

[21-May-2003]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In Re: Thomas Daly, Esq.
PRB File No. 2002.042

Decision No: 49

On January 21, 2003, Respondent and Disciplinary Counsel filed a Stipulation of Facts and a Joint Recommendation as to Conclusions of Law and Sanction. Respondent, who is represented by counsel, also waived certain procedural rights including the right to an evidentiary hearing. The Panel accepts the stipulated facts and the recommended conclusion of law and finds that Respondent violated Rule 8.4(d) of the Vermont Rules of Professional Conduct by failing to supplement his Petition for Admission to the Vermont Bar to reveal that he was the defendant in a consumer fraud complaint and that his firm was the subject of an inquiry by the New York Committee on Professional Standards.

The parties have recommended that the Panel impose a one year suspension. After consideration of the facts, the ABA Standards for Imposing Lawyer Sanctions and case law from other jurisdictions, the Panel concludes that this misconduct warrants a greater sanction and orders that Respondent be suspended from the practice of law for a period of three years.

Facts

Respondent was admitted to practice law in the State of Vermont on June 14, 2001. He sought admission to the Vermont Bar by filing a signed Petition for Admission with the Vermont Board of Bar Examiners dated November 28, 2000. Throughout the pendency of his Petition, Respondent was admitted to practice law in the State of New York.

A petition for admission to the Vermont Bar is a continuing application and an applicant has a duty to supplement all information required on the petition up to and including the date of admission.

Consumer Fraud Complaint filed by the State of New York

Respondent and other lawyers at the firm at which he was employed are named as defendants in a civil complaint brought by the state of New York. The Complaint states that the relief sought "is necessary to protect the public from each of defendants' fraudulent, deceptive and illegal acts and practices and to obtain redress for those consumers who have been victimized by those acts and practices."

The complaint, which was filed in the Albany County Clerk's office on June 28, 2000, alleges that Respondent and the other defendants are engaged in repeated and persistent fraud and that they persistently engage in deceptive business practices in violation of New York law. When Respondent

submitted his Petition for Admission to the Vermont Bar his position was that the Complaint did not exist insofar as the time for service of the Complaint upon him had run. In March of 2001, Respondent, through counsel, executed a Stipulation of Service in which he agreed that the Complaint had been served on him on July 18, 2000. Section 10(e) of Respondent's Petition for Admission to the Vermont Bar asked him to indicate whether or not he had "ever been charged with fraud, formally or informally, in any legal proceeding, civil or criminal, or in bankruptcy."

Respondent originally answered Section 10(e) so as to indicate that he had been charged with fraud. By letter dated January 25, 2001, the Administrative Assistant to the Board of Bar Examiners informed Respondent that the Board had reviewed his Petition and that his "responses to question 10 need to be corrected or clarified with explanations and/or more detail where necessary."

Respondent submitted a revised answer in which he answered Section 10(e) so as to indicate that he had never "been charged with fraud, formally or informally, in any legal proceeding, civil or criminal, or in bankruptcy." As of March 18, 2001, Respondent knew of the consumer fraud complaint, which, for the purposes of Section 10(e) on the Petition for Admission, charged the Respondent with "fraud," and as of that date Respondent had a duty to supplement his answer to Section 10(e) of his Petition for Admission to so indicate.

Between March 18, 2001, and June 14, 2001, the date of his admission, Respondent failed to supplement his response to Sections 10(e) of his Petition for Admission to inform the Board of Bar Examiners that the State of New York had named him as a defendant in a complaint that charged Respondent and other lawyers at the firm at which he was employed with engaging in, among other things, fraud, deceptive business practices, and false advertising.

Ethical Inquiries Submitted to the New York Committee on Professional Standards.

The State of New York Committee on Professional Standards for the Third Judicial Department is responsible for investigating and prosecuting alleged violations of the ethical rules that govern attorney conduct in New York's Third Judicial Department.

By certified letter dated April 4, 2001, the New York Committee on Professional Standards notified Respondent and other lawyers at the firm at which he was employed of 244 inquiries it had received regarding the firm. The letter was addressed to "The Daly Law Centers, 160 Benmont Avenue, Bennington, Vermont 05201." A representative of the firm signed for the letter on April 6, 2001.

