

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: Norman E. Watts, Esq.
PRB File No. 2019-102 & 2020-011

**ORDER REGARDING DISCOVERY DISPUTE, REQUEST FOR SANCTIONS, AND
REQUEST TO EXTEND SCHEDULING ORDER**

In July 2021 Special Disciplinary Counsel filed a motion to compel discovery from Respondent. Respondent opposed the motion. On August 9, 2021 the Hearing Panel issued an order directing the parties to engage in a process of re-examining their respective positions to be followed by a meet-and-confer conference where any remaining disputes would be discussed before the filing of any further motion to compel. The order required, in accordance with a schedule, that Disciplinary Counsel reconsider the scope and reasonableness of her requests and submit a revised set of requests to Respondent; that Respondent submit revised written responses to the revised requests by a date certain; and that the parties meet and confer on any remaining disputes by a date certain. The purpose of the order was to encourage the parties to narrow insofar as possible the dispute before placing any remaining dispute before the Panel. The Chair concluded in the ruling that Respondent's responses to the requests were deficient on their face and provided guidance on how to cure the deficiencies.

Respondent subsequently moved on August 18, 2021 for an extension of time that would permit him to file his revised responses no later than August 26, 2021. The Panel granted the motion.

Respondent filed a "notice" with the Panel on August 30, 2021 indicating that he "has been unable to maintain the schedule [the Panel] ordered," as a result of his "litigation schedule" while contending that the discovery dispute has been reduced to "one issue: [Disciplinary Counsel's] request for income statements." Respondent indicated that he was aiming to "finalize [a document package] over the upcoming weekend and deliver them early next week."

Disciplinary Counsel has filed a response disputing Respondent's assertion that the discovery dispute has been narrowed to one issue. Disciplinary Counsel has provided a copy of her revised requests that were generated in the response to the Panel's Order and complains that Respondent has not produced revised responses to the revised requests as required under the Panel's Order – as a result of which the parties were unable to engage in a meaningful meet-and-confer session.

Disciplinary Counsel argues that Respondent should now be found in violation of the Panel's Order and she requests that two sanctions be imposed for Respondent's non-compliance:

- (1) that Respondent be precluded from offering into evidence any document that has not already been provided to the Disciplinary Counsel during the course of the investigation that preceded the charges or in discovery up to this point in time; and
- (2) that Respondent be precluded from relying on any defense set forth in his Answer for which he has failed to provide an adequate response to a request for production of documents. Disciplinary Counsel has indicated, in the alternative, that she is prepared to file a supplemental memorandum with specific argument as to why a discrete defense or defenses presented in the Answer should be precluded based on a failure by Respondent to provide discovery.

In addition, Disciplinary Counsel requests an order requiring Respondent to comply with Request #5, for “documents sufficient to identify your compensation from your firm for the years 2014-2020.” Disciplinary Counsel argues that the discovery sought is relevant to the aggravating factor of “dishonest or selfish motive” set forth in the ABA Standards for Imposing Lawyer Sanctions. She argues that “[i]nformation sufficient to show Respondent's personal income during the six-year time period would reveal whether he had a selfish motive or increasing his own income during the time period in which he was inappropriately handling client

retainers.” Supp. Mem., 9/1/21, at 2. Respondent has indicated in his notice that he objects to that request.

And, finally, Disciplinary Counsel requests that certain dates in the Scheduling Order be extended in light of the delay in discovery that has resulted from Respondent’s alleged non-compliance.

Neither party has filed any update with the Panel on the status of their dispute since their filings on or about September 1.

* * *

Under Rule 19(B)(2) of A.O. 9, discovery disputes are decided by the chair of the hearing panel. After reviewing the parties’ submissions, the Chair concludes that Respondent failed to comply with the Chair’s August 9, 2021 Order by failing to submit timely revised responses to Disciplinary Counsel requests for production in accordance with the schedule provided in the Chair’s Order.

Respondent has failed to demonstrate good cause for his failure. He was granted one extension of time and never requested another before the expiration of the deadline. In addition, his attempt to blame his failure on the demands of his litigation practice is unavailing. The original requests to produce were served by Disciplinary Counsel on May 28, 2021. Respondent has had more than three months to prepare complete and otherwise appropriate responses to the requests for production. His conduct is delaying the resolution of an important proceeding – one that is designed to evaluate the fitness of a lawyer to practice. Under the circumstances presented, sanctions are appropriate.

