STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

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

MOTION TO DEEM CHARGES ADMITTED

On October 12, 2020, John Downes Burke (Respondent) was served by certified U.S. Mail with restricted delivery and return receipt with a Petition of Misconduct with a copy via e-mail. *See* Special Appointed Disciplinary Counsel's Certificate of Service (Oct. 15, 2020). The petition set forth formal notice of Respondent's obligations pursuant to A.O. 9, Rule 11(D)(3) (2019) to file an Answer within 20 days addressed to the Professional Responsibility Program, 109 State St., Montpelier, VT 05609, with copy to Disciplinary Counsel. It further stated in accordance with A.O. 9 that failure to file a timely answer may result in the facts and charges being deemed admitted.

The applicable rule, renumbered as A.O. 9, Rule 13(D)(3) in 2021, states that

> [R]espondent shall serve his or her answer upon disciplinary counsel and file the original with the Board within 20 days after the service of the petition, unless the time is extended by the chair of the hearing panel. In the event the respondent fails to answer within the prescribed time, the charges shall be deemed admitted, unless good cause is shown.

As set out in A.O. 9, Rule 14.A (2019) (renumbered as Rule 18.A (2021), "[s]ervice upon the respondent of the petition [of misconduct] . . . shall be made by registered or certified mail, with restricted delivery and return receipt requested at an address shown on the licensing statement . . . or other last known address." The rule does not appear to require that the return receipt must be returned in order for a Petition of Misconduct to be properly served. And, when a letter is properly addressed and mailed "there is a presumption of its receipt in due course." *In*

re Phyllis McCoy Jacien, PRB Decision No. 212 at 8 (Feb. 27, 2019) (citing *Mary Fletcher Hosp. v. City of Barre*, 117 Vt. 430, 431 (1953)).

Here, Respondent failed to answer within 20 days, failed to initiate any request for an extension, and failed to show good cause. Accordingly, the charges shall be deemed admitted.

Respondent had a second opportunity to respond to the pending petition of misconduct arising from this panel's order dated December 8, 2020, in which it stated: "Respondent is hereby ORDERED TO SHOW CAUSE as to why the charge in the petition should not be deemed admitted. Respondent shall file a written response to this Order no later than January 4, 2021. Disciplinary Counsel may file a memorandum in response no later than January 15, 2021." Again, Respondent failed to anything in response to the order.

As this panel noted in its orders dated May 12, 2021 and July 27, 2021, Although Respondent has never filed an Answer, Respondent has not been entirely absent from participation in the pending matter against him. He did appear at a February 2021 Status conference, and there is no question that he is aware of the pending petition.

Following that status conference, Respondent and Special Appointed Disciplinary Counsel communicated about attempting to resolve the matter. It appears, based upon subsequent filings, that those parties misunderstood certain procedural aspects of a *sui generis* disciplinary matter, certain procedural rules governing the ability to resign or relinquish a law license, and what the scope of their own authority actually was under applicable law so that they could achieve an efficient resolution. Their misunderstanding of the applicable law led them to file on April 21, 2021 a basic and undetailed "stipulation," signed only by Respondent, in which Respondent sought to admit to the only charge in the petition, that he knowingly failed to

respond to several requests for information from disciplinary counsel in violation of Rule 8.1(b).

In that "stipulation," which was understandably rejected by the panel, Respondent stated that he "surrendered" his law license. In rejecting the stipulation, as the panel correctly stated in its May 12, 2021 order, a lawyer may either "relinquish" a license under A.O. 41, a process unavailable if there is a pending disciplinary matter, or file an affidavit of resignation with the Board, under A.O. 9, Rule 23. The term "surrender" of the license, used by Respondent and predecessor special disciplinary counsel is not a process that exists, and understandably the panel was left wondering which, if either avenue was pursued by Respondent and what he intended to convey or achieve by stating in a signed filing he "surrendered" his license. Respondent was given the opportunity and essentially ordered to provide clarity to the panel on this issue and has failed to do so. The May 12 order stated on page 7, n.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." To date, Respondent has not filed anything to clarify what he intended to convey.

No affidavit of resignation under A.O. 9, Rule 23 has ever been filed by Respondent with the Professional Responsibility Board at any time. Nor has any application to Relinquish the license under A.O. 41 ever been approved by Attorney Licensing. Accordingly, there is no legally effective resignation.

WHEREFORE, Disciplinary Counsel respectfully requests that the Hearing Panel deem the charges admitted as stated in the petition of misconduct, set the matter for a hearing on the issue of sanctions so that a record may be made with respect to any aggravating and mitigating evidence, and following the hearing allow the parties to submit memoranda on the issue of

sanctions.

DATED: August 11, 2021

Sarah Katz, Disciplinary Counsel