MODIFIED OPINION[1]

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 125,879

In the Matter of KENNETH J. ELAND,
Respondent.

ORIGINAL PROCEEDING IN DISCIPLINE

Original proceeding in discipline. Original opinion filed April 28, 2023. Modified opinion filed May 12, 2023. One hundred eighty-day suspension.

Julia A. Hart, Deputy Disciplinary Administrator, argued the cause, and *Gayle Larkin*, Disciplinary Administrator, was with her on the formal complaint for the petitioner.

John J. Ambrosio, of Morris, Laing, Evans, Brock & Kennedy, Chtd., of Topeka, argued the cause, and *Kenneth J. Eland*, respondent, argued the cause pro se.

PER CURIAM: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator against the respondent, Kenneth J. Eland, of Hoxie, an attorney admitted to the practice of law in Kansas in 1984.

The Disciplinary Administrator filed a formal complaint against Eland alleging violations of the Kansas Rules of Professional Conduct (KRPC). Eland answered and eventually stipulated to some violations and disputed others. After a hearing before a

[1]**REPORTER'S NOTE:** Opinion No. 125,879 was modified by the Supreme Court in response to Respondent's motion for modification filed on May 1, 2023. Language referring to KRPC 4.1 was deleted from pages 2, 27, and 28.

panel of the Kansas Board for Discipline of Attorneys, the panel issued a final hearing report on the formal complaint.

The hearing panel determined respondent had violated:

- Kansas Rules of Professional Conduct (KRPC) 1.1 (2023 Kan. S. Ct. R. at 327) (competence),
- KRPC 1.3 (2023 Kan. S. Ct. R. at 331) (diligence),
- KRPC 1.4(a) (2023 Kan. S. Ct. R. at 332) (communication),
- KRPC 1.15(a) (2023 Kan. S. Ct. R. at 372) (safekeeping property),
- KRPC 1.16(d) (2023 Kan. S. Ct. R. at 378) (declining or terminating representation),
- KRPC 5.3(c)(2) (2023 Kan. S. Ct. R. at 408) (responsibilities regarding nonlawyer assistance),
- and KRPC 8.4(c) (2023 Kan. S. Ct. R. at 433) (misconduct).

Upon conclusion of the hearing, the panel made findings of fact and conclusions of law and recommended Eland be suspended from the practice of law for 180 days:

"*Findings of Fact*

"14. The hearing panel finds the following facts, by clear and convincing evidence:

"15. The respondent maintains a law practice in Hoxie, Kansas and also owns a real estate title insurance company named Eland Title, where the respondent serves as a licensed abstractor.

"16. The respondent's title insurance company has offices in Oakley, Colby, Hill City, Lawrence, and Hoxie, Kansas. The Hoxie office for Eland Title is in the same building as the respondent's law office.

"17. The respondent employed and paid both his title office and law office staff through the law office and not through Eland Title.

"18. In 2015, Farm & Ranch Realty, a real estate broker, hired Eland Title to prepare a title insurance commitment for the auction of real estate located in Gove County, Kansas. Farm & Ranch Realty also asked the respondent to provide an assessment of mineral interest ownership for the property, act as the closing agent for the sale of the real estate property, and provide the buyers with a mineral title opinion.

"19. The respondent testified that the mineral title opinion could only be prepared by him in his capacity as a lawyer, because Eland Title was not permitted by its underwriter to issue a title insurance policy for mineral interests severed from the surface rights. The way a buyer could ensure that they acquire good title to mineral interests is through a mineral title opinion.

"20. The Gove County property being auctioned by Farm & Ranch Realty was formerly owned by Enoch Nelson of Gove County, Kansas. Enoch Nelson previously owned the land in its entirety, including all surface and mineral interests. In 1947, Enoch Nelson transferred all surface land interest and a one-half (1/2) interest in the mineral rights to D. Laverne Webb.

"21. The D. Laverne Webb interest in the surface and mineral rights was transferred to other individuals over the following years. From the evidence, there appears to be no record that the one-half interest in the mineral rights reserved by Enoch Nelson was transferred to any other individual or entity.

"22. The one-half mineral interest transferred to D. Laverne Webb was designated during the formal hearing as having the following legal description:

'An undivided one half (1/2) mineral interest in the West Half (W/2) of the Southwest Quarter (SW/4) of Section Eight (8), Township Fourteen (14) South, Range Thirty-one (31) West of the 6th P.M., Gove County, Kansas.'

"23. On August 5, 2008, the District Court of Gove County, Kansas entered a Journal Entry of Foreclosure of a tax lien on the above-described one-half mineral interest.

"24. The one-half mineral interest previously owned by D. Laverne Webb was sold at Sheriff's sale and the Gove County Sheriff conveyed the half mineral interest via a 2009 Sheriff's Deed to W.R. and C.R., husband and wife as joint tenants and not as tenants in common. The Sheriff's Deed was executed and filed in April 2009.

