Not For Publication.

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

IN THE MATTER OF THE SUSPENSION OF **KENTH ROGERS, ESQUIRE** **AS A MEMBER OF THE VIRGIN ISLANDS BAR.**	)	**S. Ct. Civ. No. 2012-0059** Consolidated Cases: S.Ct. Civ. No. 2012-0042 S.Ct. Civ. No. 2012-0059

On Petition for Member's Suspension
Considered and Filed: October 26, 2012

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.[1]

APPEARANCES:

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St. Thomas, U.S.V.I.
Pro Se

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OPINION OF THE COURT

PER CURIAM.

This matter comes before the Court pursuant to an appeal by Kenth W. Rogers, Esq., from an adverse decision issued by the Ethics and Grievance Committee of the Virgin Islands Bar Association, as well as the Committee's petition for this Court to approve its recommended sanctions. For the reasons that follow, we grant the Committee's petition, as modified.

[1] Associate Justice Maria M. Cabret, having recused herself from this matter on September 21, 2012, took no part in the decision herein.

I. BACKGROUND

Through a letter dated April 25, 1997, Petronella Semper, a resident of New York, filed a grievance against Attorney Rogers with the Committee. In her letter, Semper stated that she owned a parcel of land on St. Thomas as joint tenants with Ricardo Farrington, and that in early 1994 she hired James Deitrich—a real estate broker—to assist her in selling the property after Farrington's death. According to Semper, Deitrich advised her that an attorney was needed to clear title to the property, and referred her to Attorney Rogers. Although Attorney Rogers sent her a retainer agreement—which called for Semper to pay a 33 1/3 percent contingent fee based on the recovery received or the fair market value of the property—Semper did not sign the agreement or otherwise retain Attorney Rogers. Rather, she hired a different attorney to complete the work the following year. Shortly after Semper notified Deitrich that the matter had been resolved, Deitrich notified her that Attorney Rogers had placed a lien on the property for $3,954.50, purportedly for work done on her behalf. In addition, Attorney Rogers had filed suit against Semper in small claims court to recover this sum. Although Semper called Attorney Rogers numerous times after discovering this information, he never responded to any of her inquiries. While Semper told Deitrich that she had never retained Attorney Rogers, he nevertheless paid him the $3,954.50 from Semper's funds.

On May 9, 1997, the Committee notified Attorney Rogers of the grievance. When the case investigator assigned to the matter solicited a response from Attorney Rogers, he stated, through an August 6, 1997 letter, that he was "very busy with many matters," but would file a response by August 27, 1997. When Attorney Rogers failed to comply with this self-imposed deadline, the case investigator, in a September 16, 1997 letter, advised him that failure to cooperate with the Committee's investigation of a grievance itself constitutes a violation of the

Model Rules of Professional Conduct, and directed him to respond to Semper's grievance by September 21, 1997. Attorney Rogers, however, failed to file any documents with the Committee. Ultimately, the Committee issued a notice of hearing on October 26, 1998, which advised Attorney Rogers and Semper that it would hold a hearing on the matter on December 2, 1998.

Attorney Rogers failed to appear at the December 2, 1998 hearing. After noting his absence on the record, the Chair of the panel admitted into evidence the sworn affidavit of the process server who served the notice of hearing on Attorney Rogers, who averred that he personally served Attorney Rogers at his law office on October 30, 1998, at 9:05 a.m. The panel proceeded with the hearing in his absence, and heard telephonic testimony from Semper as well as her son, Kem DeLeonard. Both Semper and DeLeonard testified to largely the same facts as in the initial grievance, and the case investigator introduced into evidence numerous exhibits which corroborated their claims. Most notably, the case investigator admitted a February 1, 1996 letter from Attorney Rogers to Semper in which he expressly acknowledged that she had not signed his retainer agreement and that he did not represent her, but stated he had taken action on her behalf "[p]ursuant to [his] misguided belief that [she] would retain [him]," including speaking with the attorney for the Farrington estate, who agreed to start an action for partition. Likewise, the panel took judicial notice of various filings in the Farrington probate matter, including a May 3, 1996 Amended Adjudication which identified Attorney Rogers as counsel for Semper. When the hearing concluded, the Chair requested the case investigator to obtain additional documents from the probate court record, and reserved the right to continue the hearing if additional testimony or information was required for the panel's decision.

