

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: John Downes Burke, Esq.
PRB File No. 2020-040

PRB Decision 249

A. Factual Background

1. In 2019, a complaint against Attorney Burke was filed by E.E. in connection with a family real estate transaction. That matter was resolved and plays no part in this decision.
2. On November 5, 2019, Attorney Burke was sent a letter by Bar Counsel asking that a written response to the complaint be sent to Disciplinary Counsel no later than December 3, 2019.
3. On December 20, 2019, Attorney Burke was sent a letter by Disciplinary Counsel Sarah Katz requiring an immediate response.
4. On January 8, 2020, Attorney Burke was sent a follow up letter from the Office of Disciplinary Counsel requiring a response by January 31, 2020.
5. On February 3, 2020, Disciplinary Counsel Sarah Katz again wrote a letter to Attorney Burke requiring his response.
6. In early 2020, the case was transferred to Daniel McCabe as Specially Assigned Disciplinary Counsel.

7. On or about April 13, 2020, after interviewing a witness and E.E., Specially Assigned Disciplinary Counsel sent a follow up letter to Attorney Burke allowing seven days to respond.

8. Respondent did not respond to the investigation or complaints against him until his participation in the Sanction Hearing (over 2 years later).

Under Rule 8.1(b), a lawyer is prohibited from knowingly failing to respond to a lawful demand for information from Disciplinary Counsel in connection with the disciplinary matter. This charge has been deemed admitted.

B. Sanctions Analysis

A hearing on the issue of sanctions was held on by Webex on November 7, 2022. Respondent appeared and participated and was given opportunity to cross examine witnesses and to present evidence as to any mitigating factors he wanted the panel to consider. Disciplinary Counsel introduced four exhibits, pre-marked as DC-1 through DC-4, examined Respondent under oath, and called one other witness. Respondent was provided additional time following the hearing to submit any objections to the admission of those exhibits. He did not do so and the evidence offered by Disciplinary Counsel was deemed admitted by the panel. The panel also considered Respondent's Exhibit 1, (a stipulation which he filed) which is attached.

The following additional facts (found by the Hearing Panel) coupled with the benefit of existing case law and the ABA Standards have guided the panel in its sanctions determination.

For many years, Respondent maintained a solo law practice in Castleton, where he primarily served local clients. He also resides in Castleton. In 2018, Respondent suffered a health-related event that affected his eyesight. His health and eyesight continued to worsen, causing him to decide to wind down his law practice. By January 2020, he no longer accepted new clients and was directing current clients to take their matters to other attorneys. By June 2020, he was no longer driving long distances and was not reading for pleasure. This was due to his deteriorating eyesight.

Respondent, however, continued to use his law office space and law office phone number. As of the date of the Sanctions Hearing, a sign still stood outside the law office identifying it as his law office.

In the summer of 2020, Respondent attempted to file a form with the Attorney Licensing Office to relinquish his law license, in accordance with a procedure allowable under Supreme Court A.O. 41. On that form, he certified that he was not the subject of disciplinary investigations in any jurisdiction. That certification was false. DC-1; *See* DC-2. Respondent had been repeatedly contacted and notified that he was under disciplinary investigation, and he had failed to respond to repeated attempts by disciplinary authorities to contact him. *e.g.*, DC-2. Around that same time that he filed the form marked DC-1, as noted above, Respondent continued to suffer from a problem with his eyesight. His ability to read and to drive was very limited. It is accordingly unclear whether Respondent's false certification was intentional or mistaken.

Respondent was notified by email dated July 28, 2021, that his relinquishment request was not approved by licensing authorities, and that action was required on his part

regarding the administrative status of his license. He did not respond to requests by that office. *See* DC-3.

Respondent has a prior disciplinary history from 2014 in which he received a reprimand for similar misconduct of failure to respond to and cooperate with disciplinary authority. DC-4 (PRB Decision No. 176).

Aggravating factors under ABA Standard 9.22

The panel has considered eleven enumerated factors in aggravation in determining an appropriate sanction. The evidence supports the following conclusions relevant to these factors.

