PRB 112

[Filed 28-Jul-2008]

STATE OF VERMONT

PROFESSIONAL RESPONSIBILITY BOARD

In re : Philip van Aelstyn

PRB No. 2004.026

Decision No: 112

The parties filed a stipulation of facts and a joint recommendation as to conclusions of law. A hearing was held on April 3, 2008, on the issue of sanctions before a Hearing Panel consisting of Paul Ferber, Esq., S. Stacy Chapman III, Esq. and Ruth Stokes. Michael Kennedy appeared as Disciplinary Counsel. Respondent was present and represented by Ian Carleton, Esq. Ruth Stokes participated by phone by agreement of the parties. The panel suspends Respondent for a period of one year as a result of his conviction of extortion and stalking, in violation of Rules 8.4(b) and 8.4(h) of the Vermont Rules of Professional Conduct.

Facts

The facts in this case break down into three distinct chapters and each chapter has a significant impact on our decision.

The first chapter is the period leading up to July of 2001. Respondent grew up in California. He went to Junior college in Sonoma, where he excelled in public speaking and debate as well as academics. He graduated from the University of Montana in 1989 and went to Georgetown Law School. In 1998 he came to Vermont to work at Downs Rachlin and Martin in Burlington (DRM).

While Respondent was at DRM, he became romantically involved with Julie Gaboriault, a paralegal on the staff. He believed that this in-office relationship was inappropriate, and he also knew that he wanted to return to California. Through his brother he learned of a position in a large San Francisco firm, looked into the position and decided to take the job when it was offered. The plan was that he and Ms. Gaboriault would relocate together. Respondent left DRM in July of 2001, went to California, took the California bar and looked forward to beginning his new job in October of that year.

The second chapter runs from July of 2001 through the last day of 2006. Since Respondent did not need to start work until October and with the summer free, he looked up some of his high school friends. One old friend introduced him to crystal methamphetamine. He immediately became "hooked," and his use escalated quickly from weekend use to daily use; from smoking to intra-venous injections. He became compulsive, easily enraged and engaged in compulsive behavior. He was trying to maintain the relationship with Ms. Gaboriault long distance, but in April of 2002 she ended the relationship with Respondent by email. He was emotionally and psychologically unable to cope with the sense of rejection he felt as a result of the breakup of the relationship, and he continued to call and email her to try to convince her not to leave him. Ms. Gaboriault eventually began another relationship, and Respondent sent emails to her new partner, as well as to the attorney Ms. Gaboriault eventually engaged to bring a petition for relief from abuse. The tenor of the emails escalated and became threatening and accusative.

In January of 2004, the State of Vermont charged Respondent with, inter alia, two counts of felony extortion and one count of misdemeanor stalking. In January of 2005, a jury found Respondent guilty of both counts of extortion and stalking. In May of 2005, Vermont District Judge Michael Kuppersmith entered a judgment of guilty and sentenced Respondent to serve five to eight years, all suspended but twelve months. Respondent appealed the conviction and sentence to the Vermont Supreme Court.

In November of 2005, the Vermont Supreme Court issued an order suspending Respondent's right to practice law in Vermont pending the final disposition of his appeal of the criminal convictions.

In January of 2007, the Vermont Supreme Court affirmed Respondent's conviction. State v. van Aelstyn, 2007 Vt. 6. Respondent petitioned the United States Supreme Court for a writ of certiorari which was denied in October of 2007.

In California Respondent's life began to unravel as well. Because of his drug use he became alienated from his family, lost his job, wrecked his new car and was arrested for possession of drugs and jailed.

We now come to the third chapter of this story which begins on New Year's Day 2007. The lawyer who represented Respondent in the drug charge told him that it was either "treatment or jail." It was then that Respondent realized that he needed to do something, and on New Year's Day he stopped taking drugs, initially without the help of any drug treatment program. He later ended up spending two months in jail and at that point started to come around. He began attending twelve step meetings and reading the Bible. In June of 2007, he was placed in an intensive court drug diversion program which involved daily twelve step meetings and counseling. He acknowledges that the drug program was very beneficial to him. It allowed him to deal with his denial of the reality of the situation he had created in

Vermont. As he testified, in his mind he was "the victim of all that was happening in Vermont." He learned to become accountable, to admit that he was an addict. He got strength from speaking up at AA meetings, began attending church and a faith based support group.

In November of 2007, Respondent signed up for the Lawyer's Assistance Program in California. It is a voluntary five year program designed to help lawyers with substance abuse problems. It involves individual and group therapy and random drug testing for the five year period. Respondent testified that both the individual and group counseling have helped him to understand that he made serious mistakes and to develop a new perspective on life. He has found support, friends and a rekindled hope that he might once again practice law. He believes that this program is well designed to help attorneys get their lives back on track; it is serious, intense and closely monitored.

In March of 2007 Respondent married. His wife had refused to marry him until he dealt with the drug problem. She organized a family intervention and has been supportive of his efforts at rehabilitation.

