

67 PRB

[15-Jun-2004]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2004.104

Arthur Heald, Esq.

Decision No. 67

On February 20, 2004, Disciplinary Counsel filed formal charges against Respondent. Respondent admitted the facts alleged in the Petition, and the matter was heard on the issue of sanctions on May 4, 2004, before Hearing Panel No. 6, consisting of Judith Salamandra Corso, Esq., James C. Gallagher, Esq. and Toby Young. Michael Kennedy appeared as Disciplinary Counsel. Respondent was present and appeared pro se.

Based upon Respondent's admissions and his testimony, Respondent is suspended from the practice of law for a period of three years for failure to file state income tax returns, for making a false statement on his

licensing statement filed with the Board of Bar Examiners and for failure to cooperate with disciplinary authorities in violation of Rules 8.4 (c), 8.4 (h) and 8.4(d) of the Vermont Rules of Professional Conduct.

Facts

Respondent was admitted to the practice of law in 1953 and is currently licensed to practice law in Vermont. For the years relevant to this matter, 1999 to 2003, Respondent was a resident of Vermont and operated a law office in St. Albans from which he earned taxable income. Respondent filed no Vermont state income tax returns for the years 1999 through 2002, and as a result has not been in good standing with the Vermont Tax Department since April of 2000.

In July of 2000, and again in July of 2002, Respondent filed a licensing statement with the Board of Bar Examiners in which he certified that he was "in good standing with respect to any and all taxes due the State of Vermont."

At the hearing Respondent stated that at the time that he signed the licensing statements, he took the position that he had no tax liability until he filed a return. Since he had not filed a return he was thus in good standing. He also admitted that he had made an error and stated that were he in the Panel's position, he would not give much credence to his explanation. He had a busy practice and put off tending to his personal

affairs. He also testified that he was ashamed that he had not filed, and that he had had many sleepless nights as a result.

Respondent did not cooperate with the investigation of this disciplinary case. By letter dated November 21, 2003, Disciplinary Counsel asked Respondent to respond to questions related to the investigation of his failure to file Vermont state income tax returns. By letter dated March 17, 2004, Disciplinary Counsel asked Respondent to schedule a deposition. Respondent never responded to either letter.

Respondent has since entered into an arrangement with the tax department for the payment of his delinquent taxes. He had begun discussions with the department about his delinquent returns by 2001, but did not enter into the agreement until early 2004, shortly after the department lien-ed his property.

Respondent has substantial experience in the practice of law and substantial previous discipline. His disciplinary history begins with an admonition in 1981. In re File No. 80.002, (Feb. 6, 1981). A year later he was suspended for five months for failure to file federal income tax returns. In re Heald, 140 Vt. 651 (1982). In 1994, he was admonished for neglecting his duties as the administrator of an estate. PCB Decision No. 65 (April 1, 1994). Shortly thereafter, he was publicly reprimanded for neglecting an estate. In re Heald, 163 Vt. 640 (1995). In 2002, he was publicly reprimanded for neglecting a real estate closing and failing to

cooperate with the subsequent disciplinary investigation. In re Heald, 173 Vt. 557 (2002). He was suspended for 60 days in 2003 for failure to cooperate with a disciplinary investigation, In re Heald, PRB Decision No. 54 (May 5, 2003), and finally he was very recently publicly reprimanded for negligent handling of client funds. In re Heald, PRB Decision No. 66 (May 14, 2004).

Conclusions of Law

Licensing Statements

Rule 8.4 (c) of the Vermont Rules of Professional Conduct prohibits lawyers from engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation." Respondent's certifications, filed with the Board of Bar Examiners in July of 2000 and July of 2002 with respect to his tax status, were false and each constitutes a violation of Rule 8.4(c).

Tax Returns

Rule 8.4(h)

Rule 8.4(h) of the Vermont Rules of Professional Conduct prohibits lawyers from engaging in "conduct which adversely reflects on the lawyers fitness to practice law." Two previous Vermont cases make it clear that failure to file tax returns violates this rule. In both In re Massucco, 159 Vt. 617 (1992), and In re Free, 159 Vt. 625 (1992), the Vermont Supreme

Court approved decisions of the Professional Conduct Board concluding that failure to file tax returns violated DR 1-102(A)(7), the predecessor to present Rule 8.4(h). We therefore find that Respondent violated Rule 8.4(h) in each of the years in which he failed to file a Vermont income tax return.

Rule 8.4(d).

Rule 8.4(d) of the Vermont Rules of Professional Conduct prohibits an attorney from engaging in "conduct that is prejudicial to the administration of justice." An early Vermont case on failure to file tax returns cites no specific rule in finding misconduct, but discusses the nature of the offense in language which is similar to the present rule. "It is not only a failure to perform a duty imposed by law on income-earning citizens generally, it is a breach of responsibility that tends to discredit the legal profession which the respondent, as a member of the bar is obligated to uphold with strict fidelity." *In re Calhoun*, 127 Vt. 220 (1968).