- a. *Prior disciplinary offenses:* This factor applies. Respondent was sanctioned in 2014 for similar misconduct.
- b. *Dishonest or selfish motive:* This factor does not apply.
- c. *Pattern of misconduct:* Respondent's conduct supports the inference of a pattern of disregard and disrespect for the structure and institution of the lawyer disciplinary system.
- d. *Multiple offenses:* Respondent's conduct involves multiple instances of failing to respond to requests made by Disciplinary Counsel in the instant case.
- e. *Bad faith obstruction of the disciplinary proceeding:* This factor does not apply.
- f. *Submission of false evidence, false statements, or other deceptive practices during the disciplinary process:* This factor does not apply to the circumstances of Respondent's matter.
- g. *Refusal to acknowledge wrongful nature of conduct:* This factor does not apply.
- h. *Vulnerability of victim:* This factor does not apply.
- i. *Substantial experience in the practice of law:* This factor applies. *See In re Disciplinary Proceeding Against Ferguson*, 246 P.3d 1236, 1250 (Wash. 2011) (concluding that "substantial experience" means 10 or more years of practice at the time of the misconduct).

j. *Indifference to making restitution*: This factor does not apply to the circumstances of Respondent's matter.

k. *Illegal conduct, including that involving the use of controlled substances*: This factor does not apply.

Mitigating factors under ABA Standard 9.32

The panel considered the thirteen enumerated factors in mitigation to determine an appropriate sanction. The evidence supports the following conclusions relevant to these factors.

a. *Absence of a prior disciplinary record*: This factor does not apply.

b. *Absence of a dishonest or selfish motive*: This factor applies.

c. *Personal or emotional problems*: Respondent presented credible evidence of a medical problem involving his ability to see. The panel also finds that this medical condition in conjunction with the closing of his law firm, negatively impacted the Respondent's emotional state.

d. *Timely good faith effort to make restitution or to rectify consequences of misconduct*: This factor applies to the extent that Respondent made a good faith effort to surrender his law license.

e. *Full and free disclosure to disciplinary authority or cooperative attitude toward proceedings*: This factor does not apply to the circumstances of Respondent's matter.

f. *Inexperience in the practice of law*: This factor does not apply to the circumstances of Respondent's matter.

g. *Character or reputation*: This factor does not apply to the circumstances of Respondent's matter.

h. *Physical disability*: This factor applies with respect to the medical circumstances involving Respondent's sight.

i. *Mental disability or chemical dependency*: This factor does not apply to the circumstances of Respondent's matter. However, please see (c), above.

j. *Delay in disciplinary proceedings*: This factor does not apply to the circumstances of Respondent's matter.

k. *Imposition of other penalties or sanctions*: This factor does not apply to the circumstances of Respondent's matter.

l. *Remorse*: This factor does not apply to the circumstances of Respondent's matter.

m. *Remoteness of prior offenses*: This factor does not apply to the circumstances of Respondent's matter. His prior disciplinary matter occurred within the past 10 years.

C. Conclusions

The purpose of sanctions imposed under the Rules of Professional Conduct is “to protect the public from person unfit to serve as attorneys and to maintain public confidence in the bar.” *In re Berk*, 157 Vt. 524, 532 (1991). *See also In Re PRB Docket No. 2016-042*, 154 A.3d 949, 955 (Vt. 2016) (“The purpose of sanctions is not to punish attorneys, but rather to protect the public from harm and to maintain confidence in our legal institutions by deterring future misconduct.”) (quotations omitted).

In determining a sanction for misconduct, the panel looks to the ABA Standards for Imposing Lawyer Sanctions and prior case law. *In re Andres*, 2004 VT 71, ¶ 14. Under the ABA Standards, the panel considers (1) the duty violated; (2) the lawyer's mental state; and (3) the extent of the injury caused by the violation. Based upon these considerations, the ABA Standards indicate a “presumptive sanction”, which then may be modified by aggravating or mitigating factors. *See* ABA Standards, Theoretical Framework at xviii; §3.0 at 125 (2019).

Here, suspension is the appropriate sanction under the ABA Standards for Imposing Lawyer Sanctions.

1. Duty violated

Under the ABA Sanctions, the panel must first identify whether the duty breached was owed to a client, the public, the legal system, or the profession. ABA Standards § 3.0 at 130. Rule 8.1(b) involves Respondent's duty to the profession. ABA Standards, Theoretical Framework at xix. He owed a duty to respond in a timely fashion and cooperate with the regulatory authority as a condition of holding a law license and failed to do so.

2. Mental state

The panel evaluates whether, at the time of the misconduct, the lawyer acted intentionally, knowingly, or negligently. Intentional or knowing conduct is sanctioned more severely than negligent conduct. ABA Standards § 3.0 at 133. In the context of sanctions, "knowledge" is "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." ABA Standards at xxi. "Negligence" is "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." *Id.* Here, Respondent's failure to respond was knowing. He was repeatedly notified by email and U.S. mail of the disciplinary investigation and failed to respond. At the hearing, Respondent presented no credible evidence or testimony on which the panel could conclude that he failed to receive notice of the investigation.

