

STATE OF VERMONT  
PROFESSIONAL RESPONSIBILITY BOARD

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

**RULING NULLIFYING NOTICE OF DISMISSAL**

On June 28, 2021, Special Disciplinary Counsel filed a document entitled Notice of Dismissal in the above matter. Disciplinary Counsel takes the position that under Vermont Rule of Civil Procedure 41 he is entitled to dismiss the charges that were previously filed in the proceeding as of right – in other words, without filing a motion seeking the Hearing Panel’s permission. He further maintains that dismissal is appropriate based on Respondent having conceded to Disciplinary Counsel that he committed a violation of Vermont Rule of Professional Conduct 8.1(b), as well as Respondent’s representation that Respondent has surrendered his law license and has no intention of resuming practice of law in any jurisdiction. Disciplinary Counsel states that he considers Respondent’s violation to have been “significant” but nevertheless opines that “there is no reasonable likelihood that [Respondent] will seek to reinstate his license and that, therefore, “the preservation of legal and public resources outweighs pursuing this case through to its conclusion.”

As a threshold matter, the Hearing Panel concludes that under the specific circumstances presented in this case Disciplinary Counsel does not have unilateral authority to dismiss the petition of misconduct and must request permission from the Panel to dismiss the case. Rule 41(a)(1) of the Vermont Rules of Civil Procedure provides that a plaintiff may, “without order of court,” file a notice of dismissal any time before an answer or a motion for summary judgment has been filed in a case. It is intended to address a situation at the earliest stages of litigation where a party defendant has not appeared in a case.

The situation here is quite different – both legally and factually. Rule 13(D)(3) of A.O. 9 provides that “[i]n the event the respondent fails to answer within the prescribed time, *the charges shall be deemed admitted, unless good cause is shown.*” (emphasis added). An admission attaches automatically at the point when the deadline to answer has passed. By contrast, no admission arises under the Civil Rules in the absence of an answer; under those circumstances a plaintiff must file a motion for default judgment to obtain the equivalent of an admission. The “admission” rule in A.O. 9 reflects the distinctive nature of attorney disciplinary proceedings that are designed specifically to protect the public. In this case, the charge was admitted as a matter of law when Respondent failed to answer. There was no longer a blank slate that could justify a notice of dismissal as contemplated by Civil Rule 41.<sup>1</sup>

In addition, although the Respondent in this proceeding did not technically file an Answer to the Petition of Misconduct, he participated in a status conference in the case held on February 25, 2021 and indicated at that time that he desired to work with Disciplinary Counsel to submit a stipulation of facts for the Panel’s consideration. Moreover, Respondent subsequently signed a stipulation prepared by Disciplinary Counsel that was then submitted by the parties to the Panel with the intent of having the Panel find that a violation was committed. Under A.O. 9, Rule 13(D)(5) a hearing panel may, as an alternative to conducting a contested hearing following the filing of a petition of misconduct and answer to the petition, issue a disciplinary determination based solely on a stipulation of facts submitted by the parties. V.R.C.P. 41 does not contemplate this stipulation procedure under A.O. 9.

While the Panel ended up rejecting the parties’ proposed stipulation in a ruling issued on May 12, 2021 – and, as a result, leaving the petition of misconduct pending – the ruling did not

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<sup>1</sup> The Panel does not need to reach the question of whether Disciplinary Counsel could, prior to the expiration of the time period allotted for a Respondent to file an answer, dismiss a petition of misconduct unilaterally. The Panel only addresses the circumstances presented here – where the period of time had expired by the time Disciplinary Counsel attempted to dismiss the case.

change the fact that Respondent has actively participated in this proceeding prior to the filing of the notice of dismissal. Rule 41 did not contemplate a scenario such as this one.

In sum, the Panel concludes that Disciplinary Counsel cannot unilaterally dismiss the case under the circumstances presented. Accordingly, the Panel will treat the Notice of Dismissal as a motion seeking permission to dismiss the charges.

After considering Disciplinary Counsel's submission to the Panel, the Panel has decided to deny the request for dismissal, without prejudice to the filing of a renewed motion. The current submission is deficient. Disciplinary Counsel attempts to rely on his representation that Respondent has surrendered his license to practice law. But Disciplinary Counsel has not addressed the concerns that the Panel identified in its prior ruling with respect to any reliance on that representation – which appeared in the proposed stipulation of facts. The Panel outlined these concerns in detail at pages 4-8 of its May 12, 2021 ruling. In addition, it expressly stated that in connection with any future submission pertaining to the merits of the charges Disciplinary Counsel should, based on the Panel's stated concerns, brief "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." Ruling, 5/12/21, at 12.

To be fair, Disciplinary Counsel may have perceived no need to address those issues based on his assertion of a right on his part to dismiss the case unilaterally. However, the Panel now having rejected a unilateral right of dismissal and required the filing of a motion, those issues – which raise serious questions as to whether Respondent has complied with those rules of the Supreme Court or whether Respondent made any misrepresentations that require correction and whether Disciplinary Counsel has complied with his separate obligations under those rules – are clearly material to the Panel's consideration of whether to approve dismissal of the charges on basis of a representation that Respondent has surrendered his license. If Disciplinary Counsel

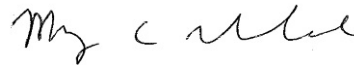
still wishes to pursue dismissal,<sup>2</sup> he must submit a brief that is fully responsive to the factual and legal issues identified and that establishes full compliance by the Respondent and Disciplinary Counsel with the legal requirements of the pertinent rules relating to resignation.<sup>3</sup>

### ORDER

Based on the foregoing, it is hereby ORDERED AND DECLARED that the Notice of Dismissal dated June 28, 2021 is null and void. This disciplinary proceeding remains pending before the Hearing Panel.

Dated: July 27, 2021.

#### Hearing Panel No. 10



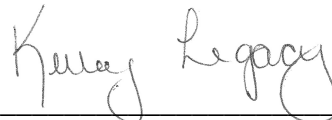
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Mary C. Welford, Esq., Chair



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Kate Lamson, Esq., Member



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Kelley Legacy, Public Member

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<sup>2</sup> In its previous May 12, 2021 ruling, the Panel has outlined other procedural avenues by which Disciplinary Counsel could seek to bring this case to a conclusion. *See* Ruling, 5/12/21, at 11. Those avenues remain open.

<sup>3</sup> The rationale proffered by Disciplinary Counsel in his notice appears to recognize that the authority of the Professional Responsibility Board to discipline attorneys extends to “any formerly admitted lawyer with respect to acts committed prior to resignation,” A.O. 9, Rule 3(A)(1). Therefore, any consideration of whether a panel should allow dismissal of charges that have been filed requires a balancing of the nature and extent of the charges filed against factual circumstances that might support dismissal. If Disciplinary Counsel decides to proceed with a renewed request for dismissal, the Panel would appreciate the submission of not only additional facts relating to Respondent’s resignation, as explained above, but also additional facts supporting Disciplinary Counsel’s opinion that “there is no reasonable likelihood that Respondent will seek to reinstate his license.” The current submission is conclusory in nature.