"25. Sometime later, W.R. and C.R. transferred this one-half mineral interest to the Rebarchek Trust. At this point, the Rebarchek Trust owned most or all of the surface and mineral interests that Enoch Nelson transferred to D. Laverne Webb in 1947. The Rebarchek Trust (hereinafter 'seller') hired Farm & Ranch Realty to separate and sell the land at auction.

"26. The respondent viewed all of the parties to the 2015 real estate transaction, including the buyer, as his client.

"27. On August 13, 2015, Farm & Ranch Realty emailed Mark Samuelson, an employee of Eland Title, and asked Eland Title to provide a preliminary title commitment to the mineral interest for the Gove County property to be auctioned. Farm & Ranch Realty also asked Eland Title to determine whether the full mineral interest for this property was owned by one entity or divided up and owned by more than one entity.

"28. Mr. Samuelson had approximately ten years of experience researching land and mineral interests. He was not a licensed abstractor. Mr. Samuelson researched the land and mineral interests for the Gove County property at the Gove County Register of Deeds office and the Gove County District Court. Based on Eland Title's routine practice, the respondent said that Mr. Samuelson then would have brought any questions

Mr. Samuelson had about what he discovered to the respondent. At the respondent's direction, Mr. Samuelson went to the Gove County Register of Deeds Office to research the property and informed the respondent of his findings.

"29. Mr. Samuelson located and copied the 2009 Sheriff's deed to the sellers. Mr. Samuelson also examined the District Court of Gove County probate records but could not locate a probate case for Enoch Nelson.

"30. On September 15, 2015, relying on a preliminary title opinion from the respondent, Farm & Ranch Realty auctioned the mineral interest associated with the property to the buyer.

"31. Eland Title prepared the closing settlement paperwork for the auction purchase. The buyer, DW Jayhawk, LLC, paid Eland Title $500.00 for the mineral title opinion. All other closing costs were split between the seller and buyer and paid to Eland Title.

"32. Closing occurred on October 21, 2015. On this same date, Eland Title paid to Eland Law Office the fees paid by the buyer and seller for closing, document preparation, and the mineral title opinion.

"33. The buyer was not provided the written mineral title opinion by the closing date. Despite this, the fees paid to Eland Law Office for the mineral title opinion were deposited into the firm's operating account instead of its trust account.

"34. Ultimately, the respondent did not provide the mineral title opinion to the buyers for this transaction until December 27, 2018.

"35. The respondent did, however, create and provide a Mineral Deed, whereby the seller purported to give 100% of the mineral interest in the property to the buyer.

"36. In spring 2016, the buyer contacted Eland Title and the seller concerned about whether they owned 100% of the mineral interest and asking for confirmation that the buyer did own 100%.

"37. Between May and August, 2016, the buyer and seller, through its attorney Steve Hirsh, sent emails and letters to the respondent's office expressing concern whether 100% of the mineral interest was transferred to the buyer. They requested confirmation from the respondent that the buyer owned 100% of the mineral interest.

"38. On August 11, 2016, the buyer demanded the respondent provide a written guarantee that the buyer owned 100% of the mineral interest. The respondent's employee, Meghann Gourley, replied to the buyer's email stating that the respondent was going to go over the documentation and would provide an answer by the following Monday.

"39. On August 12, 2016, Ms. Gourley emailed the seller and seller's attorney, stating that the respondent 'did not find any documents in our file that show anyone else owns any mineral interests.' Further, the email said, 'There are separate mineral statements going out, so we are going to go to Gove on Monday to check with the County Appraiser to see if they can shed any light on why there are separate tax statements.' Ms. Gourley said she would be in touch with them the following week.

"40. On August 17, 2016, Ms. Gourley stated in an email to the seller and buyer that the respondent had 'finished reviewing all the mineral research pertaining to the minerals . . . [and] has determined that the minerals were 100% in tact [*sic*] when you purchased them and DW Jayhawk does own 100% of the minerals.' Ms. Gourley also stated that the respondent would get the mineral title opinion typed and emailed to the buyer as soon as it was ready.

"41. On September 5, 2017, the buyer emailed Ms. Gourley stating that the Gove County Assessor's Office showed nine (9) other people paying property taxes on the mineral interest that the respondent had stated were owned 100% by the buyer. The buyer again requested the written mineral opinion that it still had not received from the respondent.

"42. On the same date, the buyer sent a second email stating the buyer found information that Enoch Nelson had kept a one-half interest in the mineral rights in 1947.

"43. In spring 2018, Gove County told the buyer that the buyer owed taxes on half of the mineral interest because there were other owners of the other half.