The commentary to Rule 8.4 suggests that it covers prohibited conduct which adversely reflects on an attorney's fitness to practice, and mentions specifically the failure to file tax returns. The Court in *In re Free*, 159 Vt. 626 (1992) found a violation of Rule 8.4(d) as have the courts of Colorado, *People v. McIntyre*, 942 P.2d 499 (1997) and Maryland, *Maryland Attorney Grievance Commission v. Breschi*, 677 A.2d 659 (1995), in similar

cases of failure to file tax returns.

Failure to Cooperate with Disciplinary Authority

One of the grounds for discipline set out in A.O. 9, is failure to respond to disciplinary authorities. Rule 7D. Respondent himself is one of a number of lawyers who have been disciplined for such failure to cooperate. In a case decided only three years ago the Hearing Panel found that Respondent's failure to cooperate was prejudicial to the administration of justice in violation of Rule 8.4(d) of the Vermont Rules of Professional Conduct *In re Heald*, PRB Decision No. 19 (June 5, 2001). See also, *In re* PRB File No. 2000.019, Decision No. 15 (Oct.23, 2000); *In re* Blais, PRB Decision No. 118 (Feb. 14, 1997), in which such conduct has also been found to be a violation of Rule 8.4. Respondent's two failures to respond to reasonable requests from disciplinary counsel constitute a violation of this rule.

Sanctions

In reaching the decision to suspend Respondent for his misconduct in this matter, the Panel has considered carefully Disciplinary Counsel's persuasive arguments for disbarment, but after examining both the nature of Respondent's current and past offenses and the recent cases in which disbarment has been imposed, we believe that a lengthy suspension is the appropriate sanction.

The most troubling aspect of Respondent's behavior is not so much the nature of the offenses themselves, but the fact that Respondent has such a long disciplinary history, and that he continues to commit the same offenses. This is the second time that he has been disciplined for failure to file tax returns and the second time that he has been disciplined for failure to cooperate with disciplinary authorities. This case presents us with more of what the Hearing Panel in Respondent's most recent case characterized as "part of a pattern which point[s] to Respondent's underlying inability to pay attention to his fundamental responsibilities as a practicing attorney and as a citizen." In re Heald, PRB Decision No.66 (May 14, 2004). This same laxity was noted by the Hearing Panel in his first tax case more than twenty years ago. "Respondent put off preparing and filing federal income tax returns for 1977 and 1978, knowing that he had no personal income tax liability and being busy in his law practice. He worked long hours and took insufficient time from his practice to attend to his personal business." In re Heald, 140 Vt. 651 (1982).

We see the same inattention, and, like the previous hearing panels, we see no motive for self-enrichment or calculated attempt to evade payment of taxes or to discredit the legal system. We do, however, believe that Respondent's behavior is a serious breach of his duty as a member of bar.

Disciplinary Counsel cites us to ABA Standard § 8.1(b) which recommends that when an attorney is suspended for the first instance of

misconduct, disbarment is appropriate for a subsequent violation of the same provision of the Rules. In general we agree with this principle. Discipline in Vermont in cases involving a first offense of failure to file tax returns incurs suspension of four to six months. In re Calhoun, 127 Vt.220 (1968), and In re Massucco, 159 Vt. 617 (1992), four months; In re Heald, 140 Vt. 651 (1982), five months, and In re Free, 159 Vt. 625 (1992), six months.

In other circumstances, application of these four cases and the ABA Standards could justify disbarment.

The same reasoning applies to Respondent's certifications on his licensing statements. From Respondent's testimony it appears that he was engaging in self-deception as well as making false statements on his filings with the Board of Bar Examiners. Disciplinary Counsel argues that this case is similar to In re Daly, PRB Decision No. 49 (April 7, 2003), in which the Hearing Panel imposed a three year suspension for making a false statement on an application for admission on motion. In the Daly case there was no evidence of aggravating factors such as prior discipline. While in both cases we find a false statement, it is important to look at what was concealed. In the present case Respondent concealed his failure to file tax returns, a serious matter, but not one that is likely to impact his clients. Daly concealed the fact that his law firm was under investigation by the New York Committee on Professional Standards and that he was the defendant in a consumer fraud complaint. The concealment of

these two matters is potentially much more harmful. Daly failed to reveal the truth relating to his law practice in New York. Respondent failed to reveal the truth relating to his personal obligations to the taxing authority.

