STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In Re: Carolyn Adams, Esq.
PRB File Nos. 2019-014 & -015

RULING ON RESPONDENT'S MOTION FOR RELIEF FROM JUDGMENT

Respondent, Carolyn Adams, Esq., has filed a motion requesting that two decisions issued in the above-captioned matter be vacated. The first decision, issued in April of 2019, found and concluded that Respondent had provided incompetent representation to her clients and had failed to act with reasonable diligence and promptness in representing clients, in violation in violation of Rules 1.1 and 1.3 of the Rules of Professional Conduct. Based on these violations, the hearing panel issued a public reprimand and imposed terms of probation going forward. The probation order required Respondent (1) to consult with another attorney regarding her systems for calendaring and other methods of keeping track of her hearings and appointments and to obtain an evaluation and recommendations from that attorney; and (2) to pursue, in light of Respondent's assertion that she was having difficulty managing stress and experiencing episodes of depression, regular counseling sessions with a Vermont-licensed clinical mental health counselor for a period of twelve months. *See* PRB Decision No. 225 (issued 4/24/19).

The second decision, issued in December 2019, found and concluded that Respondent violated the probation order by failing to identify, prior to expiration of the deadline in the order, an attorney who would undertake the office systems review; by failing to take steps to ensure that the full scope of review required by the order would be undertaken by the attorney she selected; by delaying in identifying a counselor and failing to provide the counselor with a complete copy of the panel's underlying decision, as required by the order; and by failing to provide the counselor with an unequivocal authorization to notify Disciplinary Counsel if

Respondent missed a monthly appointment or if the counselor came to believe that Respondent's condition at any point adversely affected Respondent's ability to practice law. Based on Respondent's conduct, the hearing panel ordered a six-month suspension. *See* A.O. 9, Rule 15(A)(6)(c) ("Upon proof of a probation violation, any sanction under these rules may be imposed.").

Respondent did not appeal either of those decisions. Moreover, the Vermont Supreme Court entered orders in both cases following expiration of the appeal period stating that it had decided not to review the decisions pursuant to its authority under A.O. 9, Rule 11(D)(5)(c)[1] and declaring that "the hearing panel's decision has therefore become final and has the same force and effect as an order of this Court. This case is therefore closed." *See* Entry Order (S. Ct. Docket No. 2019-152) (issued 5/29/19) & Entry Order (S. Ct. Docket No. 2020-002) (issued 2/4/2020).

As a result of Respondent's suspension, she is required under A.O. 9, Rule 26, to file an application for reinstatement if she wishes to resume the practice of law. In a reinstatement proceeding:

> the respondent-attorney shall have the burden of demonstrating by clear and convincing evidence that he or she has the moral qualifications, competency, and learning required for admission to practice law in the state, and the resumption of the practice of law will be neither detrimental to the integrity and standing of the bar or the administration of justice nor subversive of the public interest and that the respondent-attorney has been rehabilitated.

A.O. 9, Rule 26(D).

[1] Rule 11 was subsequently renumbered; an identical rule is presently set forth as Rule 13 of A.O. 9. Under Rule 13(D)(5)(c), the Supreme Court may review any hearing panel decision "on its own motion" – in other words, even in the absence of an appeal – and issue a superseding decision in the case.

Respondent's motion for relief from judgment was filed on May 17, 2021 – more than one year after the later-in-time of the two decisions became final, in February of 2020. Moreover, the motion comes after the expiration of the six-month suspension period that was imposed.

In her motion, Respondent asserts that she has suffered from a mental disability over the years – allegedly "full blown" depression, Motion for Relief from Judgment ("Motion") at 6.[2] Respondent further argues that even though she did not at any time assert that she was incapable of defending herself, nevertheless, an inquiry into whether it would have been appropriate to transfer her to "disability inactive" status pursuant to Rule 25 (formerly Rule 21) should have taken place based on the nature of the alleged misconduct – missed hearings and failing to communicate with her clients – and Respondent's failure to file timely answers in the two disciplinary proceedings and various statements she made during the hearings.