For reasons unclear from the record, this matter remained dormant for nearly 14 years, until a reconstituted panel issued a memorandum of decision on May 14, 2012. In its decision, the panel found that Attorney Rogers had violated Rules 1.2(a), 1.4(a), 1.5(a), and 8.1(b) of the Model Rules of Professional Conduct, and recommended that Attorney Rogers (1) be suspended from the practice of law for three months, (2) pay restitution to Semper in the amount of $3,954.50, and (3) pay costs in the amount of $540.00 to the Virgin Islands Bar Association.

On June 9, 2012, Attorney Rogers filed with this Court a document captioned "Respondent Petition for Writ of Review Pursuant to Supreme Court Rule 209.25," which this Court docketed as S.Ct. Civ. No. 2012-0042 and construed as an appeal of the May 14, 2012 decision. *See* V.I.S.CT.R. 207.4.11(a)-(b). Subsequently, the Committee filed a petition for this Court to approve its recommended sanction, which this Court docketed as S.Ct. Civ. No. 2012-0059. In a July 10, 2012 Order, this Court consolidated the cases and established briefing deadlines, with which both parties timely complied.

II. DISCUSSION

A. Jurisdiction and Legal Standard

This Court possesses exclusive jurisdiction to discipline members of the Virgin Islands Bar. V.I. CODE ANN. tit. 4, § 32(e). As we have previously outlined,

> The disciplinary procedures adopted by the Court require the Bar's Ethics and Grievance Committee to obtain an order from this Court to disbar an attorney from the practice of law in the Virgin Islands. In reviewing the record in this case and the Memorandum of Decision entered by the Bar's adjudicatory panel, we exercise independent judgment with respect to both findings of fact and conclusions of law on all issues, including the sanction recommended by the Bar. Under our independent review, we carefully consider the adjudicatory panel's analysis, but must separately determine, like the adjudicatory panel, whether there is clear and convincing evidence that the respondent violated the Model Rules of Professional Conduct. Our review in this respect is virtually *de novo*, except we do not hear and consider anew live testimony. If we find that the respondent has

> violated the rules, we must also decide whether to adopt the panel's recommended discipline or whether some other type of discipline is warranted.

V.I. Bar v. Brusch, 49 V.I. 409, 411-12 (V.I. 2008) (footnotes and citations omitted). Nevertheless, pursuant to both this Court's rules and the rules that were in effect at the time Semper filed her grievance,[2] the "[f]ailure to timely answer [a] grievance shall be deemed an admission by the Respondent to all factual allegations contained in the grievance, and shall permit the grievance to proceed on a default basis." *See In re Drew*, S.Ct. BA No. 2007-0013, 2008 WL 6054310, at *3 (V.I. June 30, 2008) (unpublished) (quoting V.I.S.CT.R. 207.1.11). Additionally, "[i]f the Respondent fails to appear for the Panel hearing . . . the Respondent shall be deemed to have admitted all factual allegations contained in the grievance, and to have waived his right to object to the imposition of sanctions in accordance with the Rules and the ABA's Standards for Imposing Lawyer Sanctions." *Brusch*, 49 V.I. at 417 (quoting V.I.S.CT.R. 207.3.3). Therefore, before conducting any other inquiry, this Court must first determine whether the Committee correctly found that Attorney Rogers violated Rule 8.1(b). *See In re Suspension of Joseph*, 56 V.I. 490, 499 (V.I. 2012).

B. Model Rule 8.1(b)

"Rule 8.1 prohibits a lawyer, in connection with a disciplinary matter, from knowingly failing to respond to a lawful demand for information from a disciplinary authority." *Brusch*, 49

[2] As this Court has previously explained,

> Former Superior Court Rules 301, 303, 304, 305, 306, and 307 have been adopted and amended by the Supreme Court as Supreme Court Rules 201, 203, 204, 205, 206, and 207, respectively. *See* Promulgation Order No. 2007-0011. Inasmuch as the language of the former Superior Court Rules has been adopted, virtually verbatim, as part of the new Supreme Court Rules, our citations in this Opinion will be to the Supreme Court Rules. Rule 207 consists of the Rules of the Ethics and Grievance Committee.

Brusch, 49 V.I. at 412 n.2. "Moreover, Supreme Court Rule 207 is modeled after the Model Rules of Disciplinary Enforcement, which had been previously applicable through former Superior Court Rule 303(a)." *In re Suspension of Joseph*, 56 V.I. 490, 498 n.4 (V.I. 2012) (citing *Brusch*, 49 V.I. at 412 n.4).

