

28.PRB

[Filed 5-Dec-2001]

STATE OF VERMONT  
PROFESSIONAL RESPONSIBILITY PROGRAM  
HEARING PANEL No. 6

In Re: David Sunshine, Esq.  
PRB File Nos. 2001.001 & 2001.075

Decision No. 28

This matter came before the Panel by way of a Stipulation of Facts that the parties filed pursuant to Rule 11(D)(1)(a) of Administrative Order 9. The parties also filed a Joint Recommendation as to Conclusions of Law and a Joint Recommendation as to Sanction.

A telephone conference was held on November 13, 2001. The Respondent participated, as did his counsel Attorney David Putter. Disciplinary Counsel Michael Kennedy represented the Office of Disciplinary Counsel.

Having reviewed the parties' submissions, the Panel accepts the parties' stipulated facts and recommended conclusions and sanction. The Respondent shall be suspended from the practice of law in the State of Vermont for four (4) months. The suspension shall commence on January 1, 2002, and, upon termination, shall be followed by a two-year disciplinary probation as outlined in the parties' Joint Recommendation as to Sanction.

I. Findings of Fact

The parties submitted a Stipulation of Facts. The Panel requested that the parties make a change to one of the paragraphs in the Stipulation, which did not affect the Panel's view of the outcome of the case and the parties agreed to the change. That change having been made, the Panel adopts the parties' Stipulation of Facts as its own.

A. General

1. Attorney Sunshine was admitted to practice law in the State of Vermont in 1979. He has practiced law in the State ever since. His primary focus has been on the conveyance of real estate. He does handle some litigation files.

2. For most of his career, Attorney Sunshine has lived in Richmond and has consistently maintained his office there.

3. In 1987, Attorney Sunshine joined a firm whose principal office was in Burlington. He was a member of the firm at all times relevant to these disciplinary cases. As a member of the firm, he continued to work primarily out of his office in Richmond.

4. Attorney Sunshine has never been disciplined in the State of Vermont or elsewhere.

5. Attorney Sunshine has cooperated with the Office of Disciplinary Counsel throughout the investigation of both cases.

B. PRB File No. 2001-075

6. Larry Weston of Huntington, Vermont is the Complainant in this matter.

7. On September 4, 1992, Mr. Weston was in an auto accident. He was in a head-on collision with a car driven by a Mr. Parker. Mr. Weston was injured in the accident. He broke his leg and injured his head and shoulder. He was left with one leg shorter than the other and has a 27% permanent impairment to one of his feet. He incurred substantial medical bills. At the time of the accident, Mr. Weston worked at the University of Vermont. As a result of the accident, Mr. Weston was out of work for many months.

8. Mr. Parker had \$50,000 of insurance coverage for automobile negligence liability. His policy was issued by the Kemper Insurance Co.

9. Mr. Weston had under insured motorist's coverage on his own insurance policy with Liberty Mutual.

10. Mr. Weston decided to pursue a claim against Parker/Kemper and to pursue a UM claim against his own carrier.

11. Weston initially dealt directly with Kemper on his claim against Parker. In August 1993, without negotiation, Kemper offered Weston the policy limit in return for a general release.

12. Prior to his accident, Mr. Weston had been a client of Attorney Sunshine's. He consulted with and kept Attorney Sunshine updated as to the status of his negotiations with both insurance carriers.

13. Weston discussed the Kemper offer with Attorney Sunshine. Sunshine advised Weston to insist upon tendering a covenant not to sue rather than a general release. Mr. Sunshine then became actively involved in assisting Mr. Weston with the claim against Parker (Kemper).

14. In November of 1993, Weston met with Attorney Sunshine and informed him that Liberty Mutual had offered him \$5,000 to settle the UM claim.

15. At Weston's request, Attorney Sunshine reviewed the matter to determine whether to represent Mr. Weston in these claims. On November 24, 1993, in anticipation of this possible representation, Sunshine prepared a memo for one of his law partners summarizing his understanding of the damages aspect of the claims, asking for a partner's advice on whether the lost employment time could be the basis for compensation in the UM case and soliciting that partner's views on whether the firm could demonstrate that Weston would do better retaining it than he would on his own.

