STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

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

RULING ON PARTIES' PROPOSED STIPULATION OF FACTS

Special Disciplinary Counsel and Respondent, John Downes Burke, Esq., have requested that the Hearing Panel accept a stipulation of facts ("the stipulation"). This disciplinary proceeding was initiated by the filing of a petition of misconduct dated October 15, 2020. The petition alleged that a complaint was filed against Respondent in connection with a real estate transaction; that Bar Counsel and Disciplinary Counsel sent numerous letters to Respondent, between November 2020 and February 2021, requesting a response to the complaint; that after interviewing the complainant and a witness in April 2020 Special Disciplinary Counsel sent another letter to Respondent requesting a response; and that Respondent "has not responded to the investigation or complaints against him." Petition of Misconduct, ¶ 8. The petition alleges that this conduct violated Rule 8.1(b) of the Vermont Rules of Professional Conduct.

When Respondent failed to file a response to the petition of misconduct, the chair of the Panel held a status conference in February 2021. Both Special Disciplinary Counsel and Respondent appeared and participated. At that time, the parties requested an opportunity to submit a stipulation to the Panel for its consideration.

On or about April 21, 2021, Special Disciplinary Counsel filed with the Panel a one-page document purporting to be a "stipulation." The document has no case caption on it. In addition, it is not dated and bears only one signature – that of the Respondent. It states, in its entirety, as follows:

I, John Downes Burke, hereby acknowledge and agree as follows:

1. I was subject to a Vermont Professional Responsibility Board investigation in 2020.

2. That investigation resulted in a disciplinary complaint being filed against me.

3. During the pendency of the investigation, I surrendered my law license and have no intent to practice in Vermont or any other jurisdiction in the future.

4. I acknowledge and stipulate to a finding against me that I failed to communicate with disciplinary counsel during the investigation, a violation of Vermont Rule of Professional Conduct 8.1(b).

* * *

Neither party has submitted any memorandum of law or legal brief with the one-page document. It appears from paragraph 4 that the parties contemplate the Panel issuing a decision concluding that Respondent violated Rule 8.1(b). The Panel must now consider whether to accept or reject the proposed submission. The Panel has decided to reject the submission.

Procedural Background

Under Administrative Oder 9, Disciplinary Counsel can initiate a proceeding in either of two ways: first, by filing a petition of misconduct; or, secondly, by filing "facts stipulated to by the respondent, along with any proposed legal conclusions and recommended sanction which disciplinary counsel respondent, either separately or jointly, would like the hearing panel to consider." A.O. 9, Rule 11(D)(1). Rule 11 further provides that when the parties have initiated a proceeding by submitting a stipulation of facts "the hearing panel shall review the stipulation and either: (i) reject the stipulation, in which case the parties may amend and resubmit it, or disciplinary counsel may reinstitute proceedings by filing a petition of misconduct in accordance with this rule; or (ii) accept the stipulation *and adopt it as its own findings of fact*, although the panel may take further evidence on the issue of sanctions." *Id*., 11(D)(5)(a) (emphasis added).

Similarly, Rule 11 provides that where proceedings have been initiated by petition, "[t]he hearing panel shall *in every case* issue a decision containing its *findings of fact*, conclusions of law, and the sanction imposed, if any, within 60 days after the conclusion of the hearing." *Id*., Rule 11(D)(5)(c) (emphasis added).

Rule 11 thus makes clear that in every lawyer disciplinary proceeding – whether initiated by a petition or presentation of a stipulation – the hearing panel must issue findings of fact that support a violation. It necessarily follows that the parties cannot simply stipulate that a violation of the Rules of Professional Conduct occurred. Parties seeking to stipulate must present sufficient *facts* to constitute findings of fact which, in turn, will support a conclusion of law to the effect that a violation was committed by a respondent.

Although the parties in this proceeding filed a document purporting to be a stipulation *after* Disciplinary Counsel had already initiated the proceeding with a petition of misconduct, that circumstance does not render the requirement of panel review inapplicable. There is no logical reason to exempt from review a proposed stipulation that is filed after a petition of misconduct has been filed but which is submitted to resolve a case, while requiring review for one filed to initiate a proceeding and, at the same time, to resolve a case. The rule's requirement that the panel issue findings of fact "in every case" where a petition has been filed reinforces this conclusion. In both instances the stipulation has to establish facts that will support a panel determination of the merits of alleged misconduct on the part of a respondent. In both instances the hearing panel must review the proposed stipulation and advise the parties whether it will adopt the statements in the proposed stipulation as its own findings of fact.

* * *

With this procedural background in mind, the Panel has reviewed Disciplinary Counsel's submission and has decided, for the following reasons, to reject it.