The letter was directed to the attention of "Scott Murphy, Marc G. Alster and all other attorneys of the Daly Law Centers licensed to practice law in New York State." At the time, the Respondent was an employee at the firm and was licensed to practice law in the State of New York. The letter indicated that:

All inquirers listed below allege that you {sic} firm engaged in the misconduct detailed in (1) below, and some inquirers also allege that your firm engaged in the

misconduct detailed in (2) below:

1. Engaging in misrepresentation, ineffective representation, and/or failing to communicate.
2. Failure to promptly pay or deliver to the client as requested funds or property which the client is entitled to receive

The letter directed the firm's attorneys who were admitted in the State of New York to file a written response to the allegations made by each of the 244 individual inquirers. Respondent learned of this inquiry prior to his admission to the Vermont Bar.

Section 8 of the Respondent's Petition for Admission to the Bar of the State of Vermont asked:

Have you ever been disbarred, suspended from practice, reprimanded, censured, or otherwise disciplined or disqualified as an attorney or member of any profession or organization, or holder of any office public or private; or have any complaints or charges, formal or informal, ever been made or filed or proceedings instituted against you?

Upon learning of the inquiries that had been filed with the New York Committee on Professional Standards, the Respondent had a duty to supplement his response to Section 8 and to reveal this information to the Board of Bar Examiners prior to his admission. Respondent failed to do so.

Conclusion of Law

Rule 8.4(d) of the Vermont Rules of Professional Conduct prohibits attorneys from engaging in conduct that is prejudicial to the administration of justice. The Supreme Court Rules of Admission to the Bar state that:

The public interest is best served and protected and the integrity of the Bar of the Supreme Court is best maintained when applicants for admission are fairly, impartially, and thoroughly investigated as to their moral character and fitness and examined as to their professional competence as attorneys. Rule 5(a), Rules of Admission to the Bar.

The burden of proving moral character and fitness is on the applicant. Rule 11 (C), Rules of Admission to the Bar. The Rules further provide that a petition for admission "shall be a continuing application, and all information for admission required therein must be supplemented and filed with the clerk up to and including the date of admission." Rule 9(f) (1), Rules of Admission to the Bar.

Section 10 of the Petition for Admission asked the Respondent whether he had ever been charged, formally or informally, with fraud. Though Respondent initially answered that he had been charged with fraud, when asked for details, he submitted a revised answer indicating that he had never been charged with fraud. By March 18, 2001, Respondent knew that the State of New York had named him as a defendant in a consumer fraud action. He then had a duty to update his answers to Section 10(e) to inform the

Board of Bar Examiners of this action but he failed to do so.

Similarly, section 8 of the Petition for Admission asked Respondent whether any ethics complaints had been made against him. Respondent answered "no". However, prior to being admitted to the Bar, Respondent learned that the New York Committee on Professional Standards had asked him to respond to 244 ethical inquiries. Upon learning of these inquiries, Respondent had a duty to supplement his response to Section 8, yet he did not do so. Respondent's failure to supplement his Petition for Admission prevented the Board of Bar Examiners and the Character and Fitness Committee from conducting a thorough investigation and examination of his application.

His failure to reveal the consumer fraud complaint and the inquiry from the New York Committee on Professional Standards is prejudicial to the administration of justice and violates Rule 8.4(d) of the Vermont Rules of Professional Conduct.

Sanction

The Panel has considered the recommendation for a one year suspension and does not believe that it adequately reflects the seriousness of the misconduct in this case. In essence, Respondent's application for admission to the bar was founded upon his intentional concealment of charges of fraud and ethical violations in connection with his practice of law in another jurisdiction.