16. The memo noted that Mr. Weston had approximately \$5,000 in medical bills resulting from the accident. It also noted that Mr. Weston had been out of work for nearly eight months, but had been paid for nearly six months of that time through the use of sick leave, vacation time, and personal time. It also noted there was evidence that, had he worked, Mr. Weston would have received in excess of \$10,000 of overtime pay. It further noted that Mr. Weston had lost approximately \$5,000 in outside work

as a result of the injuries he sustained in the accident. Mr. Weston, it noted, had also been deprived of the contributions which would have been made to his retirement fund, had his ability to work not been interrupted. Further, it noted that, upon an IME, Mr. Weston had been assigned a 27% permanent partial impairment to his foot and that Mr. Weston, who had been an active person prior to the accident, reported that the foot injury prevented him from hunting and restricted his motion. While he was out of work, the memo noted, Mr. Weston, who had been known as an independent person, could not walk, was immobile, and had to rely on his wife for a number of services. The memo also noted that Mr. Weston had incurred approximately \$2,000 in personal expenses as a result of the accident.

17. It was Attorney Sunshine's view, as his memo indicated, that the entire case, including the claim against the Parker/Kemper and the UM claim against his own carrier, Liberty Mutual, when combined, was worth between \$50,000 and \$100,000. However, in reaching this opinion, Sunshine noted he was unclear what the import of the 27% impairment rating had on the worth of the case or whether the claim value could be increased for compensation for Weston's use of sick days and vacation days while out of work.

18. In concluding the memo, Attorney Sunshine stated his belief that Mr. Weston would hire the firm if it could show that he would be better off using the firm than acting on his own and asked the partner to review the matter and get back to him within a few days.

19. Attorney Sunshine agreed to represent Mr. Weston in the UM claim against Liberty Mutual. On December 20, 1993, the two entered into an employment contract that called for Attorney Sunshine to represent Mr. Weston in the UM case against Liberty Mutual on a contingent fee basis. Attorney Sunshine agreed that he would not take any of the money that Mr. Weston would receive from Kemper in the third-party claim that arose from the accident with Mr. Parker.

20. By letter dated January 25, 1994, Attorney Sunshine informed a Senior Claims Adjuster at Liberty Mutual that he intended to assist Mr. Weston in making a UM claim against Liberty Mutual. He also asked for Liberty Mutual's permission to settle the third-party claim with Kemper.

21. By a letter dated February 3, 1994, the adjuster authorized Attorney Sunshine to settle Mr. Weston's third-party claim with Kemper. She also renewed Liberty Mutual's offer of \$5,000 on the UM claim.

22. By letter dated February 17, 1994, Attorney Sunshine informed the adjuster at Liberty Mutual that Mr. Weston was rejecting the \$5,000 offer to settle the UM claim. He advised that, on behalf of the Westons, he was making a claim against the UM policy that Liberty Mutual had issued to Mr. Weston. He wrote that he would forward all of Mr. Weston's medical information as soon as he had gathered it and that the parties might as well move immediately to litigation if not able to settle.

23. Weston's own automobile insurer, Liberty Mutual Insurance Company, authorized Mr. Sunshine to permit Weston to accept the Kemper Settlement. At his request, Sunshine prepared for Weston a covenant not to sue Kemper/Parker. On March 8, 1994, Mr. Weston signed that covenant. Mrs. Weston also signed such a covenant. Kemper accepted the covenants and paid the Westons the \$50,000.00 policy limit, less payments it had

already advanced.

24. As a result of this involvement of Sunshine, Weston avoided giving a general release.

25. Attorney Sunshine did not charge Mr. Weston for any work associated with the Kemper settlement. Neither did Mr. Sunshine collect any of the proceeds of that settlement.

26. Liberty Mutual never heard from Attorney Sunshine again.

27. Attorney Sunshine collected and assessed the police report of the accident, medical reports, medical bills and information concerning Mr. Weston's lost work and lost income.

28. On June 15, 1999, Attorney Sunshine filed a complaint in the Chittenden Superior Court on behalf of Mr. and Mrs. Weston. The complaint named Liberty Mutual as a defendant. It alleged that the insurer acted in bad faith and breached the insurance contract when it refused to pay Mr. Weston's UM claim. The complaint also included a claim that Mrs. Weston had endured suffering and a loss of companionship and consortium. It sought payment on the UM claim, other damages, and attorney's fees.

