STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

In Re: Carolyn Adams
PRB File No. 2019-014 and 015

Disciplinary Counsel's Opposition to Respondent's Motion for Relief from Judgment

On May 17, 2021, Respondent filed a motion with the Professional Responsibility Board seeking relief from a two hearing panel orders dated April 24, 2019 and December 31, 2019 in the closed disciplinary dockets PRB file 2019-014 and 015. *See* In re Adams, PRB Decision Nos. 225 and 225-A. The motion should be denied because the Board's hearing panels lack jurisdiction to grant relief from the final judgment, which by rule issues from the Supreme Court following that Court's automatic receipt and review of the complete record of the proceedings. *See* Supreme Court A.O. 9, Rule 13.D(5)(c), (E) (formerly numbered as Rule 11 but otherwise unchanged).

In the alternative, if jurisdiction is proper, Respondent has failed to establish that the standard for relief under V.R.C.P. 60(b) has been met.

I. Hearing panels lack jurisdiction to grant relief from final judgment.

Although hearing panels issue a final order of discipline and sanction in lawyer discipline matters, the Supreme Court is the body from which all final judgments issue, whether or not any appeal is taken. *See* Supreme Court A.O. 9, Rule 13.D(5)(c), (E). As such, the panel lacks jurisdiction to grant the requested relief.

Under the Vermont Constitution, chapter II, section 30, the Court is charged with structuring and administering the lawyer disciplinary system. In doing so, the Court promulgated Administrative Order 9, establishing the Professional Responsibility Program and permanent

rules governing its operations. A.O. 9, Preamble & Purpose.

Under A.O. 9, hearing panels of the Professional Responsibility Board adjudicate formal disciplinary proceedings. A.O. 9, Rule 14. Panel duties are enumerated by rule to include ruling upon probable cause requests, conducting disability and disciplinary hearings, making findings of fact and conclusions of law, imposing sanctions, and other related tasks assigned by the Board. A.O. 9, Rule 14.C. The language of A.O. 9 and case law supports that, while many of the functions performed by hearing panels are similar or identical to that of a trial court, the Supreme Court did not cede its inherent oversight authority of lawyer discipline and disability to the jurisdiction of volunteer panels who are appointed to two-year terms. *See* A.O. 9, Rule 14.A. Of particular consequence, each and every panel order is automatically transmitted to the Supreme Court for review, along with a complete record of the proceeding. A.O. 9, Rule 13.D(5)(c). Either party may appeal a final order of a panel, but another defining feature of Court oversight is that the Court may also, on its own, order review of all or part of the disciplinary or disability matter. A.O. 9, Rule 13.E.

The Court commonly exercises this inherent oversight authority to perform de novo review of a panel's legal conclusions and sanctions recommendations. *See, e.g.*, *In re Wysolmerski*, 2020 VT 54, ¶ 22, 39; *In re Robinson*, 2019 VT 8, ¶ 27 (reviewing both matters upon Court's own motion and emphasizing that Court treats panel's conclusions as to sanction as a "recommendation"). Unlike ordinary appeals where the parties must specifically request how they want the Court to rule, in PRB matters, the Court may freely reject both parties' arguments as to recommended sanctions and impose whatever sanction it believes is appropriate. *See, e.g.*, *In re Wysolmerski*, 2020 VT 54 (rejecting the panel's and both parties' sanctions

recommendation and disbarring respondent). Even in cases where neither party appeals and no Court review is ordered, the Court receives and reviews the full record from the panel and, at the close of the appeal period, issues an entry order declaring the matter closed.

In this case, no appeal was taken an no special review was ordered. Nevertheless, just as A.O. 9 specifies, the complete record that formed the basis for PRB Decisions 225 and 225-A, from which Respondent now seeks relief, was timely transmitted and reviewed by the Court and a separate Supreme Court Docket number was assigned. Then, the Court expressly closed each matter by judgment dated May 29, 2019 and February 4, 2020. *See* Attached Supreme Court Entry Orders *In Re Adams*, Docket Nos. 2020-002 and 2019-152. Accordingly, only the Court has jurisdiction to "relieve" the judgment and reopen the matter, and the panel must dismiss Respondent's improperly filed motion.

II. Even if the panel determines it has jurisdiction to grant relief from the judgments, Respondent has not met the requirements under V.R.C.P. 60(b).

Vermont Rule of Civil Procedure 60(b) provides that "[o]n motion and upon such terms as are just," a trial court "may relieve a party . . . from a final judgment, order, or proceeding" for various reasons, including:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial ...; (3) fraud ..., misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged ...; or (6) any other reason justifying relief from the operation of the judgment.