"44. The buyer reached out to Farm & Ranch Realty asking again for assurance that the buyer owned 100% of the mineral interest. Farm & Ranch Realty responded on April 30, 2018: 'I actually visited with [Eland Title] on Thursday and they still stand by their opinion that the minerals you purchased are correct. There is one more item they are going to check on and then you will be receiving their title opinion stating the minerals are intact as you purchased.'

"45. On June 20, 2018, Farm & Ranch Realty emailed the buyer and stated that it had spoken with the respondent, that the respondent understood the buyer's question about ownership of the mineral interest, and that the respondent had researched the issue and would send a letter to the buyer with his findings. Farm & Ranch Realty further said that any legal fees required to take care of the matter would be at the respondent's expense.

"46. In autumn 2018, the buyer hired attorney Michael Andrusak to determine whether it owned 100% of the mineral interest purchased at the 2015 Farm & Ranch Realty auction.

"47. On December 6, 2018, Ms. Gourley sent an email to Mr. Samuelson that was dictated by the respondent and sent on the respondent's behalf. In the dictated email, the respondent told Mr. Samuelson that Mr. Samuelson's prior research did not show the heirs of Enoch Nelson. The respondent asked Mr. Samuelson to locate the probate action for Enoch Nelson's estate, including the journal entry and an inventory of the estate, and also real estate tax statements for the property to see who the county believed had an interest in the mineral rights. The respondent also asked for a copy of the Sheriff's Deed from the tax foreclosure sale of D. Laverne Webb's half mineral interest. Further, the email listed twenty individuals with oil and gas leases covering the property in the chain of title. The respondent told Mr. Samuelson that this was a priority and needed to be completed as soon as possible.

"48. On December 7, 2018, the respondent dictated an email to the buyer wherein the respondent asserted again that the buyer owned 100% of the mineral interest. In the first draft email, the respondent acknowledged that there were 'a significant number of persons who have executed oil & gas leases on the property in the past and I would recommend going ahead and completing a Quiet Title Action to confirm fee title interest to you in the property.' The paragraph also stated that the respondent would complete that Quiet Title Action at his own expense. However, the respondent removed this language and directed his staff to send the email without the language about the oil and gas leases and the suggestion to complete a Quiet Title Action.

"49. In a December 14, 2018, emailed letter, Mr. Andrusak demanded the respondent provide the buyer with the mineral title opinion.

"50. On December 26, 2018, Mr. Andrusak provided the respondent with a release signed by the buyer to obtain the buyer's file from Eland Law Office. The respondent did not provide the file to Mr. Andrusak. On January 28, 2019, Mr. Andrusak traveled to the respondent's office to attempt to pick up the buyer's file. The respondent did not provide the file to Mr. Andrusak on that date either.

"51. On December 27, 2018, Mr. Andrusak received the requested mineral title opinion from the respondent. The title opinion dated October 22, 2015, stated, in part, 'I am of the opinion that merchantable fee simple title to the above described oil, gas and other minerals is vested as follows: DW Jayhawk, LLC subject to the requirements, exceptions, comments and observations hereinafter made.' The opinion listed no requirements, comments, or exceptions.

"52. While the opinion was dated October 22, 2015, the respondent acknowledged that he wrote it in 2018. The respondent stated it was his practice to always date the title opinion the same date that the deed is recorded.

"53. The respondent told the disciplinary investigator that the three-year delay in providing the opinion to the buyer was due to a backlog in his office. The respondent testified that ideally, a mineral interest title opinion should be provided within 30 days after closing the real estate transaction.

"54. While the respondent stated in the written mineral title opinion that he reviewed the abstract of the title, the respondent agreed that no abstract exists.

"55. On February 28, 2019, the law firm Depew, Gillen, Rathburn & McInteer conducted an independent title examination of the mineral interest at issue. This opinion concluded that, at best, the buyer owned one-half of the mineral interest.

"56. On June 28, 2019, Mr. Andrusak, on behalf of the buyer, filed a lawsuit against the respondent alleging malpractice and fraud regarding the real estate transaction. The lawsuit was ultimately settled.

"57. On August 21, 2020, the respondent was deposed by counsel for the buyer. During the deposition, counsel for the buyer asked the respondent, 'If you were explaining to a client, how would you explain what a mineral title opinion is?' The respondent answered, 'It is an attorney's opinion as to the ownership of minerals in, on, and under a particular piece of real estate.' The respondent agreed that a mineral title opinion will assess the defects that exist in the mineral title and how those defects could be cured so that the reader could assess the risks associated with the transaction. The respondent said he had experience writing mineral opinions since 1984.

"58. The respondent would expect the buyer to rely on the mineral title opinion he created to determine whether the seller was able to give the buyer clear title.