3. Extent of injury

The extent of injury is defined by "the type of duty violated and the extent of actual or potential harm.: ABA Standards §3.0 at 138. Here, the actual harm is measured by the time and resources expended by the judiciary, including the PRB, as a result of

Respondent's conduct. Had Respondent simply communicated in a timely fashion, acted reasonably, and agreed to an interview, it is unlikely these charges would have been brought. The extent of injury could also be measured in terms of a general harm to the integrity of the disciplinary process, one in which historically, most licensed attorneys are cooperative and responsive, even when a charge is denied, and the lawyer wishes to put the PRB to its burden of proof. *See In re Hongisto*, 2010 VT 51 ¶ 11 (The failure to cooperate with disciplinary counsel "injure[s] the disciplinary system itself by consuming scarce resources and eroding the public's confidence in the legal profession.").

4. Presumptive sanction

In sum, Respondent violated his duty to the profession, acted knowingly in doing so, and there was actual injury in the form of the consumption of regulatory resources. Section 7 of the ABA Standards addresses sanctions for attorneys who violate duties owed to the profession. Under Section 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...the legal system." Failure to cooperate with disciplinary authorities is a category of conduct with falls under this section. ABA Standards, § 7.2 at 385-86. Here, Respondent's knowing failure to respond and cooperate support that the presumptive sanction is suspension. *See In re Legus*, PRB Decision No. 238 (Vt. 2021) (imposing nine-month suspension for failure to cooperate with disciplinary counsel, as well as posing a substantial threat of harm to the public); *In re McCoy-Jacien*, 186 A.3d 626 (Vt. 2018) (imposing nine-month suspension pursuant to Standard 7.2 for failure to respond to numerous requests by disciplinary counsel, as well as her failure to follow probationary obligations); *In re Schaffner*, 918 P.2d 803, 807 n.6 (Or.

1996)(imposing suspension of 120 days under section 7.2 for failure to cooperate and respond to investigative inquiries from the Bar).

5. Aggravating and mitigating factors

The final step in analysis under the ABA Sanctions is to consider aggravating and mitigating factors that justify a departure from the presumptive sanction. ABA Standards §§3.0 at 141; 9.1 at 444. A list of factors which may be considered in aggravation and mitigation are set out at ABA Standards §§ 9.22 and 9.32. Proposed legal conclusions with respect to each factor are set out above.

This case involves several aggravating factors, including, significantly, a prior disciplinary matter from 2014 in which Respondent engaged in similar misconduct. There is, however, the mitigating factor of Respondent's credible struggle with his health, and the limitations it has placed on his ability to function on a day-to-day basis. Moreover, there is evidence that Respondent did and continues his intention to discontinue his practice of law. While the panel has no quarrel with Respondent's expressed intention to end his law practice, given his current limitations to practicing, we believe our objective and obligation to protect the public requires a six-month suspension. This will require Respondent to move for reinstatement (should he so choose) to the Professional Responsibility Program.

6. Prior Cases

When considering the issue of sanctions, panels also generally look to prior cases to compare the sanction and violations in those cases to the case before it, with the objective of achieving proportionality and consistency within the body of attorney discipline law. *See, e.g., In re Neisner*, 2010 VT 102 ¶ 26. Other cases present some helpful comparisons.

The first is *In re McCoy Jacien*, PRB Decision No. 212, 186 A.3d 626 (Vt. 2018) cited above. In that case, the panel and the Court determined that a nine-month suspension was an appropriate sanction for failure to comply with a disciplinary order and failure to respond to inquiry by disciplinary counsel. A similar conclusion was reached with respect to *In re Legus*, PRB Decision No. 238 (2021),

Again, our reasoning behind the imposed suspension is grounded in the public protection function of the lawyer disciplinary system and in the important objective of having a lawyer regulation system in which licensed lawyers understand that responding to appropriate inquiry by Disciplinary Counsel is a condition of holding a law license. By issuing a six-month suspension, the public is appropriately informed of the circumstances of the misconduct and practicing lawyers are advised that cooperation with disciplinary authority is required.

In sum, the ABA Standards indicate suspension is warranted. A proportionality analysis also indicates a six-month suspension is appropriate. A six-month suspension would reflect the seriousness of the violation, protect the public, deter future misconduct, preserve the public's confidence in the bar and fall in line with applicable standards.

Hearing Panel No. 10

Date: January 11, 2023



Katherine M. Lamson, Esq., Chair



Michael Munson, Esq.



Kelley Legacy, Public Member