A Rule 60(b) motion must be filed within a reasonable time. *Brandt v. Menard*, 2020 VT 61, ¶ 4; V.R.C.P. 60(b). For the first three reasons provided in Rule 60(b), the motion must be filed within one year. V.R.C.P. 60(b). "A V.R.C.P. 60(b) motion is invoked to prevent hardship or

injustice and therefore should be liberally construed." *Brandt v. Menard*, 2020 VT 61, ¶ 5 (quotations omitted). "At the same time, the rule . . . is not an open invitation to reconsider matters concluded at trial." *Id.* (quotations and brackets omitted). A motion for relief from judgment is not a substitute for a timely proper appeal, and certainty and finality of judgments are important considerations so that litigation can reach and end. *Id.* ¶ 10. Given that Respondents' motion is filed more than one year after both judgments, only options 4, 5, and 6 are potentially available under Rule 60(b), and it appears Respondent only requests relief under subsections 5 and 6.

Rule 60(b)(5) allows for relief when the judgment has been satisfied. Respondent argues pursuant to this subsection that the judgment imposing suspension of six months has been satisfied, circumstances have changed, and that she should not be subject to "indefinite" suspension. Respondent's motion at 19. Vermont Rule of Civil Procedure 60(b), however is not a proper basis for this type of relief. The Rules of Civil Procedure apply in PRB matters "except as otherwise provided" in A.O. 9. A.O. 9, Rule 20.B. In other words, where A.O. 9 contains a specific applicable provision, the Rules of Civil Procedure do not govern. Here, the exact relief sought is pursuant to Rule 60(b)(5) is provided for under in A.O. 9, under the rule entitled "Reinstatement." That rule addresses an avenue for relief from suspension on the basis that the sanction has been satisfied or completed. A.O. 9, Rule 26 sets out the procedure, timelines, and burdens for a properly filed motion for reinstatement. Respondent's suspension was effective January 1, 2020. *See* PRB Decision No. 225-A. She was never subject to an "indefinite suspension," as she asserts. She has been eligible to apply for reinstatement since April 1, 2020, which would have been 90 days before the six-month suspension expired, as provided for under

A.O. 9. Respondent has never attempted to apply for reinstatement, and should not be permitted to use Rule 60(b)(5) as a way to circumvent an applicable A.O. 9 Rule.

Next, Respondent argues that the Civil Rule 60(b)(6) should apply here to relieve her from the judgment to prevent hardship or injustice. Respondent claims, for the first time, that she during her hearings that she was disabled to such a degree that she was unable to properly defend against the charges. She now asserts that under the former A.O. 9, Rule 21(b) (now Rule 25.B, substantively unchanged), the Court should have immediately transferred her to disability inactive status based upon her explanations at her hearing that she was experiencing stress, depression and difficulty coping with and preparing for her disciplinary proceedings. Respondent's motion at 3, 8-13, 19-22. According to Respondent's reading of A.O. 9, her statements about her mental health and the stress at her hearings should have automatically triggered some action on this issue by either the panel or disciplinary counsel.

The plain meaning of Rule 25.B does not support Respondent's reading of that provision. Under A.O. 9, Rule 25.B, a respondent must clearly "allege[ ]" an inability to defend. While Respondent certainly offered evidence of her conditions, which the panel properly considered in mitigation, at no point did she request that proceedings stop so that a disability inactive matter, which is an entirely separate non-public proceeding, could commence.

It would be an unfair reading of Rule 25.B to impose an affirmative duty upon the panel or disciplinary counsel to stop a hearing when a respondent raises any issue involving mental health. If Respondent had exhibited clear signs of a disability at her hearing, such as an inability to speak, write, or sensibly form thoughts, then perhaps an affirmative duty could be triggered. This is not all what occurred at either of Respondent's hearings, however. She appeared on time,

dressed appropriately, was able to give coherent testimony and cross examine witnesses.

One specific example that contradicts Respondent's claim comes from her first hearing. As Respondent was addressing questions related to her mental health at the time of the misconduct, she was then expressly asked by the Chair about her current health circumstances:

Q: And what can you say to us that would lead us to conclude that you're in control now, that this wouldn't happen again?

A: That's a good question. What I've done is voluntarily limit my practice to transactional things.

Mar. 13, 2019 Tr. at 33. Had Respondent intended at any point to allege inability to properly defend withing the meaning of Rule 25.A, this would have been one of many opportunities she was afforded to do so. Additionally, later in the hearing, Respondent stated "I'm a lot better now than I was then. So I'm working through this. I do have a plan to work through it." Tr. at 42. In sum, there is no support in the record for any assertion that a disability was apparent and significant so as to render the entire proceedings unjust.