"59. Further, the respondent was asked, 'If you're looking at a chain of title and you see in the index that a particular tract seems to have a series of transactions involving people who you can't figure out—you can't see in the record, how they ever got any interest in the property to begin with, does that cause you to take note?' The respondent responded affirmatively and added, 'Well, I think what you're describing is a typical hole in the title . . . [a]nd there you're going to go to the District Court to see if you can clear up that hole in the title.'

"60. When asked about 1947 Enoch Nelson deed where Nelson transferred the surface and one-half mineral interest to D. Laverne Webb, reserving a one-half mineral interest for Nelson, the respondent said:

'A. It's a mineral reservation contained in the deed.

'Q. Why is that significant?

'A. Because that person could claim some right, title, or interest, in and to the minerals.

'Q. Did you follow a chain of title [*sic*] that reserved interest?

'A. Yes.

'Q. And where did it lead you?

'A. Nowhere.'

"61. The respondent agreed that there was no link connecting the half mineral interest reserved by Enoch Nelson to the sellers. The respondent testified about several factors that caused the respondent concern about what mineral interest was actually transferred to the buyer at the auction. Yet, the respondent said that he believed that the buyer purchased 100% of the mineral interest in the property.

"62. The respondent testified that he thought that the buyer could bring a quiet tile action against anyone who claimed an interest in the property, including the oil and gas leaseholders, to resolve any issues with the chain of title. At one point, the following colloquy occurred:

'Q. Would you agree that an unrecorded deed from Enoch Nelson to somebody else would have conveyed a mineral interest?

'A. Yes.

'Q. And you're saying that any such mineral interest now belongs to DW Jayhawk?

'A. Yes.

'Q. And that's because it was somehow extinguished by the person who held it after Enoch Nelson; right?

'A. Yes.

'Q. What extinguished that? What event extinguished that interest?

'A. The deed from the sellers to DW Jayhawk.

'Q. Okay. So you're saying that because the seller, who didn't actually own it, said they were conveying it, that extinguished the interest in an unrecorded deed; right?

'A. You're putting words in my mouth, and I am not going to agree with those.

'Q. Did the seller to DW Jayhawk own the mineral interests?

'A. What's that?

'Q. Did the seller to DW Jayhawk own a hundred percent of the mineral interests?

'A. I believe they did.

'Q. How did the seller to DW Jayhawk acquire the portion of the mineral interests that had been reserved by Enoch Nelson in 1947?

'A. I don't have an answer to that.

'Q. Is it important to have an answer if you're going to get a title opinion?

'A. Sure.

'Q. And, all right. So why is—why do you hold the opinion, if you can't give an answer for why you hold the opinion?

'A. Because I think a quiet title action will resolve the issue.'

"63. The respondent offered no further explanation for the reason he held the opinion that the buyer owned 100% of the mineral interest or why a quiet title action would resolve the issue. Counsel for the buyer asked the respondent, 'your opinion comes from your expertise . . . [a]nd it comes from your legal training; right?' The respondent answered affirmatively.

"64. When asked whether he was 'familiar with the concept that in a quiet title action the plaintiff must rely on the strength of his own title and not the weakness of his adversary,' the respondent answered, 'No.'

"65. The respondent admitted that he did not tell the buyer that the respondent believed the one-half mineral interest reservation in Enoch Nelson could be resolved by a quiet title action. He acknowledged his December 6, 2018, draft email to the buyer where the respondent removed the language:

'There are a significant number of persons who have executed oil & gas leases on the property in the past and I would recommend going ahead and completing a Quiet Title Action to confirm the title interest to you in the property. I do not believe that should be at any expense to you since your mineral purchased [*sic*] was guaranteed in your contract of sale. Therefore, I would complete that Quiet Title Action on your behalf.'

"66. The respondent answered in the affirmative when asked, 'Do you still hold that opinion today, that the minerals were intact at the time of the closing on this property?'

"67. Counsel for the buyer asked the respondent in several different ways to provide a factual or legal basis for why the respondent believed the buyer owned 100% of the mineral interest. The only explanation the respondent gave was that was what he believed.

"68. The respondent also testified during the formal hearing in this disciplinary matter. The respondent testified that the buyer did not purchase 100% of the mineral interest and in fact only purchased 50% of the mineral interest. The respondent agreed that he had previously missed the mineral reservation of Enoch Nelson.

"69. The respondent said that he had never chained the title from beginning to end until after he received the mineral title opinion of the Depew, Rathman, Gillen and McInteer law firm. However, the respondent stated that he did review the Depew title opinion and conducted this beginning to end chain of title research prior to his deposition testimony in August 2020.