Rule 25(B) provides, in pertinent part, as follows:

> **B. Inability to Properly Defend. --** If a respondent alleges in the course of a disciplinary proceeding that he or she is unable to assist in his or her defense due to a mental or physical disability, the Court shall immediately transfer the lawyer to disability inactive status pending determination of the incapacity. Such determination shall be made by a hearing panel assigned by the Board, following notice and an opportunity to be heard. The panel shall submit a report to the Court with its recommendation.
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> **(1)** If the Court determines the claim of inability to defend is valid, the disciplinary proceeding shall be deferred and the respondent retained on disability inactive status until the respondent's return to active status.
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> **(2)** If the Court determines the claim of inability to defend to be invalid, the disciplinary proceeding shall resume.
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> **C. Proceedings to Determine Incapacity. --** Information relating to a lawyer's physical or mental condition which adversely affects his or her

[2] She maintains in her motion that her depression reached this stage by 2009 and that a private admonition she received in 2012 for a separate violation of Rule 1.3 "had a [further] damaging and sustained impact on her and her practice." *Id*. at 6.

> ability to practice law shall be the subject of formal proceedings to determine whether the lawyer shall be transferred to disability inactive status. The Court may take or direct whatever action it deems necessary or proper to determine whether the respondent is so incapacitated, including the examination of the respondent by qualified medical experts designated by the Court. If, upon due consideration of the matter, the Court concludes that the respondent is incapacitated from continuing to practice law, it shall enter an order transferring the lawyer to disability inactive status for an indefinite period and until the further order of the Court. Any pending disciplinary proceedings against the respondent shall be held in abeyance.
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> The Court shall provide for such notice to the respondent of proceedings in the matter as it deems proper and advisable and may appoint an attorney to represent the respondent if the lawyer is without adequate representation.

A.O. 9, Rule 25 (B) & (C).

Respondent maintains that Disciplinary Counsel inquired as to whether Respondent was interested in "disability inactive" status but that Respondent declined for various reasons. Motion at 9-10. Respondent maintains that her "intense feelings and her mental health made it impossible for her . . . to decide to accept DI status." *Id*. at 10. She further maintains that the provision in Rule 25(c) requiring a pending disciplinary proceeding to be held in abeyance while a respondent is on disciplinary inactive status made disability inactive status "unappealing" to her. *Id*. at 9. Respondent does not contend that she ever requested a mental health assessment. Rather, Respondent attempts to argue that, in hindsight, that she should have been compelled to submit to an inquiry into her capacity to defend the charges, including possibly a mental health examination by an independent medical expert.

Respondent argues that Disciplinary Counsel and the panel should have "presumed" or "inferred" a "wellness" issue, including that she was mentally unable to defend herself, based on the alleged misconduct. Motion at 10. Respondent further claims that she "provided evidence of

a mental health defense [to the charges] and an inability to defend due to a disability" during the hearings which should have triggered an examination.

In an effort to support her effort to vacate the two decisions, Respondent also attempts to relitigate the underlying conduct that was the subject of findings of fact and conclusions of law, including her failures to comply with the probation order. And she makes factual assertions related to new charges that are currently pending against her before a different hearing panel in *In re Carolyn Adams, Esq., PRB File No. 2020-064*. Finally, Respondent argues that the decisions should be vacated because she is currently addressing her mental health issues and is capable of returning to practice.

As legal justification for her request to vacate the two decisions, Respondent cites to Rule 60(b)(5) & (6) of the Vermont Rules of Civil Procedure. That rule provides, in its entirety, as follows:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (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 under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be filed within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. ****

V.R.C.P. 60(b).

Disciplinary Counsel has filed an opposition to Respondent's motion. Disciplinary Counsel argues that the hearing panel does not have jurisdiction to consider Respondent's motion and that, once the Supreme Court has declared a hearing panel decision to be final, any such motion must be presented to the Supreme Court. Disciplinary Counsel argues in the alternative that, even assuming jurisdiction over the motion, the motion is without merit.

