

[24-Jan-2001]

State of Vermont
Professional Responsibility Board

Decision No. 16

In Re: PCB File No. 95.19

Hearing Panel Decision

The parties submitted this matter via stipulated facts and joint recommendations as to conclusions of law and sanctions. The Hearing Panel conducted a telephone conference on October 24, 2000, in which both Disciplinary Counsel and Respondent participated.

I. Findings of Fact

The Panel adopts the parties' stipulated facts as its findings, as

follows:

1. The respondent is an attorney licensed to practice law in the state of Vermont. He was admitted to practice in 1975.
2. This complaint was filed against the Respondent on February 8, 1994 by a former client. The essence of the client's complaint was that Respondent neglected his client.
3. On April 16, 1998, former Bar Counsel Ms. Shelley Hill wrote to Respondent that "I have concluded that there is sufficient cause to believe that you are in violation of DR 6-101(A) (3) and DR 9-102(B)(3). The circumstances presented, however, suggest that this conduct, if proved, would fall within the definition of minor misconduct in Administrative Order 9 Rule 7.A (5) (b)."
4. Hill referred the case to a Non-disciplinary Resolution Panel. (hereinafter "Assistance Panel")
5. On May 20, 1998, a PCB Assistance Panel took up the matter. They decided to dismiss the matter against the Respondent if he met the following conditions:

1. Pass the Multi-State Professional Responsibility Examination within the next year.

2. Use written fee agreements with all clients for the next 12 months

3. Maintain all records of your financial accounts for at least six years.

4. Write a letter of apology to the Complainant for the misunderstanding as to how the funds he paid you were to be applied.

6. On June 4, 1998, then Board Counsel Wendy Collins, by letter, informed the Respondent of the conditions that the PCB Assistance Panel had set for dismissal of the matter. Collins' two-page letter concluded:

"We will hold this case an open file for one year. If at the end of that period you have successfully completed conditions 1,2, and 4 and if you have systems in place which ensure successful completion of condition 3, you should write to the Board requesting a full dismissal. If the conditions have not been met, the matter will be referred to Disciplinary Counsel for further proceedings."

7. The Respondent did not contact the Board or Ms. Collins for an entire year concerning his fulfillment of the required conditions to

dismiss the case. Therefore, on August 4, 1999 Collins wrote to the Respondent asking the Respondent to inform her of the progress he had made in completing the conditions. She wrote, "I need to make a determination as to whether this matter should be closed or returned to Disciplinary Counsel."

8. From June 1998 through May 2000, Respondent never communicated with Collins or anyone else at the PRB concerning whether he had met any of the conditions for dismissal.

9. In fact, he had not met any of the conditions for dismissal, except for passing the National Conference of Bar Examiners Multi-State Professional Responsibility Examination on August 13, 1999.

10. On May 24, 2000 Collins, having not heard from the Respondent, referred the case to the Office of Disciplinary Counsel (ODC) for further action.

11. Since receiving Collins' May 24, 2000 letter, the ODC has had verbal and written contacts with the Respondent, who has agreed to the above-stipulated facts.

II. Conclusions of Law

The Panel accepts the parties' recommendations as to conclusions of

law concerning the alleged violation of Administrative Order No. 9, Rule 7(D), but reaches a different conclusion with regard to the alleged violation of A.O. 9, Rule 7(C).

1. Respondent violated Administrative Order No. 9 Rule 7 (D) by failing to furnish information to or respond to a request from Disciplinary Counsel or a Hearing Panel with no reasonable grounds for doing so.
2. The panel is troubled with the failure of A.O. 9, Rule 4 (B)(3) to satisfactorily address the failure of a Respondent to comply with agreed-upon conditions. The rule simply provides "the complainant may be referred to disciplinary counsel for further action." It does not indicate whether Respondent's non-compliance requires Disciplinary Counsel to bring formal charges on a matter that may now be stale or whether the failure of Respondent to comply with the agreed conditions is itself grounds for discipline under A.O. 9, Rule 7. Disciplinary Counsel suggests the rule contemplates the latter and says such a failure is grounds for discipline under Rule 7(C).

A significant amount of time may elapse between an offense by a lawyer and a determination that the lawyer has failed to comply with conditions imposed by an assistance panel. There will often be significant time between the offense and the filing of a complaint with the Professional Responsibility Program. Additional time will pass as Bar Counsel screens a complaint and assigns it to an assistance panel and then as the assistance

panel deals with the complaint and works out conditions to which the lawyer will agree. Finally, additional time will pass before an assistance panel determines the lawyer has failed to comply with the conditions. In trying to determine the intent of the drafters of Rule 4(B)(3), we conclude they would not have intended, at this late date, for disciplinary counsel to start over. To do so could handicap Disciplinary Counsel with stale or unavailable evidence and could reward Respondent's non-cooperation by making it more difficult for Disciplinary Counsel to prove the original case against Respondent. Since there is no other reasonable alternative, the drafters of A.O. 9 must have intended to subject the recalcitrant attorney to discipline under Rule 7(C).