In March of 2008 Respondent completed the drug diversion program in California, and the charges were dismissed.

Respondent has no fear of relapse and has no drug cravings.

Respondent also testified about his radically different view of the break up with Ms. Gaboriault. He now realizes that he took her backing away as rejection and became vindictive. He blamed her, but he now acknowledges that it was fully his fault. He feels ashamed of the things that he did while using drugs and finds it hard now to understand what he was thinking at the time.

Respondent offered by way of character testimony a number of letters addressed to Judge Kuppersmith. The day after the hearing in this matter, Respondent was to appear in District Court on a violation of probation resulting from the drug arrest in California, and a motion to amend the sentence filed by his attorney. He was also scheduled to report for incarceration.[1]

Conclusions of Law

We accept the parties recommendation that we find a violation of Rules 8.4(b) and 8.4(h). Rule 8.4(b) prohibits attorneys from engaging in conduct involving a serious crime. Under that rule, any felony qualifies as a "serious crime." 13 V.S.A. §1701 establishes extortion as a felony.

Rule 8.4(h) prohibits attorneys from engaging in conduct that adversely reflects on their fitness to practice law. Respondent's conduct toward Ms. Gaboriault and those she turned to for assistance adversely reflects on Respondent's fitness to practice law.

Sanctions

Determining the appropriate sanction in a case of this nature is a difficult task, and because of the stark contrast between the behavior of Respondent in chapters one and three compared to chapter two,

we believe that it is important to set forth in some detail our reasoning for the imposition of a one year suspension, a sanction that could be thought to be too lenient.

It is well settled in Vermont that we can look to the ABA Standards for Imposing Lawyer Discipline as well as case law in determining the appropriate sanction in a particular case. In re Warren, 167 Vt. 259, 261(1997); In re Berk, 157 Vt. 524, 532 (1991), and we have considered both the ABA Standards and recent Vermont cases in reaching our decision.

We first examine the Vermont decisions. Disbarment was imposed for conviction of crimes in several recent cases. In In re Ruggiero, 179 Vt. 636 (2006), In re McGinn, 178 Vt. 604 (2005), In re Daly, 179 Vt. 635 (2006) and In re Sinnott, 178 Vt. 646 (2005). In each of these cases, the attorneys were convicted of felonies, and in each case clients lost large sums of money as a result of the violations. Our decision in no way detracts from these cases which make it clear that disbarment is the only appropriate sanction for conviction of a felony involving misappropriation of client money.

In In re Harrington, PRB Decision No. 53 (April 2003), the attorney was suspended for three years after convicted of a felony for filing false fee information with the Social Security Administration. This case was presented to the Hearing Panel by way of stipulation, and the Panel accepted the stipulation, noting the presence of mitigating factors, and the fact that the public was adequately protected since Harrington would have to petition for reinstatement and meet the standards of Administrative Order 9, Rule 22(D), which we will discuss in more detail below as it relates to Respondent.

It is important to note that the violations in all of these cases directly arose out of the practice of law. The persons who lost money in the disbarment cases were clients. In Harrington, the false affidavit was again in the context of the practice of law. In all of these cases the duty violated was the duty to the client.

We now turn to the application of the ABA Standards for Imposing Lawyer Discipline to this case. The ABA Standards sets forth a two step process. In the first step, we look at the duty violated, the lawyer's mental state and any actual or potential injury, and arrive at a presumptive sanction. The second step requires us to look at any aggravating and mitigating circumstance that might suggest a modification of this sanction.

In the present case, Respondent had a duty to the public to obey the law and to not engage in criminal conduct. "The most fundamental duty which a lawyer owes to the public is the duty to maintain the standards of personal integrity upon which the community relies. The public expects the lawyer to be honest and to abide by the law; public confidence in the integrity of officers of the court is undermined when lawyers engage in illegal conduct." ABA Standards, §5.0 Introduction.

This conduct was clearly intentional, though we recognize that Respondent's drug use altered his perceptions. There was clearly injury in this case. Respondent's actions toward Ms. Gaboriault caused her anguish and required her to spend funds to engage an attorney to represent her in her attempts to stop his contacts with her. There is also injury to the public perception of the integrity of the legal system when lawyers engage in criminal behavior.

Section 5.11 provides that "[d]isbarment is generally appropriate when a lawyer engages in serious criminal conduct a necessary element of which includes . . . extortion . . . ." ABA Standards, §5.11(a).

Were we to consider only the criminal conviction and the illegal behavior leading up to it, we would have no hesitation in recommending to the Supreme Court that Respondent be disbarred. Not only would this be consistent with the ABA Standards and prior Vermont cases involving conviction of a felony, but it would underscore as well as our belief that it is incumbent on attorneys to maintain high standards of personal integrity, and that absent extraordinary circumstances, one who fails to do so should be denied the right to practice law.

It is these extraordinary circumstances that we now consider in mitigation, and in this case they are quite remarkable.