29. Attorney Sunshine failed to have the complaint served upon Liberty Mutual at any time. At the time he filed the complaint, Attorney Sunshine knew that Liberty Mutual's principal place of business was in South Burlington, Vermont.

30. By a form letter dated September 14, 1999, the Chittenden Superior Court informed Attorney Sunshine that Liberty Mutual had failed to enter an appearance and, that as a result, Mr. and Mrs. Weston were entitled to a default judgment. The letter, which Attorney Sunshine received, invited the filing of a motion for a default judgment and a proposed judgment order. But since service was never effectuated upon Liberty Mutual, the Westons were not entitled to a default judgment. Attorney Sunshine did not, therefore, file such a motion or proposed order.

31. By a form letter dated December 15, 1999, the Chittenden Superior Court informed Attorney Sunshine that the Weston complaint needed attention within 10 days. The letter cited V.R.C.P. 41(b)(1) and informed Attorney Sunshine that, failing such attention, the case would be dismissed within 10 days for one of two alternative reasons: (1) because Plaintiff had failed to move for a default judgment after the defendants had failed to appear within six months; or (2) because the defendants had not been served within six months of filing the complaint.

32. Attorney Sunshine took no action in response to the Court's letter of December 15, 1999 or its letter of September 14, 1999.

33. Attorney Sunshine did not notify the Westons of the Court's letter of December 15, 1999 or its letter of September 14, 1999.

34. On January 25, 2000, the Chittenden Superior Court dismissed, without prejudice, the complaint that Attorney Sunshine had filed on behalf of the Westons. The dismissal was based on the alternative reasons that (1) the defendants had not been served within six months of filing; or, in the alternative, (2) that Plaintiffs had failed to move for a default judgment.

35. Attorney Sunshine received a copy of the Court's order dismissing the Weston complaint.

36. Attorney Sunshine did not inform Mr. or Mrs. Weston that the complaint had been dismissed.

37. Attorney Sunshine did not appeal the "without prejudice" dismissal of the complaint. There was neither a basis for him to do so nor a prejudice resulting from his failure to do so.

38. At some point in 2000, Attorney Sunshine told Mr. Weston that he had filed the complaint incorrectly and would re-file it. But Sunshine did not re-file the complaint.

39. In March of 2000, Mr. Weston became concerned that the case against Liberty Mutual was taking too long. He phoned Attorney Sunshine and expressed concern that the case would be dismissed. Although Attorney Sunshine was aware, at that time, that the case had been dismissed, he did not advise Mr. Weston of that fact.

40. The day after he spoke with Attorney Sunshine, Mr. Weston phoned the Court and thereby learned, for the first time, that the complaint had been dismissed.

41. From the time the Kemper claim was settled in March 1994, until the time that he learned the complaint had been dismissed, Sunshine did not contact Mr. Weston. But Mr. Weston did telephone Sunshine periodically. During this period they would occasionally meet each other around town and Mr. Weston would inquire about the case. Sunshine recalls telling Mr. Weston that the case would probably go to trial soon.

42. Attorney Sunshine recalls talking about the Liberty Mutual claim with Weston over the years, both in person and on the telephone.

43. At one point Mr. Weston expressed concern that he had not received money that he was trying to recover, Sunshine recalls responding by discussing the concept of prejudgment interest.

44. Until he learned that the complaint had been dismissed, Mr. Weston believed that Attorney Sunshine was pursuing his claim against Liberty Mutual.

45. After learning that the complaint had been dismissed, Mr. Weston retained Attorney Gareth Caldbeck. In August of 2000, Attorney Caldbeck filed a complaint against Attorney Sunshine and Liberty Mutual. Count I of the complaint sought relief from Attorney Sunshine for his negligence in failing to file and serve a UM claim against Liberty Mutual. Count II of the complaint sought a declaration of Mr. Weston's rights vis-à-vis Liberty Mutual. Specifically, Count II asked the Court to issue a judgment declaring whether Mr. Weston's UM claim against Liberty Mutual was barred by the Statute of Limitations.

46. Motions and cross motions for summary judgment were filed. In addition, Attorney Caldbeck, acting on behalf of Mr. Weston, moved for relief from the judgment order that dismissed the complaint that Attorney Sunshine had filed, but not served.