"*Conclusions of Law*

"70. Based upon the findings of fact, the hearing panel concludes as a matter of law that the respondent violated KRPC 1.1 (competence), KRPC 1.3 (diligence), KRPC 1.4(a) (communication), KRPC 1.15(a) (safekeeping property), KRPC 1.16(d) (declining or terminating representation), KRPC 5.3(c)(2) (responsibilities regarding nonlawyer assistance), and KRPC 8.4(c) (misconduct), as detailed below.

"71. The disciplinary administrator alleged that the respondent also violated KRPC 4.1(a) (truthfulness in statements to others).

"72. The respondent did not properly research the chain of title despite many obvious red flags indicating other individuals claimed an interest in the mineral rights prior to offering an opinion that the seller could convey 100% of the mineral interest.

However, the evidence stops short of establishing that the respondent violated KRPC 4.1(a).

"73. While, as discussed further below, the hearing panel concludes there is clear and convincing evidence that the respondent engaged in conduct involving misrepresentation by withholding information that would reveal his concerns about the chain of title to the mineral interest (See KRPC 8.4[c]), there is not clear and convincing evidence that the respondent 'knowingly . . . [made] a false statement of material fact or law to a third person.' KRPC 4.1(a).

"KRPC 1.1

"74. Lawyers must provide competent representation to their clients. KRPC 1.1. 'Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.' *Id*.

"75. The respondent did not provide competent representation to the parties to this real estate transaction. The respondent failed to provide legal knowledge, skill, thoroughness, and preparation reasonably necessary to offer an opinion regarding the mineral interest that the parties to the transaction could reasonably rely on.

"76. The respondent's August 12, 2020, deposition testimony shows that the respondent relied on no law or facts to support his assertion to the seller, buyer, and Farm & Ranch Realty that the seller owned and could convey the full mineral interest to the buyer. The respondent effectively admitted that his opinion was baseless.

"77. The respondent stipulated that he violated KRPC 1.1.

"78. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.1.

"KRPC 1.3

"79. Attorneys must act with reasonable diligence and promptness in representing their clients. *See* KRPC 1.3.

"80. The respondent failed to diligently and promptly represent the buyer, DW Jayhawk. The respondent testified that generally, a mineral title opinion should be provided within 30 days after a real estate transaction closes.

"81. Here, the respondent did not provide the mineral title opinion to the buyer for more than three years after closing.

"82. Further, the respondent failed to properly and diligently research the mineral title to the property, despite several clear indications that the sellers did not own 100% of the mineral interests, before providing assurances to the parties to the transaction that the seller could convey 100% of the mineral interests.

"83. The respondent stipulated that he violated KRPC 1.3.

"84. Because the respondent failed to act with reasonable diligence and promptness in representing his client, the hearing panel concludes that the respondent violated KRPC 1.3.

"KRPC 1.4

"85. KRPC 1.4(a) provides that '[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.' *Id.*

"86. In this case, the respondent violated KRPC 1.4(a) when he failed to respond to multiple requests from the buyer for information regarding the status of the mineral interest the buyer had purchased. The buyer spent three years trying to obtain confirmation from the respondent about the mineral interests and ultimately had to hire another attorney to obtain the information requested.

"87. Further, the respondent failed to communicate information that he knew about to the buyer that could affect the buyer's interest in the property, including the fact that multiple oil and gas leases executed by others on the property could present an issue for the buyer and that further legal action may be necessary to establish the buyer's rights.

"88. The respondent stipulated that he violated KRPC 1.4(a).

"89. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.4(a).

"KRPC 1.15

"90. Lawyers must properly safeguard and hold in a separate account the property of their clients and third persons. Unearned fees must be deposited into an attorney trust account. KRPC 1.15(a).

"91. KRPC 1.15(a) specifically provides that:

> '(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state of Kansas. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.'

"92. In this case, the buyer paid Eland Title $500.00 (or, possibly as much as $1,000.00) for the written mineral title opinion and Eland Title paid this $500.00 (or $1,000.00) to Eland Law Office for the opinion on the date of closing, October 21, 2015.

"93. Eland Law Office deposited these funds into the firm operating account instead of its trust account that same day.

"94. The buyer was not provided the written mineral title opinion by October 21, 2015. As a result, the funds paid by the buyer [were] not earned on the date [they were] deposited into the Eland Law Office operating account.

"95. The respondent stipulated that he violated KRPC 1.15(a).

"96. Accordingly, the hearing panel concludes that the respondent failed to properly safeguard DW Jayhawk's property, in violation of KRPC 1.15(a).

"KRPC 1.16(d)

"97. KRPC 1.16 requires lawyers to take certain steps to protect clients after the representation has been terminated. Specifically, KRPC 1.16(d) provides:

> 'Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.'

"98. On December 14, 2018, Mr. Andrusak advised the respondent that he represented the buyer. On December 26, 2018, Mr. Andrusak provided the respondent with a release signed by the buyer to obtain the buyer's file from Eland Law Office. The respondent did not provide Mr. Andrusak with the buyer's file.

