even the application of ABA Standard 6.33 would not warrant suspension as there has

been no showing that the respondent knew the communication was improper and no showing of injury or interference.

The final consideration for the Court in imposing a sanction is the existence of aggravating or mitigating factors. ABA Standard 3.0(d). Aggravating circumstances are any considerations that may justify an increase in the degree of discipline to be imposed and include prior disciplinary offenses. ABA Standards 9.21, 9.22. I agree with the majority's characterization of respondent's past disciplinary record and conclude that this record warrants a greater punishment than admonition; I would impose a public reprimand.

/s/
Chief Justice