1. The reference to Respondent surrendering his law license raises significant issues that have not been addressed.

The submission of the parties includes Respondent's statement that "[d]uring the pendency of the investigation [in 2020 that resulted in the filing of a disciplinary complaint against me], I surrendered my law license and have no intent to practice in Vermont or any other jurisdiction in the future." Para. 3. This statement raises procedural and jurisdictional issues that have not been addressed by Special Disciplinary Counsel.

The Supreme Court has provided a process by which a licensed attorney may "relinquish" his or her license. *See* A.O. 41("Licensing of Attorneys"), Rule 12. However, the Rule 41 process is not available to an attorney who is under disciplinary investigation. *See id.*, Rule 12(a)(1) ("To relinquish a license, an attorney must not currently be the subject of any . . . disciplinary investigations or proceedings in any jurisdiction."); *see also id.*, Rule 12(a)(5) (requiring attorney to "certify[ ] compliance with this rule") & Notice of License Relinquishment (available at https://www.vermontjudiciary.org/sites/default/files/documents/900-00018_0.pdf (including a certification statement that "I am not currently the subject of any . . . disciplinary investigations or proceedings in any jurisdiction.").

An attorney under disciplinary investigation who wishes to surrender his or her license is subject to a different provision – one that is set forth in the administrative rule governing lawyer discipline, A.O. 9. Rule 23 of A.O. 9 (effective 4/1/21) (identical to former Rule 19) creates a procedure for resignation by an attorney who is the subject of a disciplinary investigation. It assigns jurisdiction over that procedure to the Professional Responsibility Board.

Rule 23 allows an attorney to resign by:

> delivering to the Board an affidavit stating that the attorney desires to resign and that:
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> (1) The resignation is freely and voluntarily rendered; the attorney is not being subjected to coercion or duress, is fully aware of the implications of submitting a resignation; and
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> (2) The attorney is aware that there is presently pending an investigation into allegations that the attorney has been guilty of misconduct, the nature of which the attorney shall specifically set forth;
>
> (3) The attorney acknowledges that the material facts upon which the complaint is predicated are true; and
>
> (4) The attorney submits the resignation because the attorney knows that if charges were predicated upon the misconduct under investigation the attorney could not successfully defend against them.

A.O. 9, Rule 23.

In addition to requiring submission of an affidavit to the Board, the rule requires Disciplinary Counsel to "submit to the Board and to the respondent a statement of facts supporting a finding of violation in addition to those in the affidavit, for consideration in any reinstatement proceeding." *Id*., Rule 23(B). There is no exception to this requirement. Following the submission of a respondent's affidavit and Disciplinary Counsel's statement of additional facts, "the Board may file them with the [Supreme] Court, in which case the Court shall enter an order disbarring the attorney on consent, or the Board may assign the matter to hearing panel to investigate the matter, hold a hearing, or make other inquiry." *Id*., Rule 23(C).

Here, Respondent's statement to the panel that he "surrendered" his law license during the course of the investigation into possible misconduct on his part raises a number of concerns. Given the two different procedural avenues for surrendering a license – and the factual

dimension to resignation under Rule 23 -- it is necessary for the parties to provide information to the Panel as to how the Respondent surrendered his license. Their current submission lacks any such information.

As noted, there are only two ways that a law license can be surrendered – either through A.O. 41 "relinquishment" or through A.O. 9 "resignation" while under disciplinary investigation. Based on Respondent's representation that he was already under investigation at the time in question, Respondent could not have legally surrendered his license under A.O. 41 and any certification submitted under the terms of that rule would have involved Respondent making a false statement – that he was not under disciplinary investigation – and therefore would have to be considered legally ineffective by this Panel. Thus, the Panel needs to know whether Respondent proceeded under A.O. 41.[1]

Conversely, if Respondent pursued resignation pursuant to A.O. 9, Rule 23, the Panel should be provided with the relevant documents. The Panel would need to see the Rule 23 documents because depending on the scope of the facts presented under Rule 23, this Panel's authority to proceed could be called into question. As a condition of pursuing resignation under Rule 23, the subject matter of an investigation is addressed, at least initially, through the specific process set forth in Rule 23 and by a different decisionmaker – the Professional Responsibility Board. The Board is a separate entity from the hearing panels, and it exercises separate authority. *See id.*, Rules 1 & 14(a). Hearing panels cannot exercise authority that is conferred specifically on the Board.

[1] It should be noted that any such conduct involving a false statement would also create potential grounds for further disciplinary action against Respondent.