"99. On January 28, 2019, Mr. Andrusak traveled to the respondent's office to attempt to pick up the buyer's file. The respondent did not provide the buyer's file on this date either.

"100. The respondent violated KRPC 1.16(d) when he failed to return the buyer's file, which is the property of the buyer, to the buyer or the buyer's counsel.

"101. The respondent stipulated that he violated KRPC 1.16(d).

"102. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.16(d).

"KRPC 5.3(c)(2)

"103. With respect to a nonlawyer employed or retained by or associated with a lawyer:

> '(c) [A] lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:
>
> > (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
> >
> > (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.'

"104. Attorneys in supervisory positions must properly supervise nonlawyer assistants. Here, the respondent failed to properly supervise his employees to ensure proper research was conducted to create a complete and accurate mineral title opinion. Further, the respondent failed to properly supervise his employees to ensure that accurate information was properly communicated between his office and his clients.

"105. The respondent stipulated that he violated KRPC 5.3(c)(2).

"106. Accordingly, the hearing panel concludes that the respondent violated KRPC 5.3(c)(2).

"KRPC 8.4(c)

"107. 'It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.' KRPC 8.4(c).

"108. It is clear from the evidence the respondent was aware that his office may have neglected issues in its research of the mineral interest. There were numerous red flags in the chain of title, including the unresolved issue of where the half reserved mineral interest of Enoch Nelson transferred after his death and why other individuals were paying taxes and executing oil and gas leases on the mineral interest in the property. Based on his expertise and experience in this area of the law, these facts should have, and as the respondent's testimony during the deposition revealed, did alert the respondent to the fact that the mineral title opinion may not be accurate.

"109. The evidence shows that the respondent was aware of these facts and questioned his own legal conclusion that the seller could transfer 100% of the mineral interest to the buyer.

"110. The respondent knowingly misrepresented the facts when he failed to advise the buyer of the concerns he saw that could lead to the conclusion that not all of the mineral interest was transferred to the buyer during the 2015 real estate sale.

"111. Further, by the time the respondent testified during his deposition, he knew there was some problem with the title but continued to insist that his mineral title opinion was 100% accurate. At the time of the formal hearing, this inconsistency was never fully explained by the respondent.

"112. As such, the hearing panel concludes that the respondent violated KRPC 8.4(c).

"*American Bar Association*
Standards for Imposing Lawyer Sanctions

"113. In making this recommendation for discipline, the hearing panel considered the factors outlined by the American Bar Association in its Standards for Imposing Lawyer Sanctions (hereinafter 'Standards'). Pursuant to Standard 3, the factors to be considered are the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors.

"114. *Duty Violated*. The respondent violated his duty to his clients and to the public.

"115. *Mental State*. The respondent knowingly violated certain duties and negligently violated other duties.

"116. *Injury*. As a result of the respondent's misconduct, the respondent caused the parties to the real estate transaction to be misled about matters that might impact the mineral interest being conveyed, when the respondent was hired for the purpose of providing a legal opinion on this issue. The respondent also caused the buyer to spend years, effort, and expense in paying an attorney to obtain its file and information from respondent and for a mineral title opinion from the Depew, Rathman, Gillen and McInteer Law Firm that it had already paid the respondent to provide. Further, the buyer purchased the mineral interest based on the respondent's representation that it was purchasing 100% of the mineral interest but may have obtained only up to one-half of the mineral interest.

"Aggravating and Mitigating Factors

"117. Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. In reaching its recommendation for discipline, the hearing panel, in this case, found the following aggravating factors present:

"118. *Prior Disciplinary Offenses*. The respondent has been previously disciplined with informal admonition on two occasions. However, both prior informal admonitions were imposed more than twenty years ago, the first being in 1998 and the second in 2000. The hearing panel concludes that the two prior informal admonitions, which are so remote, are neither aggravating nor mitigating.

"119. *Dishonest or Selfish Motive*. The respondent spent a long time avoiding responsibility for resolving the mineral title issue and providing a written opinion. The hearing panel concludes that an apparent motivation for the respondent's delay was to avoid a negative impact on his pride and reputation in the title industry. Accordingly, the hearing panel concludes that the respondent's misconduct was motivated by selfishness.

"120. *A Pattern of Misconduct*. The respondent has engaged in a pattern of misconduct. The respondent repeatedly and consistently violated the Kansas Rules of Professional Conduct regarding this mineral title opinion over the course of more than three years.