* * *

The issue of whether the panel or the Supreme Court has original jurisdiction to rule on Respondent's motion for relief from judgment is open to debate. After due consideration, the Panel concludes that under the circumstances of this case the panel should proceed to decide the motion in the first instance. As Disciplinary Counsel correctly points out, the Supreme Court exercises ultimate authority over the subject matter of attorney discipline, as well as the specific discipline that is imposed in each individual case. Even in the absence of an appeal, the Court can decide to review a panel decision and issue a superseding decision or, alternatively, it can decide not to do so and thereby allow a hearing panel decision to become final. When the Supreme Court decides to review a decision, Rule 13(E) provides for an order announcing review to issue within 30 days of the filing of a panel's decision. Rule 13(D)(5)(c) further provides that "[i]f no appeal is served and filed within 30 days of the hearing panel decision, *and the Court does not otherwise order review on its own motion,* the decision shall become final, and shall have the same force and effect as an order of the Court." (emphasis added).

In this case, there is no dispute that the Court did not order review of either decision and that it declared that the decisions are final and that they have the "same force and effect as an order of the [Supreme] Court." The decisions in question have force and effect by virtue of the authority of the Supreme Court.

But the question is not whether the Supreme Court has ultimate authority over every disciplinary decision – rather, it is whether a motion for relief from judgment should be filed, in the first instance, with a hearing panel that rendered a decision that is the subject of the motion or with the Supreme Court. There is no explicit guidance in A.O. 9. Nevertheless, several considerations cause us to conclude that under the circumstances presented a hearing panel can and should, in the first instance, render a decision on Respondent's motion.

To begin with, Rule 20(B) provides that the Vermont Rules of Civil Procedure – which include Rule 60(b) – apply in disciplinary proceedings "[e]xcept as otherwise provided in these rules." There is no language elsewhere in A.O. 9 that precludes such motions as a general rule or that refers such motions to the Supreme Court. This omission is significant in light of the fact that certain proceedings are specifically assigned in A.O. 9 to the Supreme Court – for example, proceedings for interim suspension under Rule 22 and for reciprocal discipline under Rule 24.

Moreover, the fact that Rule 60(b) contemplates a motion being filed with a court of original jurisdiction that rendered the judgment in the first instance – the Civil Division of the Superior Court – suggests that the rule is appropriately applied to hearing panels. Hearing panels presiding over disciplinary charges serve a similar function as the Vermont trial courts – they receive evidence and issue decisions which are then subject to review by the Supreme Court.

It also bears noting that a judgment rendered in the Civil Division is subject to the filing of a motion under Rule 60(b) even after completion of an appeal process. The "finality" of a Civil Division judgment – even after completion of an appeal – does not preclude the filing of a Rule 60(b) motion in the trial court. It stands to reason, therefore, that the "finality" of the two

disciplinary decisions at issue here – rendered final by the Supreme Court's decision to forego review – should not preclude hearing panel review of a motion for relief from judgment.[3]

Finally, review by the panel is appropriate in this particular case because several of the arguments presented in the motion are claims of error directed for the first time at the record of the proceedings. It is only logical – and fair – for a hearing panel to have an opportunity to address those arguments.

In sum, the panel concludes that it should rule on the motion.

* * *

Having considered the motion and Disciplinary Counsel's opposition, the Panel concludes that Respondent's motion should be denied. Respondent argues, in essence, that a failure to compel Respondent to undergo a mental health examination that *might have* resulted in her being placed on disability inactive status justifies vacating the two adverse disciplinary decisions.

Beyond the obvious speculation presented, there are fundamental problems with Respondent's argument. To begin with, Respondent's request to vacate the two decisions fails to take into account the overriding purpose of the Rules of Professional Conduct and attorney disciplinary proceedings – the protection of the public. Whether or not Respondent was experiencing depression at the time of the misconduct hearings does not change the fact that Respondent failed to appear at two hearings on behalf of clients. Attending hearings is a fundamental requirement of competent representation. Simply put, a lawyer who fails to attend hearings – even negligently, as the panel found was the case here – violates Rules 1.1 sand 1.3.

[3] The Panel does not need to reach the issue of whether a respondent would have to seek, directly from the Supreme Court, a form of relief analogous to Rule 60(b) in a particular case where the Supreme Court has issued a superseding decision. That situation is not presented here.

In alleging violations of the rules, Disciplinary Counsel did not argue that Respondent's conduct was intentional – nor did the Panel make any such finding. Whatever the cause of Respondent's failure to appear, it was highly problematic from the standpoint of the public's interest in ensuring competent representation. Respondent's motion does not provide any basis to undo the determination that Respondent's conduct violated the rules in question. *See also ABA Standards for Imposing Sanctions*, § 9.3, at 52, Commentary ("[T]he consideration of [mental disability or impairment] does not completely excuse the lawyer's conduct.").