We acknowledge the presence of the aggravating factors of Respondent's substantial disciplinary history and length of practice but do not believe they are sufficient in this case to raise the sanction to disbarment. This is borne out by a comparison of the recent Vermont cases in which disbarment has been imposed. Most, if not all of these cases, involve either criminal behavior or willful deceit or misrepresentation; In re Mitiguy, PCB Decision No. 59, (1993), attorney convicted of 6 felonies and misappropriated client's trust monies; In re Palmisano, PCB Decision No. 105 (1996), five cases involving fraud, deceit, misrepresentation and neglect of client matters; In re Abel, PCB Decision No. 117 (1997), embezzlement from law firm; In re Thompson, PCB Decision No. 138 (1999), misappropriation of client funds, conviction of interstate transfer of stolen goods, and structuring a transaction to avoid currency reporting laws. In re Singiser, PRB Decision No 6 (2000), abandonment of clients, failure to account for client funds and other charges. In re Frattini, PRB Decision No 26 (2001), conviction in Maine of embezzlement, mail fraud and tax evasion. In re Lane, PRB Decision No 42 (2002), as Treasurer of Chittenden County Democrats, used funds for his own purposes.

All of these cases involve either substantial harm to clients or the

potential for serious harm to clients. A review of Respondent's disciplinary cases reveals that harm to clients was minimal. The four cases involving failure to file taxes and failure to cooperate with the disciplinary authorities had no impact on Respondent's clients. In the 1994 case involving neglect of an estate, the Professional Conduct Board found that "[t]he total value of the estate was not diminished" and approved an admonition. In the most recent case Respondent held a client check in his file for several months rather than depositing it as required by the rules. Again, however, there was little or no injury to the client, though the potential for injury was present. The only case in which there is clear evidence of client injury is PRB Decision No. 19 (June 5, 2001). In this case there was an order of restitution to make the client whole, and since nothing further about the case appears in Respondent's disciplinary history, we assume that payment was made.

This case presents us with a somewhat unique fact situation. Though Respondent's disciplinary history is long, it is not comprised of cases in which clients have suffered any substantial harm, nor do we find the kind of calculated and intentional wrongdoing that we find in a number of the disbarment cases. It is also clear, however, that the series of reprimands and short suspensions that have been imposed on Respondent in the past have not served to ameliorate his behavior.

We are faced here with a situation similar to that in *In re Blais*, PRB Decision No. 48 (Dec. 20, 2002). In deciding to impose a six month

suspension in that case this Panel stated:

It is not the relative severity of the present case that is persuasive to the Panel. It is the fact that it is one in a long series of complaints of neglect coupled with the fact that the existence of these prior cases has not prompted the Respondent to change the way he practices law. In imposing a suspension of six months the Panel is aware that the Respondent must go through the Reinstatement process provided in A.O. 9 22 (D). The Panel believes that this process will be helpful to the Respondent in rethinking his method of practice and will serve as a protection to the public.

In the Blais case the Panel was correct. At his reinstatement hearing Blais testified that he had indeed used the period of suspension to rethink his approach to the practice of law. The Panel was convinced that he had done so and recommended to the Supreme Court that he be reinstated. In re Blais, PRD Decision No. 58, (October 1, 2003).

Respondent's approach to his professional and personal obligations is inept and careless and reflects badly on the legal profession. His inability to change his way of dealing with obligations is similar to Blais's unwillingness to keep his practice at manageable levels. By imposing a lengthy suspension we offer Respondent the opportunity to either retire completely, as is his present intention, or to rethink and

reevaluate his approach to his obligations and move for reinstatement.

Should he decide to do so after the expiration of the three year suspension, he will have to meet the substantial evidentiary burden of A.O.9, Rule 22 (D) which provides that:

The respondent-attorney shall have the burden of demonstrating by clear and convincing evidence that he or she has the moral qualifications, competency, and learning required for admission to practice law in the state, and the resumption of the practice of law will be neither detrimental to the integrity and standing of the bar or the administration of justice nor subversive of the public interest and that the respondent-attorney has been rehabilitated.

We believe that the three year suspension coupled with the provisions of Rule 22(D) are sufficient to both protect the public and to signal to other members of the bar that they must meet their obligations as citizens as well as to the legal system.

Conclusion

Respondent, Arthur Heald is hereby SUSPENDED from the practice of law

for a period of three years commencing 45 days from the date of this opinion for violation of Rules 8.4 (c), 8.4 (h) and 8.4(d) of the Vermont Rules of Professional Conduct. Respondent shall promptly comply with the provisions of Rule 23 of A.O. 9.

Dated: June 15, 2004

Hearing Panel No. 6

FILED JUNE 15, 2004

/s/

Judith Salamandra Corso

/s/

James Gallagher, Esq.

/s/

Toby Young