Section 9.32(i) of the ABA Standards provides that we may consider in mitigation

a mental disability or chemical dependency including alcohol or drug abuse when:

(1) there is medical evidence that the Respondent is effected by a chemical dependency or mental disability;

(2) the mental disability or chemical dependency caused the misconduct;

(3) the respondent's recovery from the mental disability or chemical dependency is demonstrated by a meaningful and sustained period of successful rehabilitation; and

(4) the recovery arrested the misconduct and a recurrence of the misconduct is unlikely."

While there was no medical evidence of Respondent's drug dependency, we believe that it was not necessary in this circumstance. It is clear that the drug use exacerbated the emotional reaction to being rejected which led to the misconduct, and that Respondent is not now using drugs. We believe that recurrence is unlikely because of the concrete steps Respondent has taken and the support systems Respondent has built to enable him to deal with any future emotional stressors.

There are other mitigating factors present as well. Respondent has no prior disciplinary record, ABA Standards §9.32(a), he has been subject to other penalties in the criminal law system, ABA Standards §9.32(k), and he has exhibited genuine remorse for his conduct toward Ms. Gabroiault. ABA Standards §9.32(l).

It is these mitigating factors which require us to think carefully about the purpose of lawyer discipline and the effect not only on Respondent but on the integrity of the bar and the legal system of our decision not to disbar Respondent. It should also be stressed that our decision in no way diminishes the

seriousness of Respondent's conduct and the gravity with which we view an attorney's conviction of a felony such as extortion.

Our Supreme Court has made it clear that sanctions in disciplinary matters are not intended to punish lawyers, but rather "to protect the public from harm and to maintain confidence in our legal institutions by deterring future misconduct." In re Hunter, 167 Vt. 219, 266 (1977).

Were we to disbar Respondent, he would no longer have access to the California Lawyer's Assistance Program, a program which he has clearly embraced as a lifeline to continuing to live drug free and to his possible resumption of the practice of law. This program will be available to him in the case of suspension. Thus, for Respondent, a disbarment has consequences which go beyond the mere question of when and whether he can return to the practice of law, but also affects his ability to access the programs he needs to continue his recovery.

We must also consider the effect of our failure to disbar Respondent for a felony conviction on the public and its confidence in the integrity of the legal system. We hope that this decision will be viewed not as an incidence of leniency to a fellow attorney, but as an indication of the great flexibility built into the law of sanctions. Since punishment is not an appropriate response to misconduct, we hope that those reading this opinion will acknowledge that exceptional leniency is appropriate in exceptional circumstances and that the public's confidence in the legal system will be enhanced rather than diminished.

It was Respondent's testimony alone that convinced us that our decision is the correct one. We have no doubt that he now more fully understands the nature of his conduct while on drugs, that he takes full responsibility for his actions, and is committed to turning his life around. We were impressed by the fact that not only has Respondent stopped using drugs, but has actively sought out the support and treatment options open to him, and, it appears, used them to the fullest extent available. He has gained knowledge of himself that he did not have in the past, and he is willing and eager to share his understanding of the nature of drug addiction with others in similar circumstances.

He passed the first hurdle presented to him when he recently completed the drug diversion program which resulted in the dismissal of the California criminal charges. He has also entered into the Lawyer's Assistance Program for drug users in California, and we are inclined to share his optimism that he will complete it successfully.

While we have only ordered a one year suspension, since Respondent has been suspended under the interim suspension rule since November of 2005, the total suspension will be in excess of three years.

Also, since the suspension is for longer than one year, it will be necessary for Respondent to petition to be readmitted. Rule 22(D) of A.O.9 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.

Thus, another Hearing Panel will have the opportunity in one year's time to assess whether we made the correct decision. If Respondent continues to be drug free and continues with the support and treatment that he is now receiving, our decision will have been justified. If he does not, we are confident that the next hearing panel will find that he has not been rehabilitated and will deny the motion for reinstatement.

We considered whether we should craft some probation conditions to apply on Respondent's readmission. We believe that this would be appropriate as an additional protection to the public, but will leave it to the next Hearing Panel to decide any conditions of probation based upon the circumstances existing at that time.

Order

For the foregoing reasons, the Hearing Panel orders that PHILIP VAN AELSTYN be suspended from the practice of law for a period of one year, commencing on the date this decision becomes final. Respondent shall comply with the provision of A.O.9,

Rule 23.

Dated: July 28, 2008 Hearing Panel

FILED 7/28/08 /s/

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Paul Ferber, Esq.

/s/

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S. Stacy Chapman, III, Esq.

/s/

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Ruth Stokes

[1] Respondent's attorney wrote to the Hearing Panel after the hearing informing us of the result of Respondent's appearance before Judge Kuppersmith the day after our hearing. We learned that the court was impressed, as were we, with the extent of Respondent's rehabilitation and amended the sentence on the criminal charges continuing Respondent on probation with no additional time to serve. While Judge Kuppersmith's decision did not affect our decision, it gives us some assurance that we were not the only body impressed with the extent of Respondent's rehabilitation and willing to give him a second chance.