V.I. at 419 (citing MODEL RULES PROF'L CONDUCT R. 8.1(b)). Thus, "an attorney who has been 'provided [with] numerous opportunities to respond' to a grievance, yet who 'inexplicably remain[s] silent' by failing to respond to the grievance or to appear at the adjudicatory hearing will clearly violate Rule 8.1(b)." *Joseph*, 56 V.I. at 499 (quoting *Brusch*, 49 V.I. at 419).

We agree with the Committee that clear and convincing evidence exists that Attorney Rogers violated Rule 8.1(b). The record unquestionably reflects that Attorney Rogers was aware that a grievance had been filed against him—as demonstrated by his August 6, 1997 letter promising to file a response by August 27, 1997—yet took no steps to defend against the grievance or otherwise assist the case investigator or the Committee with the investigation. Moreover, the affidavit of the process server who served Attorney Rogers with the Committee's October 26, 1998 notice of hearing establishes that Attorney Rogers had more than sufficient notice of the December 2, 1998 hearing, yet failed to appear. Significantly, none of the documents Attorney Rogers has filed with this Court dispute the authenticity of any of these materials. *See id.* Therefore, because Attorney Rogers neither timely responded to the grievance nor appeared at the adjudicatory hearing, this Court accepts all of the factual allegations against Attorney Rogers as true, deems all of the issues raised in Attorney Rogers's filings before this Court to have been waived,[3] and shall review the Committee's decision solely "to independently determine whether the panel correctly held that these facts constituted ethical

[3] Although we hold that Attorney Rogers has waived his right to challenge the Committee's decision due to his failure to cooperate with its investigation in violation of Rule 8.1(b), we note that even in the absence of this waiver this Court would be unable to address most of the issues Attorney Rogers has identified in his response to the Committee's petition. Significantly, Attorney Rogers's response is only two pages long, and identifies numerous objections to the Committee's decision in a cursory manner without citing to any legal authority. For instance, Attorney Rogers states, without any elaboration, that "the hearings did not comply with substantive or procedural due process and did not observe the essential requirements of law." Similarly, Attorney Rogers "requests that the rules applicable to Judicial Disciplinary Enforcement . . . be applied in this case," without providing any legal authority to support this claim. Under these circumstances, review of these issues would have been waived even if Attorney Rogers had cooperated with the Committee's investigation. *See Bernhardt v. Bernhardt*, 51 V.I. 341, 345-46 (V.I. 2009) (holding issues raised but not supported by argument are considered waived).

violations." *Id.*

C. Remaining Ethical Violations

The Committee, in its memorandum of decision, found that Attorney Rogers violated Rules 1.2(a), 1.4(a), and 1.5(a) of the Model Rules of Professional Conduct with respect to his dealings with Semper. We agree.

1. Model Rule 1.2

Model Rule 1.2(a) provides, in pertinent part, that "a lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation." We recognize that, although Rule 1.2(a) uses the term "client," all the evidence in the record establishes that Semper never retained Attorney Rogers to represent her in any matter, and thus at all pertinent points she was—at best—only a prospective client. Nevertheless, we agree that Rule 1.2(a) prohibits an attorney from acting on behalf of a prospective client who ultimately never retains the attorney or otherwise authorizes the attorney to act as an agent. *See, e.g., Florida Bar v. Spann*, 682 So.2d 1070, 1073 (Fla. 1996). In this case, both the contents of Semper's grievance and testimony, as well as the February 1, 1996 letter from Attorney Rogers to Semper in which he admitted to acting on her behalf even though she had never retained him, unquestionably establish that Attorney Rogers represented Semper without any actual or implicit authorization. Consequently, the Committee correctly found that Attorney Rogers violated Rule 1.2(a).

2. Model Rule 1.4

Pursuant to Model Rule 1.4(a), "[a] lawyer shall . . . keep the client reasonably informed about the status of the matter [and] promptly comply with reasonable requests for information."