Likewise, the fact remains that Respondent did not comply with the terms of a probation order that was designed to provide some level of confidence that Respondent could continue representing clients without a recurrence of conduct that violated the Rules of Professional Conduct. Her fitness to serve clients was called into question once again and justified the protective step taken – Respondent's suspension. The purpose of the underlying requirements and the rulings that were rendered in the two proceedings was not to punish Respondent, but rather to protect the public.[4]

[4] Consistent with this guiding principle, the *ABA Standards* recognize mental health issues as a potential mitigating factor that may come into play but only *after* a presumptive sanction is assigned to the misconduct in question and *only* for purposes of determining whether a balancing of all applicable mitigating and aggravating factors justifies either an increase or reduction of the presumptive sanction. It should also be noted that the Standards place a stringent burden on a respondent to demonstrate that a mental disability or impairment caused the conduct in question. They recognize a mitigating factor for "mental disability" when:

> (1) there is medical evidence that the respondent is affected by a . . . mental disability;
>
> (2) The . . . mental disability caused the misconduct;
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> (3) The respondent's recovery from the . . . mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
>
> (4) The recovery arrested the misconduct and recurrence of that misconduct is unlikely.

ABA Standards, § 9.32(i).

Respondent also cannot disregard the fact that she appeared in both proceedings and proceeded to represent herself. She cross-examined witnesses, testified willingly, and presented argument at the hearing in the first case. In the second case she presented witnesses and testified willingly once again. Under A.O. 9, Rule 25(B), she could have availed herself of the "disability inactive" procedure by "alleg[ing] in the course of a disciplinary proceeding that . . . she [was] unable to assist in . . . her defense due to a mental . . . disability," but she did not do so. In fact, she states in her motion that she discussed the option with Disciplinary Counsel and decided for various reasons not to pursue disability inactive status.

Respondent's brief suggests that she chose not to allege her inability to defend because of the provision in Rule 25(C) stating that in the event of a transfer to disability inactive status due to inability to defend "[a]ny pending disciplinary proceedings against the respondent shall be held in abeyance." Such a rationale based on an objection to the substance of the Supreme Court's administrative rule – leaving aside the fact that it is being proffered long after conclusion of the hearing in question – is simply untenable. Moreover, Respondent's representation that she discussed the possibility of stipulating to disability inactive status with Disciplinary Counsel and decided not to take that course of action suggests that Respondent made a deliberate decision *not to* assert that was unable to defend herself. She bears responsibility for that choice.

Respondent argues that, notwithstanding her failure to allege inability to defend, the panel had reason to order an assessment of Respondent's ability to defend herself based on statements Respondent made that suggested she experienced stress from practicing law and depression related to various events in her life. The argument is rejected for several reasons.

First, Respondent cannot conflate a statement of inability to defend oneself and testimony she offered to explain the misconduct in question. As found in the two decisions, Respondent

testified regarding her stress and episodes of depression as a means of trying to explain her failure to attend hearings on behalf of her clients and failure to comply with the probation order. In both proceedings, she testified that she had taken steps to scale back to part-time practice in specific subject areas and to otherwise limit her practice and adopt strategies to address the stress that she experienced from practicing law. But at no point did she suggest she was incapable of defending against the charges. On the contrary she appeared at final hearings in both proceedings and mounted a vigorous defense of the charges. Moreover, she never moved to reopen either of the proceedings during the 30-day appeal window on grounds that she was incapable of defending herself, even after she learned that she was being suspended; nor did she file any appeal from either decision.

In contrast to the attempt she now makes to offer evidence from her counselor regarding her mental state, at no point did Respondent offer any medical evidence during either proceeding from which the panel might conclude that she was suffering from a mental disability that impaired her ability to defend. It should be noted that the panel evaluating the probation violation charges concluded that while it could recognize a mitigating factor for personal and emotional problems under § 9.32(c), it could not recognize a "mental disability" mitigating factor under § 9.32(i) because no medical evidence had been submitted. PRB Decision No. 225A at 24 & n.8. Again, it bears noting that even after being so advised by the panel Respondent never moved to reopen the proceeding to offer medical evidence of any kind.