47. The Court ruled on the various motions in an order dated February 20, 2001. The Court denied Mr. Weston's motion for relief from judgment. The Court granted Liberty Mutual's motion for summary judgment on the grounds that Mr. Weston's UM claim was barred by the statute of limitations. The Court denied Attorney Sunshine's motion for summary judgment. The Court ruled that Mr. Weston's claims against Attorney Sunshine would survive for trial.

48. In the course of Weston's negligence litigation against him, Attorney Sunshine has produced the client file he generated and maintained when representing Mr. Weston in the UM claim against Liberty Mutual. He has represented that the file he produced is the entire file. 49. Attorney Sunshine's client file contains, amongst other things, the three letters that were exchanged between him and Liberty Mutual in January and February of 1994, the notices that the Court sent to Attorney Sunshine in September and December of 1999 and medical records, medical bills and police reports obtained from third parties together with the correspondence written to procure them.

50. The client file Sunshine produced in the malpractice action does not contain any notes of conversations between himself and Weston. Sunshine has not produced any such notes in the course of the disciplinary action, nor has Sunshine represented that any such notes exist.

51. Since March of 2000, Sunshine was aware that Weston knew of the dismissal. However, it was not until he answered requests to admit in the discovery process in the malpractice litigation, that Attorney Sunshine admitted that the UM complaint against Liberty Mutual had been dismissed.

52. Mr. Weston's malpractice claim against Attorney Sunshine currently continues in litigation. If the assessment of damages made in Mr. Sunshine's November 24, 1993 memo is correct, the UM claim which he failed to timely pursue was worth between \$0 and \$50,000.00.

C. PRB File No. 2001.001

53. In the 1980's and 1990's, Attorney Sunshine frequently represented a man named Xenophon Wheeler, a successful businessman in the Richmond area. Attorney Sunshine handled many matters related to Mr. Wheeler's real estate and business transactions.

54. On December 7, 1989, John Belter signed a promissory note in favor of Mr. Wheeler. The note obligated Mr. Belter to pay \$13,596.20 to Mr. Wheeler. Interest was to accrue at 1% per month. The note was payable on demand.

55. The debt underlying the December 7, 1989 note originated as an open account. Mr. Belter gave Wheeler the note for an amount owed on this account. However, thereafter, Wheeler and Belter continued to transact business using the open account. From time to time Belter would charge new items to the account and would also make payments upon it.

56. Mr. Belter made two partial payments on the note in the early 1990's. The second was on May 5, 1992.

57. Belter did not make any monetary payments on any such debt

after May 1992. But he did not "refuse" to do so in May 1992 or thereafter. On the contrary, after May 5, 1992, Belter continued to admit to Attorney Sunshine that he owed this debt.

58. By 1994, Mr. Wheeler had died. His daughter, Barbara Cowles succeeded to Mr. Wheeler's interest in the Belter promissory note.

59. Prior to February 1995, Ms. Cowles asked Attorney Sunshine to represent her in an effort to collect on the Belter promissory note. He agreed to do so.

60. In an effort to determine collectibility of the note, Attorney Sunshine examined the lien record on Belter's major asset, his South Burlington property. That review apprised Sunshine that Belter had outstanding debts, many of which were secured by liens asserted against that asset.

61. With the understanding that Belter was "cash poor", Sunshine explored with Belter the possibility of barter as a means to partially satisfy the note. During a February 2, 1995 conversation with Sunshine, Belter stated his desire to pay the note and avoid litigation. But since he had very little disposable cash and many creditors, Belter offered to provide Cowles with topsoil for her golf course as partial payment upon the debt. In a letter to Cowles dated that same day, Attorney Sunshine reported Belter's acknowledgment of the debt and Belter's offer of a topsoil barter as partial payment.

62. Mr. Sunshine believed that Belter's acknowledgment of the debt recommenced the statute of limitations anew. He based his belief on holdings that even an expired statute of limitation will recommence, ab initio, where the debtor acknowledges the debt as still due and demonstrates an apparent willingness to remain liable for it. See *Hunter v. Kittredge's Estate*, 41 Vt. 359, 365-69 (1868); and *Williams v. Finney*, 16 Vt. 297, 299 (1844).

63. Over the next few years, Ms. Cowles occasionally asked for updates on the case. Attorney Sunshine never advised her that he was withdrawing or otherwise declining to pursue collection of the note.