Again, we recognize that Semper never retained Attorney Rogers. However, because Attorney Rogers provided legal services to Semper—albeit services which she did not request or authorize—he voluntarily assumed the obligations and duties attendant to an attorney-client relationship, including the duty to communicate with her. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 15(1)(c); cmt. e (2000). Moreover, at an absolute minimum Attorney Rogers possessed an obligation to communicate with Semper after she called him numerous times upon discovering that he had placed a lien on her property and had sued her in small claims court. Therefore, we agree with the Committee that Attorney Rogers violated Rule 1.4(a).

3. Model Rule 1.5

In its memorandum of decision, the Committee concluded that Attorney Rogers violated Model Rule 1.5(a)—which provides, in pertinent part, that "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee"—because he had never been authorized to perform any work for Semper, and thus his $3,954.50 fee was *per se* unreasonable since he had no right to receive any compensation from Semper. We agree.[4] However, we cannot ignore that

[4] We recognize that some courts have permitted an attorney who performed legal services on behalf of a client or prospective client in the absence of a valid retainer agreement to pursue a claim for quantum meruit. *See, e.g.*, *Akron Bar Ass'n v. Catanzarite*, 893 N.E.2d 835, 840 (Ohio 2008); *Starkey, Kelly, Blaney & White v. Estate of Nicolaysen*, 773 A.2d 1176, 1188-89 (N.J. Super. Ct. App. Div. 2001); *Seth Rubenstein, P.C. v. Ganea*, 833 N.Y.S.2d 566, 572-73 (N.Y. App. Div. 2007). However, it is well established that, in the absence of explicit statutory authority to the contrary, an attorney is precluded from placing a lien on real property based on a claim for fees that has not been adjudicated by a court. *See Ross v. Scannell*, 647 P.2d 1004, 1008 n.2 (Wash. 1982) (collecting cases). As the Washington Supreme Court explained,

> [t]he result of our approving the practice [of unadjudicated attorney liens] would allow members of the Bar to cloud title to real property with "claims of attorney lien" without resort to any adjudication of such claims. The potential for economic coercion by attorneys is obvious. In today's economic setting a client may well be forced to settle the attorney's claim for fees, no matter how unfounded, simply to gain the ability to convey, lease, or otherwise utilize the "liened" property.

Id. at 1008-09. In this case, although Attorney Rogers sued Semper in small claims court—the outcome of which

Attorney Rogers also violated Model Rule 1.5(c), which mandates that "[a] contingent fee agreement shall be in writing signed by the client and shall state the method by which the fee is to be determined." In this case, the agreement Attorney Rogers relied upon was not only never signed by Semper, but stated that Attorney Rogers would receive "33 1/3% of the recovery received or the fair market value of the property," without specifying what method would be used to determine whether Attorney Rogers would receive a third of the recovery or a third of the property's fair market value. Accordingly, the Committee correctly held that Attorney Rogers violated Model Rule 1.5.

D. Sanctions

Having agreed with the Committee that Attorney Rogers violated Model Rules 1.2, 1.4, 1.5, and 8.1, this Court must determine the appropriate sanction to impose for his misconduct. To determine the appropriate sanction, this Court "consider[s] the following four factors: '[1] the duty violated; [2] the lawyer's mental state; [3] the potential or actual injury caused by the lawyer's misconduct; and [4] the existence of aggravating or mitigating factors.'" *Brusch*, 49 V.I. at 420 (quoting STD'S FOR IMPOSING LAWYER SANCTIONS § III.B., Std. 3.0 (1986 as amended 1992)). "The Court considers the first three factors to initially determine the appropriate sanction," and only "consider[s] the presence of any relevant aggravating or mitigating factors to determine whether to depart from that initial determination." *Id.* Furthermore, in crafting the appropriate sanction, this Court is "mindful that the purpose of disciplinary sanctions . . . 'is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession." *Id.* at 419 (quoting STD'S FOR IMPOSING LAWYER

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has not been provided to this Court—the record reflects that Attorney Rogers placed the lien on Semper's property on the same day he filed his small claims complaint.

SANCTIONS § III.A., Std. 1.1).

We agree with the Committee that Attorney Rogers breached some of the most important duties owed to Semper and to the legal profession itself, that his breach was intentional, and that his actions resulted in an actual monetary loss. Under these circumstances—a serious, intentional ethical breach that resulted in injury, but only with respect to a single client matter—the American Bar Association's Standards for Imposing Lawyer Sanctions recommend, as an initial baseline sanction, a six month suspension. STD'S FOR IMPOSING LAWYER SANCTIONS § III.C., Std's. 2.3, 4.42(a).