"121. *Multiple Offenses*. The respondent committed multiple rule violations. The respondent violated KRPC 1.1 (competence), KRPC 1.3 (diligence), KRPC 1.4(a) (communication), KRPC 1.15(a) (safekeeping property), KRPC 1.16(d) (declining or terminating representation), KRPC 5.3(c)(2) (responsibilities regarding nonlawyer assistance), and KRPC 8.4(c) (misconduct). Accordingly, the hearing panel concludes that the respondent committed multiple offenses.

"122. *Refusal to Acknowledge Wrongful Nature of Conduct*. The respondent has refused to acknowledge his misrepresentation and the harm that his conduct caused the parties to the real estate transaction, particularly the buyer. Accordingly, the hearing panel concludes that the respondent refused to acknowledge the wrongful nature of his conduct.

"123. *Substantial Experience in the Practice of Law*. The Kansas Supreme Court admitted the respondent to practice law in the State of Kansas in 1984. At the time of the misconduct, the respondent had been practicing law for more than 30 years. Further, the respondent testified that he has significant experience in the practice of law

doing title work and owns title company offices in five different cities in Kansas. The hearing panel concludes that the respondent has substantial experience in the practice of law and in the area of title work, specifically.

"124. *Refusal to Take Action to Mitigate Negative Consequences of Misconduct*. There were clear signs early on that the respondent's conclusions regarding the mineral interest were not supported. Yet, despite the respondent's substantial experience in the law and with performing title work, he refused to take feasible actions to cure the problem or even notify the parties to the transaction of the issues at a time when they could have been more easily rectified and the harm mitigated.

"125. Mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. In reaching its recommendation for discipline, the hearing panel, in this case, found the following mitigating circumstances present:

"126. *Previous Good Character and Reputation in the Community Including Any Letters from Clients, Friends and Lawyers in Support of the Character and General Reputation of the Attorney*. The respondent is an active and productive member of the bar of Sheridan County, Kansas and surrounding areas. The respondent also enjoys the respect of his peers and generally possesses a good character and reputation as evidenced by the testimony of former judge Robert Schmisseur, attorney Ronald Shalz, and several letters received by the hearing panel.

"127. *The Present and Past Attitude of the Attorney as Shown by His Cooperation During the Hearing and His Full and Free Acknowledgment of the Transgressions.* The respondent cooperated with the disciplinary process. Additionally, the respondent admitted many of the facts that gave rise to the violations and stipulated that he violated KRPC 1.1 (competence); KRPC 1.3 (diligence); KRPC 1.4(a) (communication); KRPC 1.15(a) (safekeeping property); KRPC 1.16(d) (declining or terminating representation); and KRPC 5.3(c)(2) (responsibilities regarding nonlawyer assistance).

"128. A factor which is neither aggravating nor mitigating is forced or compelled restitution. The respondent ultimately settled the lawsuit brought against him by the buyer and made payment to the buyer for damages. However, the hearing panel concludes that this fact is neither aggravating nor mitigating because the payment to the buyer was made years after the real estate closing time period and the buyer was forced to file a lawsuit to obtain it.

"129. In addition to the above-cited factors, the hearing panel has thoroughly examined and considered the following Standards:

> '4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.'
>
> '4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.'
>
> '4.42 Suspension is generally appropriate when:
>
> (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or
>
> (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.'
>
> '4.54 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether he or she is competent to handle a legal matter, and causes little or no actual or potential injury to a client.'

'4.62 Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.'

'4.63 Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client.'

'5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.'

'7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.'

'7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.'

"*Recommendation of the Parties*

"130. The disciplinary administrator recommended that the respondent be suspended for a period of 180 days.

"131. The respondent recommended that he receive a public censure.

"*Discussion*

"132. The respondent initially acted negligently regarding this real estate transaction. Over time the respondent's conduct turned into a pattern of negligence and,

ultimately, knowing misrepresentations of the facts to the parties to the transaction. The respondent's lack of competence in handling the matter, depositing the fees paid for the mineral title opinion into his firm operating account, and failure to turn the buyer's file over to new counsel in a timely manner appear to be a result of the respondent's negligence.

"133. The hearing panel concludes that the respondent did not intend to mislead the buyer or other parties to the transaction, but instead missed the issues with the mineral title initially and then believed any issue with title could be resolved with a quiet title action. However, the respondent's misconduct is serious and warrants suspension from the practice of law.

"134. The hearing panel recognizes that the Supreme Court 'bases each disciplinary sanction on the specific facts and circumstances of the violations and aggravating and mitigating circumstances presented in the case,' and 'while prior cases may have some bearing on the sanctions that the court elects to impose, those prior cases must give way to consideration of the unique circumstances that each individual case presents.' *In re Williams*, 302 Kan. 990, 1003, 362 P.3d 816 (2015).