Moreover, assuming Respondent pursued resignation under Rule 23, it is unclear whether Respondent followed the procedure in Rule 23 and whether the resignation was accepted. If not accepted then Respondent's resignation would, as a matter of law, be ineffective.

In addition, the scope of the material facts presented by Respondent and additional facts presented by Disciplinary Counsel would be important information for the Panel to have. The Panel is aware that the initial investigation in this matter was in connection with a real estate transaction, while the charge currently before the Panel is for alleged failure to cooperate with Disciplinary Counsel's investigation. Assuming a Rule 23 resignation was effected, it is not clear whether the resignation was predicated on facts concerning the real estate transaction underlying the initial complaint or whether it was predicated on or encompassed the alleged failure to cooperate with Disciplinary Counsel.

The Panel also acknowledges the possibility that Respondent did not – and does not – wish to acknowledge the truth of the material facts concerning the initial complaint which prompted the initial investigation, *see* Rule 23(A)(3), or that Disciplinary Counsel ultimately concluded that the initial complaint did not merit a charge. That could conceivably explain any failure on Respondent's part to pursue a Rule 23 resignation – while leaving Respondent in the position of being unable to achieve a legally effective resignation.[2]

Finally, it should be noted that even assuming Respondent did not pursue a Rule 23 resignation previously, based on the content of the four-paragraph submission it appears that Respondent might now be willing to pursue the Rule 23 process based on the material facts relating to his failure to cooperate with Disciplinary Counsel's investigation. In that event, the

[2] If Respondent has not achieved a legally effective resignation to date, then the representation that Respondent surrendered his license needs to be withdrawn promptly by Respondent and an explanation provided.

Rule 23 process should arguably go forward.[3] If a resignation application based on the charge of failure to cooperate (or in combination with material facts concerning the real estate transaction complaint) were to be submitted pursuant to Rule 23, this proceeding could be held in abeyance and, in the event of a successful completion of the Rule 23 process, the petition could be dismissed as procedurally duplicative.

No information has been provided to the Panel as to whether the process and substantive requirements of Rule 23 were followed – whether a sufficient affidavit and additional statement of facts were ever submitted, whether a resignation has been accepted, and whether Respondent has been disbarred. Moreover, at present, the Panel has not been provided with any information indicating that the Board has referred this matter pursuant to Rule 23(C) to the Panel for action. Without further clarification from the parties with respect to Respondent's representation that he has surrendered his law license it is not clear.

In sum, without more information from the parties regarding the Res[pondent's stated desire to surrender his license, it is not clear whether the Panel should exercise jurisdiction.

2. Apart from the resignation-related issues, there are not sufficient facts set forth within the four corners of the "stipulation" to support a determination that Respondent violated Rule 8.1(b), and it is unclear whether Respondent is admitting the additional facts set forth in the petition of misconduct.

Apart from the issues related to Respondent's representation that he surrendered his license, the Panel concludes that the parties' submission is deficient. In the four-paragraph

[3] One related question is whether a resignation pursuant to Rule 23 is available only before a petition of misconduct has been filed, and not after. The rule refers to "an attorney who is under investigation" and provides for an attorney to concede that "if charges were predicated upon the misconduct under investigation the attorney could not successfully defend against them." Rule 23(A)(4). Nevertheless, the Supreme Court affirmed the availability of this procedure in a case where disciplinary action had already been initiated. *See In re Canney*, 2018 VT 69, ¶ 1, 208 Vt. 657, 194 A.3d 267 (2018) (accepting resignation from attorney who had been previously "suspended pending final disposition of a disciplinary proceeding" against him). Thus, it appears that the procedure is available post-petition until the final merits of a charge have been addressed.

document submitted to the Panel, Respondent "acknowledge[s] and stipulate[s] to a finding against [him] that he failed to communicate with disciplinary counsel during the investigation [in] violation of [V.R.Pr.C.] 8.1(b). This is essentially a conclusion of law or mixed statement of fact and law – not a statement of facts. And, to the extent it may considered factual, it is conclusory in nature. There are no specific statements of fact in the document that would provide a sufficient basis to conclude that a violation of the rule was committed.

The Panel recognizes that when a case is initiated by the filing of a petition of misconduct and the respondent "fails to answer within the prescribed time, the charges shall be deemed admitted, unless good cause is shown." A.O. 9, Rule 11(D)(3). And Respondent never filed an answer to the petition in this case. Thus, in the absence of a stipulation by the parties, it is clear that the factual allegations in the petition in this case would be deemed admitted and, in turn, would support a conclusion that a violation was committed by Respondent.[4]

[4] The petition of misconduct alleges a violation of Rule 8.1(b) of the Vermont Rules of Professional Conduct and alleges the following facts:

1. In 2019, a complaint against Attorney Burke was filed by E.E. in connection with a family real estate transaction.

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 Buke 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 the undersigned 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.