It also bears noting that Respondent presented the testimony of a counselor during the hearing on the probation violation charges, but only for purposes of demonstrating that she attended regular counseling sessions and in an attempt to contest the allegation that she had failed to provide a complete copy of the disciplinary decision to her counselor. Respondent

never asked her counselor to render any opinion regarding her mental state at any point in time – let alone in connection with her ability to defend against the charges.

In sum, the record suggests that Respondent did not believe she was incapable of defending herself and did not wish to make that assertion; that she decided to forego opportunities to place her ability to defend into question; and that she actively defended herself against the charges. There was no legal or factual basis for the Panel to compel her to submit to the disability inactive procedure and potentially subjecting her to a mental examination. Respondent has not pointed to anything in the record that would indicate that Respondent could not defend herself.

Finally, Respondent cannot justify vacating the two disciplinary decisions based on Rule 60(b). Respondent cites to subsections (5) and (6) of that rule. The former provides for relief from a judgment when "it is no longer equitable that the judgment should have prospective application." V.R.C.P. 60(b)(5). The latter is a catch-all provision intended to cover situations not enumerated elsewhere in the rule: "any other reason justifying relief from the operation of the judgment."

A threshold problem with Respondent's attempted reliance on Rule 60(b) is that her argument squarely implicates a separate subsection of the rule which is subject to a one-year post-judgment deadline. Respondent's argument boils down to an assertion of a mistake or excusable neglect – that she should be excused from failing to assert in the earlier proceedings that she was unable to defend against the charges because she had valid reasons for failing to do so. Such an assertion clearly falls under V.R.C.P. 60(b)(1) ("mistake, inadvertence, surprises, or excusable neglect"). Motions under Rule 60(b)(1) "shall be filed . . . for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken." *Id.* This

rule strikes a balance between the public interest in the finality of orders and the moving party's interests. Respondent's motion has been filed more than one year after the two decisions became final and therefore is barred.[5]

Respondent attempts to invoke subsection (5), which is not subject to the one-year deadline in Rule 60(b). She argues that the decisions should have no further prospective application – and therefore should be vacated – because she has been receiving regular counseling and believes she is now capable of avoiding the problems that she experienced previously. She attempts to make an evidentiary showing along those lines. In essence, she argues that she should be able to expunge the prior adjudications based on a showing that she is presently rehabilitated through her counseling work. This argument is legally deficient.

Under A.O. 9, Rule 20(B), the Rules of Civil Procedure are applicable "[e]xcept as otherwise provided in [A.O. 9]." As Respondent would apply subsection (5), it is inconsistent with A.O. 9. Under A.O. 9, a lawyer who is suspended for six months or longer must apply for reinstatement and in the resulting reinstatement proceeding bears "the burden of demonstrating by clear and convincing evidence that he or she has the moral qualifications, competency, and learning required for admission to practice law in the state, and the resumption of the practice of law will be neither detrimental to the integrity and standing of the bar or the administration of justice nor subversive of the public interest and that the respondent-attorney has been rehabilitated." A.O. 9, Rule 26(D). Respondent cannot invoke Rule 60(b)(5) as a substitute for the reinstatement process. The reinstatement procedure does not vacate an earlier disciplinary adjudication, as Respondent seeks to do through Rule 60(b)(5). Her attempt to invoke subsection (5) is fundamentally inconsistent with Rule 26(D).

[5] Rule 60(b)(6) is inapplicable because the situation presented here is clearly covered by subsection (1). Subsection (6) is intended for "*other* reason[s] justifying relief." (emphasis added).

As Respondent's six-month suspension period has now expired, she can apply for reinstatement at any time pursuant to Rule 26(D) and offer evidence in support of that application.[6] But she cannot avoid the decisions that resulted in her suspension.

For all these reasons, Respondent's Motion for Relief from Judgment is hereby DENIED. Dated: June 7, 2021.

Hearing Panel No. 10

Mary C. Welford, Esq., Chair

Kate Lamson, Esq., Member

Kelley Legacy, Public Member

[6] Of course, Respondent must also respond to the latest charges that have been filed against her in *In re Adams*, PRB File No. 2020-064.