"135. The hearing panel concludes that both the specific circumstances in this case as well as discipline imposed for similar conduct in prior attorney discipline cases warrant the discipline recommended below. *See In re Borich*, 316 Kan. 257, 514 P.3d 352 (2022) (attorney's knowing and negligent violation of rules including KRPC 1.1, 1.15, 1.16, and 8.4(c) warranted one-year suspension); *In re Winterberg*, 314 Kan. 486, 500 P.3d 535 (2021) (attorney's negligent and knowing violation of rules including KRPC 1.3, 1.4(a), and 8.4(c) resulted in six-month suspension); *In re Colvin*, 300 Kan. 864, 336 P.3d 823 (2014) (despite the serious nature of respondent's conduct, which included knowing misrepresentation, published censure was held appropriate).

"*Recommendation of the Hearing Panel*

"136. Based upon the findings of fact, conclusions of law, and the Standards listed above, the hearing panel unanimously recommends that the respondent be suspended for a period of 180 days. The panel does not recommend that the respondent

be required to undergo a reinstatement hearing pursuant to Rule 232. However, the hearing panel encourages the respondent to follow through with his testimony that he will formulate a plan to develop a division between his law office and title company and business practices to ensure the respondent complies with the rules of professional conduct.

"137. Costs are assessed against the respondent in an amount to be certified by the Office of the Disciplinary Administrator."

DISCUSSION

In a disciplinary proceeding, we consider the evidence, the disciplinary panel's findings, and the parties' arguments and determine whether KRPC violations exist and, if they do, the appropriate discipline. Attorney misconduct must be established by clear and convincing evidence. *In re Spiegel*, 315 Kan. 143, 147, 504 P.3d 1057 (2022); see Supreme Court Rule 226(a)(1)(A) (2023 Kan. S. Ct. R. at 281). "'Clear and convincing evidence is "evidence that causes the factfinder to believe that 'the truth of the facts asserted is highly probable.'"'" 315 Kan. at 147.

Respondent Eland had adequate notice of the formal complaint, the hearing before the panel, and the hearing before this court. And he had the opportunity to present evidence at his hearing and argue before this court. He also had the opportunity to take exception to the hearing panel's findings in its final hearing report. He chose to take no exceptions, and we thus deem the panel's findings of fact admitted. Supreme Court Rule 228(g)(1), (2) (2023 Kan. S. Ct. R. at 287).

These admitted facts establish by clear and convincing evidence the charged misconduct in violation of:

- Kansas Rules of Professional Conduct (KRPC) 1.1 (2023 Kan. S. Ct. R. at 327) (competence),
- KRPC 1.3 (2023 Kan. S. Ct. R. at 331) (diligence),
- KRPC 1.4(a) (2023 Kan. S. Ct. R. at 332) (communication),
- KRPC 1.15(a) (2023 Kan. S. Ct. R. at 372) (safekeeping property),
- KRPC 1.16(d) (2023 Kan. S. Ct. R. at 378) (declining or terminating representation),
- KRPC 5.3(c)(2) (2023 Kan. S. Ct. R. at 408) (responsibilities regarding nonlawyer assistance),
- and KRPC 8.4(c) (2023 Kan. S. Ct. R. at 433) (misconduct).

The only issue left to be determined is the appropriate discipline. During oral arguments, both the Disciplinary Administrator's office and respondent Eland agreed the panel's recommendation of a 180-day suspension was appropriate discipline and that no reinstatement hearing under Supreme Court Rule 232 (2023 Kan. S. Ct. R. at 293) was necessary. See Supreme Court Rule 232(d) (2023 Kan. S. Ct. R. at 294). This court is not bound by the recommendations made by the Disciplinary Administrator or the hearing panel, however. *In re Long*, 315 Kan. 842, 853, 511 P.3d 952 (2022). That said, after considering the evidence presented, the recommendations of the hearing panel, and the recommendations of the parties, we determine the recommended discipline is appropriate. We also agree that respondent Eland need not undergo a reinstatement hearing.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that, effective April 28, 2023, the date of the original opinion, the court suspends Kenneth J. Eland from the practice of law in the state of

Kansas, for 180 days in accordance with Supreme Court Rule 225(a)(3) (2023 Kan. S. Ct. at 281) for violating KRPC 1.1, 1.3, 1.4(a), 1.15(a), 1.16(d), 5.3(c)(2), and 8.4(c).

IT IS FURTHER ORDERED that respondent shall comply with Supreme Court Rule 231 (2023 Kan. S. Ct. R. at 292) (notice to clients, opposing counsel, and courts following suspension or disbarment).

IT IS FURTHER ORDERED that respondent shall comply with Supreme Court Rule 232(b) when seeking reinstatement and that Rule 232(d) applies in that a reinstatement hearing is not required.

IT IS FURTHER ORDERED that the costs of these proceedings be assessed to the respondent and that this opinion be published in the official Kansas Reports.

WALL, J., not participating.