The problem here is that Respondent did eventually appear in this proceeding and Disciplinary Counsel proceeded to pursue a stipulation with Respondent that makes no mention of the factual statements in the petition. The lack of any factual statements in the submission, or any reference to the petition, results in ambiguity. It is unclear whether Disciplinary Counsel is asking the Panel to issue a decision based only on the four paragraphs of the purported stipulation or whether he anticipates findings of fact that encompass the allegations in the petition. Similarly, it is not clear whether Respondent thought he was negotiating for a bare-bones adjudication based only on the four paragraphs of the purported stipulation or whether he contemplated that findings of fact would be made by the Panel encompassing all the allegations in the petition.

If the parties are seeking an adjudication based only on the four paragraphs of the submission, that is problematic because the four paragraphs do not provide a sufficient factual basis for a conclusion that Respondent violated Rule 8.1(b). Moreover, assuming the parties anticipate that the Panel will incorporate the allegations of the petition into its findings, that expectation has not been stated anywhere in the four-paragraph submission. Under A.O. 9, Rule 11(D)(5)(a), the parties are expected to submit a statement of facts which, if accepted by the Panel, is converted directly into findings of fact. It follows that if the parties' intent with respect to statements of fact has not been made sufficiently clear, a submission must be rejected.

Finally, the Panel has to consider the possibility under the circumstances presented that there was not a meeting of the minds between the parties on this issue, in which case the parties

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8. To date, Respondent has not responded to the investigation or complaints against him.

The petition further alleges that Respondent "knowingly failed to respond to several requests for information." Petition of Misconduct, 10/15/20, at 2.

have not actually reached an agreement. In sum, the submission is ambiguous as to the parties' intent and, in its current form, it is insufficient to support a conclusion that a violation was committed. Assuming the parties demonstrate that the Panel has jurisdiction, they must submit a comprehensive and clear statement of facts if they wish to proceed by stipulation.[5]

Finally, assuming this Panel has jurisdiction, the Panel wishes to point out that Special Disciplinary Counsel can, in the alternative, seek to advance this matter by filing a motion to deem the charge in the petition admitted, *see* A.O. 9, Rule 11(D)(3), along with any additional factual stipulation the parties may reach. In addition, Special Disciplinary Counsel may, if he so desires, request an opportunity to present further evidence on the issue of an appropriate sanction. *See id.*, Rule 11(D)(5)(a).[6]

In sum, the Panel cannot approve the parties' submission given these ambiguities and the question as to whether the Panel has jurisdiction to decide the merits of the charge.

ORDER

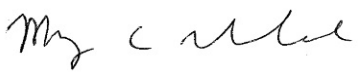
For all these reasons, the parties' four-paragraph submission is hereby REJECTED. In addition, in light of the multiple issues and ambiguities presented and the absence of any legal briefing from the parties, Special Disciplinary Counsel is hereby directed to submit a legal memorandum in connection with any and all future submissions related to the merits of the

[5] If the parties do submit an amended stipulation, they should correct several defects in the form of the document they submitted. The four-paragraph submission entitled "stipulation" does not have a case caption or file number on it. In addition, the document is not dated. And, finally, Disciplinary Counsel did not sign the document – and there was no signature line on the document for him to sign. In fairness to Disciplinary Counsel, he attached this document to his status report and that report does bear a case caption and file number. In addition, he represents in the status report that he drafted the document and sent it to Respondent. Nevertheless, these threshold requirements – a case caption, date, and signature of the parties – are fundamental matters of form that should appear within the four corners of any stipulation filed in a disciplinary proceeding.

charge. The issues addressed in the memorandum shall include: (1) whether Respondent has pursued or is pursuing resignation under either A.O. 41 or A.O. 9, Rule 23 and, if the latter, the respondent's affidavit and Disciplinary Counsel's additional statement of facts; (2) whether this Panel has jurisdiction to adjudicate the charge in the petition; and (3) assuming the Panel has jurisdiction to proceed, what sanction is appropriate for the alleged misconduct in question and a supporting analysis of the ABA Standards for Imposing Lawyer Sanctions, as applied, including any and all aggravating factors for which there is factual support in the record. Respondent shall have 15 days to respond to Disciplinary Counsel's submission.

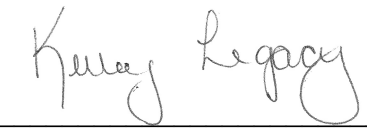
Dated: May 12, 2021

Hearing Panel No. 10



Mary C. Welford, Esq., Chair

Kate Lamson, Esq., Member



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