To the extent Respondent only seeks relief from the specific judgments in which each panel deemed the charges admitted for Respondent's failure to file an Answer, the panel must also reject this request. Respondent had an opportunity to request an extension of time in each proceeding and failed to do so. *See* A.O. 9, Rule 13.D(3). She could have attempted to show timely good cause for failure to respond. *Id.* She also could have objected at her hearings and made a timely written request arguing excusable neglect at the times those judgments issued. She could have filed a timely motion to alter or amend judgment. *See* V.R.C.P. 59(e). And, she could have appealed from those orders but did not. A.O. 9, Rule 13.E. Respondent's assertion, nearly

two years later, that the stress of the disciplinary action amounts to excusable neglect sufficient to grant relief from judgment is unsupported by any authority as a basis for relief. *Cf. Clodgo v. Green Mtn. Transit*, No. 2020-157, 2020 WL 7121770, at *1-2 (rejecting appellant's claim that her failure to file a response to the motion to dismiss was caused by the closure of her attorney's normal business operations due to the COVID-19 pandemic and emphasizing that she never sought an extension of time to file a response and never filed an appropriate timely post-judgment motion).

Relatedly, Respondent further asserts that her "precise mental state at the time of the alleged misconduct is unclear." Respondent's Motion at 4. But this is also incorrect. The panel in both orders made clear findings based upon record evidence as to Respondent's mental state in relation to the conduct charged. In Decision 225, it found she acted with a "negligent" mental state in missing scheduled hearings for her clients. PRB Decision No. 225 at 9. In Decision 225-A, it found she acted "knowingly" and "recklessly" in failing to comply with the terms of her probation. PRB Decision No. 225-A at 18. If Respondent disagreed, she should have appealed from those conclusions. She cannot now claim, two years later, that there was a lack of clarity in the evidence at those proceedings and cannot relitigate these issues under the guise of a motion for relief from judgment.

Finally, the bulk of Respondent's motion and exhibits introduces evidence in the form of representation to the panel that was never properly introduced at her hearings with proper foundation, subject to inquiry and cross examination. Respondent's Motion at 3, 8-16; "Exhibits" A-D. Respondent argues that this evidence supports what she may have been going through at the time of the disciplinary matter and provides additional details about her mental health

diagnoses and further supports her claim that she must be relieved from the judgments. Much of the evidence is not properly before the panel because it was not introduced in accordance with the Rules of Evidence and subject to cross examination, and the panel should not consider it.

Any contention that Respondent was not afforded ample opportunity to introduce whatever mitigating evidence she wished at both of her hearings is false. In fact, the record shows that Respondent did put on evidence of her mental health condition, which the panel considered in both proceedings. In the first matter, PRB Decision No. 225 at pages 3-4, the panel expressly found:

> Respondent suffers from periodic bouts of depression and anxiety. She has periodically sought treatment and counseling. She attributes her failure to attend the July 20 court appearance to a bout of depression and anxiety. . . . Respondent maintains she "was not functioning well that week" and was depressed because her deceased parents' wedding anniversary was on July 20.

The panel applied these findings in its sanctions analysis, concluding that Respondent's mental state in carrying out the rule violations found was one of negligence in part because of her "personal emotional problems." PRB Decision No. 225 at 9. Further, it credited Respondent's mental health situation as a mitigating factor. *Id.* at 13.

In the second matter, the panel again assigned mitigating weight in its sanctions analysis for Respondent's mental health status. PRB Decision No. 225-A at 24. That panel further expressly considered whether there was evidence that Respondent suffered from mental disability and concluded there was not. *Id.* at 24 n.8. The panel further found:

> Respondent has now failed to file timely answers in two consecutive disciplinary proceedings, only to appear at the last possible minute in both proceedings and attempt to contest the charges. This conduct is deeply troubling – it amounts to a serious disregard of established legal process, not unlike failing to appear at a scheduled hearing.

Id. at 26.

Finally, to the extent Respondent asks the panel to consider (improperly offered) evidence of her current mental state and her current job performance, this is entirely irrelevant to a motion for relief from judgment for misconduct that occurred approximately three years ago. Certainly, evidence of Respondent's current condition and job performance would be relevant for the panel to consider in a properly filed motion for reinstatement. Notably, Respondent was eligible to apply for reinstatement as of April 1, 2020 but has not done so. A.O. 9, Rule 26.D (setting out procedure and requirements for seeking reinstatement from suspension).

Conclusion

The panel lacks jurisdiction to consider Respondent's Motion for Relief from judgment under its enumerated duties in A.O. 9, and only the Supreme Court can consider such a motion. In the alternative, Respondent has not set forth any basis for relief under the requirements of V.R.C.P. 60(b).

DATED: May 26, 2021

Respectfully submitted,

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