There is no guidance in A.O. 9 on the issue of sanctions. Rule 19 sets up some basic ground rules for discovery and does not address the issue of sanctions. Nevertheless, it must be the case that the Chair has inherent authority to sanction a party who has not cooperated in discovery. Otherwise, proceedings could be brought to a halt through non-compliance.

After reviewing the several submissions by the parties and their respective arguments, the Chair issues the following ORDER:

1. In light of Respondent's non-compliance with the August 9, 2021 Order, Respondent will be precluded from offering into evidence any document that has not already been provided in response to requests for production by Disciplinary Counsel during the course of the investigation that preceded the charges or in discovery up to the date of this Order. The burden will be on Respondent at the merits hearing to prove that any particular document was timely produced to Disciplinary Counsel.

2. In the event that it is ultimately determined that Respondent committed one or more violations of the Code of Professional Conduct, Respondent's non-compliance with the August 9, 2021 Order will be considered, in connection with the Panel's sanctions determination, to be some evidence supporting the aggravating factor of "bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency."¹ Any continuing non-compliance by Respondent will increase the weight assigned to that evidence by the Panel.

3. Disciplinary Counsel's general request to preclude Respondent from "relying on any defense set forth in his Answer for which he has refused to provide discovery is DENIED without prejudice. The request lacks specificity. Respondent may file a supplemental memorandum of law requesting that Respondent be barred from presenting a **specific** defense or

¹ The Vermont Supreme Court has directed hearing panels to be guided in their selection of an appropriate sanction by the ABA Standards for Imposing Lawyer Sanctions. Part of the evaluation under the ABA Standards identifies mitigating and aggravating factors and assesses the balance of those factors for purposes of deciding whether to increase or decrease a "presumptive sanction" that has been identified through application of the Standards.

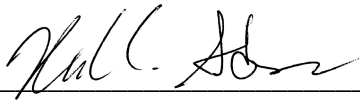
defenses in this proceeding based on Respondent's non-compliance with one or more of Disciplinary Counsel's **specific** revised requests for production the responses to which Disciplinary Counsel maintains are incomplete or otherwise deficient. The memorandum must (a) identify, with specificity, Respondent's assertion of a defense in the pleadings; (b) provide a verbatim reproduction of the request and the latest response to the request by Respondent related to the defense; (c) explain in detail why the request is relevant and reasonably tailored to the defense asserted by Respondent; and (d) explain why preclusion is the appropriate sanction, as opposed to another sanction. Any such memorandum shall be filed within 14 days of the issuance of this Order. Any responsive memorandum from Respondent shall be filed within 14 days thereafter.

4. Disciplinary Counsel's request to resolve the dispute related to Request #5 is denied without prejudice. Although sanction issues do fall within the scope of discovery, Disciplinary Counsel's briefing has not shown that the discovery is reasonably calculated at this time to lead to admissible evidence. First, it is not clear to the Chair that compensation figures would prove a selfish motive, as Disciplinary Counsel contends. The fact that money has been made proves nothing by itself. And Disciplinary Counsel has not identified any connection of the financial information requested to any other information obtained in the case that would somehow render the financial information relevant. Finally, the Chair wonders whether it may be possible to prove a selfish financial motive without using earnings information and Disciplinary Counsel has not briefed the issues of proof surrounding the "selfish motive" aggravating factor or explained why this financial information is reasonably necessary in this particular case. She has not cited a single case supporting her request. In short, the briefing is insufficient. Any renewal of this request by Disciplinary Counsel must be filed within 14 days of the date of this Order and must be fully responsive to the issues identified above. Any responsive memorandum from Respondent shall be filed within 14 days thereafter.

5. Disciplinary Counsel's Motion to Extend Scheduling Order is GRANTED. The deadlines under Paragraphs 8-11 are all extended to a date 45 days following the issuance of this Order.

Dated: September 28, 2021

Hearing Panel No. 9

By: 

Karl C. Anderson, Esq., Chair