64. In October of 1999, Ms. Cowles called Attorney Sunshine to discuss the Belter matter and other matters. At that time he indicated to her that he would commence litigation designed to try and collect upon the Belter note.

65. By letter dated December 17, 1999, Attorney Sunshine acknowledged to Ms. Cowles that he took responsibility for the collection of the Belter note and would continue to work towards collecting on it.

66. In early 2000, Ms. Cowles contacted Attorney Matt Daly to discuss several concerns that she had about Attorney Sunshine. Attorney Daly agreed to contact Attorney Sunshine.

67. By letter dated February 29, 2000, Attorney Daly informed Attorney Sunshine that Ms. Cowles had retained Attorney Daly to pursue collection of the note. In the letter, Attorney Daly informed Attorney Sunshine that Ms. Cowles had asked him to have Attorney Sunshine transfer her file to Attorney Daly. In March of 2000, Ms. Cowles provided Attorney

Sunshine with a written authorization to transfer the file to Attorney Daly.

68. On March 9, 2000, Attorney Sunshine faxed Attorney Daly and indicated that he would call on March 13 to discuss the Cowles/Belter matter. Attorney Sunshine did not call Attorney Daly on March 13.

69. By letter dated March 15, Attorney Daly asked Attorney Sunshine to contact him. Attorneys Daly and Sunshine spoke on March 21, 2000. Sunshine indicated that he would get the Belter Promissory Note file to Attorney Daly immediately. By April 10, 2000, Attorney Daly had yet to receive the file. That day, he informed Attorney Sunshine that he would proceed against Mr. Belter on behalf of Ms. Cowles.

70. Several weeks later, Attorney Sunshine again promised to get the file to Attorney Daly. By June 6, 2000, Attorney Daly had yet to receive the file. That day, he wrote a letter to Attorney Sunshine asking that the file be transferred immediately. In the letter, Attorney Daly expressed his concern that Ms. Cowles might have a problem with the statute of limitations. He indicated that because the note was not witnessed, there was a six-year statute of limitations from the date of default.

71. On June 14, 2000, Attorney Daly filed suit against Mr. Belter in the Chittenden Superior Court. The suit alleged that Mr. Belter had failed to honor his obligations under the terms of the note. Attorney Daly had a copy of the promissory note Ms. Cowles had provided. At the time the suit was filed, approximately \$32,000 in principal and interest was due under the note.

72. Sunshine believed the claim remained actionable at the time the complaint on the Belter note was filed. This was based on the Belter re-acknowledgement and his own research.

73. Attorney Sunshine had not sued Mr. Belter for collection on the note by the time Attorney Daly filed such a suit.

74. Through counsel, Mr. Belter answered the complaint. On September 7, 2000, he moved for summary judgment. Belter's statement of facts in support of that motion, and the affidavit supporting that statement of facts, asserted that the last payment he had made under the note was on May 5, 1992, and that thereafter he repeatedly refused to make any more payments on the note. He argued to the Court that the Cowles claim was barred by the statute of limitations because the complaint was not filed until eight years after that refusal to pay on the note.

75. Having researched the issue, it was Attorney Sunshine's belief, at this time, that the six-year statute of limitations on the note had been extended until February 2, 2001 by Belter's February 2, 1995 re-acknowledgement of the debt.

76. On October 6, 2000, Attorney Sunshine wrote and faxed a letter to Attorney Daly advising him of Sunshine's personal knowledge of Belter's February 2, 1995 re-acknowledgement of and offer to pay the debt, the details thereof and his own belief that this re-acknowledgement enlarged the limitations period for Cowles' claim.

77. On October 6, 2000, Cowles' counsel of record in the pending



litigation responded with a memorandum, to the effect that Defendant acknowledged and offered to pay the debt in February 1995 and that this acknowledgment operated to recommence the statute of limitations.

78. The Chittenden Superior Court granted Belter's Motion for summary judgment and dismissed Cowles' claim on the note ruling that the complaint was after the six-year statute of limitations expired. Its order stated:

Plaintiff contends that the statute of limitations is tolled by the defendant's alleged acknowledgment of the debt and a statement on February 2, 1995 that he wished to satisfy the debt. However, plaintiff has not provided any authority for this position; nor has plaintiff established that there was, in fact, a promise by the defendant to satisfy the debt. Plaintiff's Complaint was filed after the expiration of the statute of limitations, and therefore, it must be dismissed. *Cowles v. Belter*, Dkt. No. S0775-00 CnC, at 2, (Nov. 30, 2000).