In an attorney discipline case involving omissions from a bar application the Maryland Supreme Court stated that "[w]e have held often that no moral character qualification to practice law is more important than truthfulness and candor." Attorney Grievance Commission v. Joehl, 642 A.2d 194, 200 (Md. 1994). The court went on to cite with approval the New Jersey Supreme Court which stated in *In re Scavone*, 524 A.2d 813, 820 (1987), that "[t]ruth is not a matter of convenience. Sometimes lawyers may find it inconvenient, embarrassing, or even painful to tell the truth. Nowhere is this more important than when an applicant applies for admission to the bar." Joehl, 200. The Supreme Court of Illinois found that deceptive answers on an application for admission to the bar "constituted a fraud on this court." *In re Mitran*, 387 N.E. 2d 289 (Ill. 1979). The Panel is in full accord with these sentiments. Our judicial system is premised on the fact that an attorney's relationships with courts, clients and fellow members of the bar will be truthful and candid. An attorney's failure to meet this standard on his application for admission is of grave concern.

In reaching its opinion the panel is guided by the ABA Standards for Imposing Lawyer Sanctions, Vermont case law and case law from other jurisdictions.

ABA Standards for Imposing Lawyer Sanctions

In making their recommendation the parties cite the Panel to Standard 7.2 which provides:

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 a client, the public, or the legal system.

We believe that Standard 7.1 is more to the point. It provides:

Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional WITH THE INTENT TO OBTAIN A BENEFIT FOR THE LAWYER or another, and causes serious or potentially SERIOUS injury to a client, the public, or the legal system.
(emphasis added)

The key difference between the two sections is the fact that the ABA Standards suggest that disbarment is appropriate when the lawyer acts to obtain a benefit and the injury is serious. Here the benefit was the enhancement of his application for admission to the bar. There is the potential for serious injury to the public perception of the bar when its application process is undermined by such conduct. The Commentary to Standard 7.1 states that disbarment is appropriate in cases involving misrepresentation in bar applications. Thus it is clear that the ABA Standards consider this to be serious misconduct.

Case Law From Other Jurisdictions

A number of jurisdictions have considered disbarment the appropriate sanction for lack of truthfulness in bar applications. In *In re Mitan*, supra, the court ordered disbarment for misleading and deceptive statements on the bar application having to do with addresses, date of birth, law schools attended, employers, prior civil proceedings and conviction of a felony. In another Illinois case, the court ordered disbarment due to the number of omissions on the application which when taken together constituted serious misstatements. *In re Jordan*, 478 N.E.2d 316 (Ill. 1985). A similar result was reached in a Maryland case involving numerous omissions. *Attorney Grievance Commission v. Joehl*, 642 A.2d 194 (Md. 1994).

In comparing the present case to these we find that Respondent's omissions, while concealing matters bearing on his fitness for admission, were not as serious as those in which the attorney concealed commission of a crime, nor so numerous as those in the *Jordan* and *Joehl* cases.

Vermont Case Law

In reviewing the Vermont cases imposing substantial discipline, we find that for the most part disbarment has been reserved for commission of felonies, *In re Abel*, PCB Decision No. 117 (1997), embezzlement from firm; *In re Thompson*, PCB Decision No. 138 (1999), misappropriation of client funds, interstate transfer stolen goods, and structuring a transaction to avoid currency reporting laws, *In re Frattini* PRB Decision No. 26 (2001), embezzlement, mail fraud and tax evasion, or cases involving serious harm to clients, *In re Joy*, PCB Decision No. 22 (1991), lying to clients, letting statute of limitations run, and *In re Karpin*, PCB Decision No. 41 (1992), lying to clients and court among other offenses. Again we find that the misconduct, though serious does not rise to this level.

Conclusion

We believe the situation to be close to that faced by the Illinois Court in *In re Chandler*, 641 N.E.2d 473 (1994), in which the attorney was

suspended for a period for three years for making false statements on a mortgage application. We also believe it to be in line with the three year suspensions imposed in In re Hunter, PCB Decision 110 (1996), and In re Wysolmerski, PRB Decision No. 22 (1996).

The Panel believes that a three year suspension adequately protects the public in that Respondent will be prohibited from practicing law and will have to petition for readmission should he desire to return to practice.

Order

For the foregoing reasons Respondent is SUSPENDED from the practice of law for a period of three years commencing April 7, 2003.

Dated: _____

FILED 3/7/03

HEARING PANEL NO. 2

/s/

Douglas Richards, Esq., Chair

/s/

Lawrin P. Crispe, Esq.

Michael H. Filipiak