However, this Panel is reluctant to say, on the specific facts of this case, that Respondent violated A.O. 9, Rule 7(C). Disciplinary Counsel asks us to find that Respondent violated an order of a hearing panel or of the Board, either of which would be grounds for discipline under Rule 7(C). The first question we must address is whether an action of an "assistance panel" is an action of a "hearing panel" or of the "Board." Disciplinary Counsel advises us the rules applicable to this case were interim, temporary rules, not those presently found in A.O. 9. These temporary rules, says Disciplinary Counsel, allowed a hearing panel to act in the same manner as present-day assistance panels under contemporary Rule 4(B). Consequently, Disciplinary Counsel concludes Respondent actually agreed to conditions imposed by a hearing panel acting like a present- day assistance panel. Respondent does not challenge this representation and we

accept it as one explanation of how the actions of an assistance panel could be equated to actions of a hearing panel.(FN1)

This takes us to the second question, whether the actions of the Assistance Panel (which we are willing to equate to actions of a "hearing panel" or with actions of the "Board") amounted to an "order." There are two considerations on this issue. The first is whether assistance panels are authorized to issue orders. We conclude they are. Rule 4(B)(1) authorizes hearing panels to "impose conditions as an alternative to discipline" "with the concurrence of the attorney." Under this language, if an attorney agrees to specified conditions whereby formal disciplinary proceedings can be avoided, the panel may "order" compliance. Without the ability to "order" compliance, the mechanism for the alternative to formal discipline will not work. It would have been better if the drafters of A.O. 9 had provided (or do provide in the future) a more precise consequence than the ambiguous one of Rule 4 (B)(3).(FN2) In the absence of such an express provision, the logic of A.O. 9, taken as a whole, and the logical meaning of the verb "impose," compel the conclusion that an assistance panel is authorized to "order" compliance with the agreed-upon conditions. Without this authority on the part of an assistance panel, Disciplinary Counsel would be left with no alternative under Rule 4(B)(3) but to start over. In such an event, it is likely Disciplinary Counsel would be handicapped by stale or unavailable evidence because of the passage of time attributable to the unsuccessful alternative disciplinary process.

The second consideration on the question whether the actions of this Assistance Panel was an order, focuses on the documentation that followed Respondent's agreement to the conditions of the Assistance Panel. Even though we conclude an assistance panel has authority to issue an "order," we cannot find, on the record before us, that it ever issued one in this matter. The Stipulation of Facts does not indicate any written or oral order was ever issued by the Assistance Panel. Indeed, it appears the only documentation of the conditions was a letter sent to Respondent by counsel to the Professional Responsibility Board. We conclude this letter was not an "order" of the Assistance Panel as contemplated and authorized by Rule 4(B). Under these precise circumstances, we do not find a violation of Rule 7(C).

III. Sanction

1. The parties acknowledge, and the Hearing Panel agrees, that the Respondent should be publicly reprimanded for his violation absent the strong mitigating circumstances involved in this case. Because of these mitigating circumstances detailed below, the Panel concludes that the Respondent should be given a private admonition and be required to complete the initial conditions placed upon him by the Assistance Panel in conjunction with a six-month probationary period.

2. According to ABA Standards, an admonition may be imposed when a

lawyer engages in cases of minor misconduct, where the lawyer's acts cause little or no injury to a client, the public, the legal system, or the profession, and where the lawyer is unlikely to engage in further misconduct. See ABA Standards for Imposing Lawyers Sanctions, Section 8.4 (Commentary).

The Duty

The Respondent violated a duty to the Board by not complying with its conditions for dismissal.

State of Mind

The Respondent neglected complying with the conditions set down by the Panel.

Injury

Respondent failed to communicate to his client as agreed upon with the Assistance Panel, thereby not meeting his agreed upon obligation to his client.

Mitigating and Aggravating Factors

In mitigation, Respondent has an unexpected life threatening illness and has provided this office with evidence of such illness. His illness

has impacted his ability to focus enough to comply with the conditions set by the Panel.

In aggravation, Respondent has had over two years to comply with the conditions set by the Panel and has not yet done so.

IV. General Conclusions

Based upon the above, the Panel concludes that a private admonition is appropriate and, in addition, that the Respondent should be placed on probation for six months, fulfill all the conditions originally required by the Assistance Panel on May 20, 1998, not violate the Vermont Rules of Professional Conduct, and promptly respond to all requests from the Office of Bar Counsel that relate to his compliance, or lack thereof, with this decision.

The parties have agreed, and the Panel includes as part of its decision, that upon presentation to the Board of clear and convincing evidence that Respondent has materially violated this order, Respondent may immediately be issued a Public Reprimand. The panel accepts the parties' agreement that in the event the Court desires to impose more stringent discipline than that stated above, the parties' stipulation shall not be binding upon the Respondent, except for the Stipulation of Facts.

Dated: 1/11/01

Atty. Judith Salamandra Corso, Chair

Dated: 1/23/01

Mr. George Coppenrath, Panel Member

Dated: 1/22/01

Atty. James Gallagher, Panel Member

FILED 1/24/01

Footnotes

FN1. This is an important distinction for future application of the rule because present-day A.O. 9 makes a clear distinction between hearing panels (Rule 2) and assistance panels (Rule 4) and, under present A.O. 9, we would not say the "hearing panel" referred to in Rule 7(C) would include an assistance panel appointed under Rule 4. However, Rule 7(C) also

imposes discipline for violation of an order of the "Board." Under the present disciplinary procedure, there is no procedure that would allow the Professional Responsibility Board to make an order in a specific case. The Board's role in the new system involves oversight of the program and implementation, coordination, and review of policies and goals. Assuming the reference to Board orders in Rule 7(C) had some meaning, recognizing the need to enforce the conditions of an assistance panel under Rule 4 (B)(1), and acknowledging that assistance panels are arms of the Board (they were appointed by the Board Chair and each includes a Board member), we believe the drafters equated actions of assistance panels with action of the Board.

FN2. For example, they could have expressly provided that failure to comply with agreed-upon conditions would be grounds for discipline under Rule 7 and could have authorized an appropriate range of sanctions such as public reprimand, admonition or probation to be imposed by a hearing panel upon proof the lawyer agreed to conditions and did not comply with them.