79. At Attorney Daly's request, Attorney Sunshine has put his carrier on notice of a potential malpractice claim by Ms. Cowles.

80. The carrier has filed for a declaratory judgment that it is not liable to cover Ms. Cowles' claim. The matter is in the early stages of litigation.

81. By failing to file an action seeking recovery on the note, Attorney Sunshine violated his duty to his client, Ms. Cowles.

82. The extent to which this failure proximately damaged Ms. Cowles has not been determined. The extent to which the Belter note was collectible has not been determined.

#### D. Aggravating Factors

83. The parties stipulate that, given his personal and family history and the nature of the representation Attorney Sunshine provided, Mr. Weston was a vulnerable victim. ABA Standards for Imposing Lawyer Sanctions, Section 9.22(h).

84. At all times relevant to these complaints, Attorney Sunshine had substantial experience in the practice of law. ABA Standards for Imposing Lawyer Sanctions, Section 9.22(i).

#### E. Mitigating Factors

85. Attorney Sunshine has never been disciplined. ABA Standards for Imposing Lawyer Sanctions, Section 9.32(a).

86. Attorney Sunshine's failure to pursue Mr. Weston's and Ms. Cowles' claims was not the result of a dishonest or selfish motive. ABA Standards for Imposing Lawyer Sanctions, Section 9.32(b).

87. Attorney Sunshine suffered from personal problems and stress resulting from factors caused by the break-up of his firm, for which he was then acting as managing partner. ABA Standards for Imposing Lawyer

Sanctions, Section 9.32(c). Those problems no longer affect Attorney Sunshine's practice.

88. Attorney Sunshine has cooperated with Disciplinary Counsel's investigation. ABA Standards for Imposing Lawyer Sanctions, Section 9.32(e).

89. After realizing the impact this was having on his clients, Attorney Sunshine transferred some of his litigation files to other counsel and procured the assistance of experienced litigation counsel to review and supervise his handling of his remaining litigation files.

90. Attorney Sunshine expressed sincere remorse to Disciplinary Counsel with respect to his acts and omissions and their impacts upon his clients. ABA Standards for Imposing Lawyer Sanctions, Section 9.32(i). He also hereby expresses that remorse.

91. Attorney Sunshine joined a firm in 1987. The firm's principal place of business was in Burlington, Vermont.

92. Attorney Sunshine continued to concentrate his practice on real estate law and to operate primarily out of his Richmond office.

93. In December of 1998, problems arose at Attorney Sunshine's firm. By that time, Attorney Sunshine had become the firm's business manager. These problems concerned physical health, marital relations, "change of professional focus" and matters which substantially affected the staff and income of the firm.

94. Those events caused financial stress at the firm. As a result, in 1999, Attorney Sunshine focused on his real estate conveyance cases because they generally brought money in at a quicker and more consistent pace. As a result, his attention was directed away from his litigation cases.

95. The summer of 1999 was the busiest time of year in Attorney Sunshine's real estate practice.

96. By 2000, the financial strain on the firm had mounted. As business manager, Attorney Sunshine was concerned about slowing revenues, meeting bills and expenses, rising debt and the fact that expenses were expected to rise in June when, under the terms of a lease, the rents the firm was paying would increase substantially. The financial pressures affected morale at the firm, and, eventually, led to the firm being disbanded in the spring and summer of 2000.

97. The financial pressures, coupled with the pressures of being a manager at the firm at this time, also affected Attorney Sunshine's ability to attend to his litigation files.

98. In 1998-2000, Attorney Sunshine was responsible for his own litigation files. The firm did not oversee, check or provide guidance or support for his litigation work.

99. Attorney Sunshine now works on his own. He has two full time employees and hundreds of clients. He has a family including a school aged child.

100. The factors that affected his ability to attend to litigation files are no longer in place. He is no longer part of a firm that is going through a break-up. He has relatively few litigation files. Those litigation files he does have are supervised and reviewed by an attorney with whom Attorney Sunshine formerly practiced. That attorney is now serving as a mentor, monitor and advisor on Attorney Sunshine's litigation files.