"An aggravating circumstance is one that may justify a more severe sanction, while a mitigating circumstance is one that may justify a more lenient sanction." *Brusch*, 49 V.I. at 422 (quoting STD'S FOR IMPOSING LAWYER SANCTIONS § III.C., Std's. 9.21, 9.31). As the panel correctly recognized in its memorandum of decision, Attorney Rogers's violation of Model Rule 8.1 by failing to participate in the proceedings before the Committee constitutes an aggravating factor that warrants a higher sanction. *Id.* However, in its memorandum of decision, the panel identified an additional aggravating factor—Rogers's prior history of discipline—as well as a mitigating factor: the nearly 14 year delay between the December 2, 1998 hearing and the May 14, 2012 memorandum of decision. We disagree. Although Attorney Rogers technically possesses a prior history of discipline, in that he previously received a private reprimand in an unrelated matter, *see In re Rogers*, 56 V.I. 618, 622 (V.I. 2012), the reprimand had not been imposed until approximately 13 years after the panel held its hearing in this matter, and therefore should not be considered as an aggravating factor in this case. *See Joseph*, 56 V.I. at 506 n.8. Moreover, while the extreme delay in adjudicating Semper's grievance is wholly unacceptable, this Court's rules expressly provide that "[t]he failure of any Adjudicatory Panel . . . to adjudicate

any grievance within twelve (12) months, shall not be grounds for dismissal, mitigation of sanctions, or any other relief to any Respondent." V.I.S.CT.R. 207.7.7(c). Therefore, the Committee, in determining whether to deviate from the baseline sanction of suspension, should have proceeded as if there was only one aggravating factor and no mitigating circumstances.

As noted above, the baseline sanction for Attorney Rogers's ethical violations is a six month suspension pursuant to the Standards for Imposing Lawyer Sanctions. Nevertheless, the Committee only recommended a three month suspension, without explaining the reasons for the deviation. We recognize that, given the error in identifying aggravating and mitigating factors, it is possible that the Committee weighed the 13 year delay in adjudicating the grievance far more heavily than any other factor, thus resulting in a sanction below the baseline. Moreover, because reinstatement from suspension in the Virgin Islands is not automatic if the suspension exceeds three months, *see* V.I.S.CT.R. 203(h)(1)-(2), it is possible that the Committee fashioned this sanction so that Attorney Rogers could seek reinstatement under Rule 203(h)(1) rather than Rule 203(h)(2). We emphasize, however, that the main purpose furthered by the Standards is to avoid the problem of inconsistent sanctions, which can "cast doubt on the efficiency and the basic fairness of the disciplinary systems." STD'S FOR IMPOSING LAWYER SANCTIONS § I.A. Accordingly, since the initial baseline sanction for Attorney Rogers's violations is a six month suspension, and a single aggravating factor exists with no mitigating factors, we find that the proper sanction in this matter is a six month suspension, along with a public reprimand, completion of six hours of continuing legal education in the field of ethics, and payment of costs and restitution. Such a sanction is in line with what the Committee has recommended in other cases involving similarly serious misconduct. *See, e.g., Joseph*, 56 V.I. at 496.

III. CONCLUSION

This Court shall suspend Attorney Rogers from the practice of law for six months, and order him to complete six continuing legal education credit hours in the field of legal ethics, in addition to the continuing legal education hours he must complete to satisfy his obligation under Supreme Court Rule 208. He is also hereby ordered to pay $3,954.50 in restitution to Semper, and $540.00 in costs to the Virgin Islands Bar Association, such payments to be made no later than **January 24, 2013**. Furthermore, the Committee shall publicly reprimand Attorney Rogers in a manner consistent with Supreme Court Rule 207.4.3(d). The six month suspension shall become effective in fifteen days in order to provide Attorney Rogers with an opportunity to comply with Supreme Court Rule 207.5.5, including notifying all clients of his suspension and filing motions to withdraw as counsel in all pending matters. Upon expiration of this fifteen day period, Disciplinary Counsel shall confer with Attorney Rogers to ascertain that all clients, so desiring, have secured new counsel and to determine if any additional action is required to safeguard their interests during his suspension. Upon expiration of the six month period, Attorney Rogers may petition for re-instatement in accordance with Supreme Court Rule 203(h).

Dated this 26th day of October, 2012.

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court