## II. Conclusions of Law

Based upon the above findings of fact, the Panel accepts the parties' Joint Recommendation as to Conclusions of Law. Specifically, the Panel concludes that:

### A. General

1. The Code of Professional Responsibility applies to conduct that took place prior to September 1, 1999.

2. The Vermont Rules of Professional Conduct applies to the extent that a pattern of conduct continued or commenced after September 1, 1999.

3. DR6-101(A) (3) of the Code of Professional Responsibility prohibited a lawyer from neglecting a legal matter entrusted to him by a client until September 1, 1999. Commencing on that date that rule was replaced and superceded by Rule 1.3 of the Vermont Rules of Professional Conduct, which requires a lawyer to act with reasonable diligence and promptness in representing a client.

### B. PRB File No. 2001.075 (The Weston UM Claim)

4. Attorney Sunshine's acts and omissions with respect to the Weston UM claim against Liberty Mutual Insurance Co. was a pattern of conduct which violated DR6-101(A) (3) of the Code of Professional Responsibility and, when it continued on and after September 1, 1999, violated its successor rule, Rule 1.3 of the Vermont Rules of Professional Conduct.

5. Rule 8.4(d) of the Vermont Rules of Professional Conduct prohibits a lawyer from engaging in conduct that is prejudicial to the administration of justice. By failing, after receiving the Court's September and December 1999 notices, to take action to try and prevent dismissal of Weston's UM complaint, Respondent violated that rule.

6. Rule 8.4(c) of the Vermont Rules of Professional Conduct prohibit lawyers from engaging in conduct that involves dishonesty, deceit, or misrepresentation. Attorney Sunshine engaged in deceitful conduct in violation of that rule by failing to disclose to Mr. Weston that the UM claim had been dismissed by the Court and failing to accurately and fully respond to Mr. Weston's questions about the status of the case at that time. This caused Mr. Weston to incorrectly believe that this matter was on track and would come to trial soon.

### C. PRB File No. 2001.001 (The Belter Note/Cowles matter)

7. Attorney Sunshine's acts and omissions with respect to filing a cause of action on behalf of Ms. Cowles to seek collection upon the Belter Promissory Note were a pattern of conduct which violated DR6-101(A) (3) of the Code of Professional Responsibility (neglecting a legal matter entrusted to him by a client) and, when it continued on and after September 1, 1999, violated its successor rule, Rule 1.3 of the Vermont Rules of Professional Conduct (a lawyer is required to act with reasonable diligence and promptness in representing a client).

### III. Sanctions

The parties recommend that the Panel suspend the Respondent's license to practice law for four months commencing on January 1, 2002, and that it be followed by a two-year disciplinary probation.

Section 2.3 of the ABA Standards for Imposing Lawyer Sanctions recommends that suspensions, if warranted at all, generally be imposed for more than six months. The commentary to the Standards suggest that a minimum of six months is needed to ensure effective rehabilitation of the lawyer involved, and to ensure that the lawyer is not automatically reinstated without first demonstrating such rehabilitation. Vermont Supreme Court Administrative Order 9, Rule 8. A.(6)(a) requires that probation be used only in conjunction with another sanction and only when there is little likelihood that the respondent will harm the public during the period of probation.

The Panel agrees that some term of suspension is appropriate under the ABA Standards for Imposing Lawyer Sanctions, Section 4.42 (suspension appropriate when lawyer engages in a pattern of neglect and causes injury or potential injury to client) and Section 4.62 (suspension appropriate when lawyer knowingly deceives client and causes injury or potential injury to client).

After weighing the aggravating and mitigating circumstances cited above, in particular the steps already taken by Respondent to improve his handling of litigation cases, the Panel concludes that it is not likely that Attorney Sunshine will repeat his ethical violations or present a threat of harm to the public if allowed to resume the practice of law under disciplinary probation following a four month suspension. The detailed plan of probation ordered below provides for demonstrable rehabilitation of the Respondent and provides adequate protection to the public. The Panel, therefore, accepts the parties recommended sanctions.

### IV. Order

The Respondent's license to practice law in the State of Vermont shall be suspended for four (4) months beginning on January 1, 2002. Once the suspension runs, the Respondent shall be on disciplinary probation. The terms of the probation are as follows:

1. Period of Probation: The terms of this probation shall begin to run upon the expiration of the Respondent's four month suspension from the practice of law and shall continue to run for two years.

2. General: Once suspended, the Respondent shall comply with Rule 23 of Administrative Order 9.

3. Selecting a Monitor: Before his suspension expires, the Respondent shall select an attorney licensed to practice law in Vermont who will agree to serve as the Respondent's probation monitor during the period of the Respondent's disciplinary probation. The Respondent's choice must be approved by Disciplinary Counsel.

4. Monitoring Sessions: As a condition of probation, the Respondent shall meet with his probation monitor at least once every two months. At each meeting, the Respondent and his monitor shall review issues affecting the Respondent's practice, including, for each litigation client:

- : client needs;
- : client expectations;
- : quality of communications with clients;
- : deadlines and schedules; and
- : Respondent's plan to resolve the particular matter.

5. Attendance: The Respondent agrees that if he misses a scheduled meeting without informing his monitor, or, if he goes more than 2.5 months without meeting with his monitor, that the monitor shall report the Respondent's failure to attend a scheduled meeting to Disciplinary Counsel.

6. Implementing: The Respondent shall implement any recommendation that his monitor deems necessary to ensure the appropriate conduct of his office.

7. Reporting: The Respondent shall permit and authorize his monitor to respond to Disciplinary Counsel's requests for information relating to the Respondent's compliance with the monitoring arrangement and this probationary agreement. The Respondent shall secure from his monitor a report summarizing each meeting, including any recommendations made pursuant to paragraph 6 of this agreement. The report shall be filed with Disciplinary Counsel within two weeks of the meeting between the Respondent and the monitor.

8. Conflicts and Waivers: As part of the monitoring program, the Respondent shall provide litigation clients with an engagement letter that discloses the fact he is on probation and has entered into a monitoring relationship with another attorney. The letter, which shall also be sent to all existing litigation clients, shall state:

"I have agreed to represent you in this (lawsuit, claim, etc.) I will handle the case and will ensure that no client confidences are disclosed without your specific authorization. However, as I have advised you, I have established a monitoring relationship with another attorney in order to assist me in ensuring the highest quality of legal services will be provided on your behalf. I have specifically requested and obtained your permission to discuss generally your matter with my monitor without discussing the specific substantive basis of your matter.

I will limit the discussions with my monitor to the general areas of client needs, client expectations, client

communications, deadline & schedules, and my plan to resolve your matter. If, in my opinion, it becomes advisable to discuss the substantive basis of your matter with my monitor,

I will request that you give me specific permission to do so in writing, and will do so only after you have given me that permission. You will not be billed or charged in any way for the time that I spend discussing your matter with my monitor."

The Respondent shall ensure that the monitor does not have a conflict in discussing a particular matter. If the monitor does have a conflict, the Respondent shall immediately inform Disciplinary Counsel. The Respondent shall not accept a litigation client who chooses not to agree to sign the engagement letter.

9. Continuing Legal Education: As soon as practicable, the Respondent shall attend a continuing legal education program that offers at least 3 hours of CLE credit in the area of law office management/practices & procedures. To satisfy this provision, the Respondent must receive advance approval from Disciplinary Counsel. Respondent shall provide Disciplinary Counsel with proof of attendance.

10. Costs: The Respondent shall bear the costs and expenses related to his compliance with the probation and monitoring agreement.

11. Unavailability of Monitor: In the event that the monitor is not able to continue to serve as the monitor under this agreement, the Respondent shall immediately notify Disciplinary Counsel. In addition, Respondent shall, as soon as possible, find a replacement monitor. The Respondent's choice of a replacement monitor must be approved by Disciplinary Counsel.

12. Termination of Probation: This probation shall run for two years from the date that the Respondent's suspension expires. The probation shall not be terminated until the Respondent complies with Rule 8(a)(6) of Administrative Order 9.

13. The Respondent agrees that any violation of the terms in this order may serve as the basis for disciplinary prosecution.

Dated this November 29, 2001.

HEARING PANEL NO. 6

/s/

\_\_\_\_\_  
Judith Salamandra Corso, Atty., Chair

/s/

\_\_\_\_\_  
James Gallagher, Esq.

/s/

\_\_\_\_\_  
George Coppenrath

