

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-171

SEPTEMBER TERM, 2004

	}	APPEALED FROM:
	}	
	}	Professional Responsibility Board
	}	
In re PRB Docket Nos. 2002.043	}	
& 2003.031	}	
	}	DOCKET NO. 2002.043 & 2003.031 Trial
Original Jurisdiction	}	
	}	
	}	
	}	

In the above-entitled cause, the Clerk will enter:

Robert Andres appeals pro se from the Professional Responsibility Board= s decision suspending his license to practice law for three years after finding that he violated Rule 8.4(h) of the Vermont Rules of Professional Conduct. He argues that: (1) a three year suspension is inappropriate; (2) the Board should not have focused on the amount of media coverage that the underlying assault charge generated in determining an appropriate sanction ; (3) the merits hearing should not have been held prior to the final disposition of his underlying criminal case; and (4) he should be credited for the interim suspension of his license prior to the Board= s final decision. We reject these arguments and adopt the hearing panel= s recommended sanction.

Robert Andres is an attorney who was licensed to practice in the State of Vermont. In April 2002, he was convicted of simple assault after punching a man in a wheelchair. In May 2002, Disciplinary Counsel filed a petition of misconduct against Andres, and a hearing was set for September 2002. In June 2002, Andres was sentenced to serve three to twelve months in prison, all suspended but three months. The district court stayed the incarceration portion of his sentence, but placed Andres on probation. In July 2002, Andres violated his probation by entering a bar and consuming alcohol, and he was ordered to serve the incarceration portion of his sentence. Additional disciplinary charges followed, and in September 2002, Andres= license was suspended on an interim basis pending final resolution of the disciplinary charges.

After a hearing in February 2003, the Board issued an opinion suspending Andres= license for three years. The Board concluded that Andres= assault on a man in a wheelchair and his failure to abide by the terms of his probation adversely reflected on his fitness to practice law and, as such, violated Rule 8.4(h) of the Vermont Rules of Professional Conduct. The Board explained that over a thirteen year period, Andres had been convicted of four separate crimes involving assaultive behavior. He had also been warned that misdemeanor assaults would constitute a disciplinary violation. The Board found that Andres= assaultive behavior was compounded by his failure to abide by the terms of his probation after his last conviction, despite a specific warning from the trial judge that he would be incarcerated if he was found in a bar. The Board found that Andres= behavior indicated a substantial disregard for both the criminal law in general as well as explicit judicial orders directed at him personally.

In determining an appropriate sanction, the Board relied on the ABA Standards for Imposing Lawyer Sanctions (ABA Standards), as well as Andres= prior criminal and disciplinary history, which it considered substantial aggravating factors. The Board found that Andres had violated a duty to the public and to the legal profession. His conduct was intentional, and as an experienced criminal attorney, he knew the consequences of his actions. His actions damaged the

public perception of the bar, and caused injury to the profession and to the legal system. The Board found suspension appropriate, and it acknowledged that, generally, courts had not imposed substantial suspension for lawyers convicted of assault. In this case, however, the Board found the presence of a number of aggravating factors that warranted a lengthy suspension. The Board explained that Andres' behavior evidenced two patterns that raised serious questions about his long term prospects for fitness to practice. The first was Andres' history of criminal assaults, which indicated that Andres had difficulty conforming his behavior to that required of the ordinary citizen, let alone a member of the bar. The other pattern, the Board explained, was Andres' prior disciplinary record. He was first disciplined for his 1999 criminal conviction, which was his third criminal conviction. The disciplinary case also included two complaints of neglect, and Andres received a public reprimand.

The panel was also troubled by Andres' testimony at the disciplinary hearing, where he had led the panel to believe that his appeal in the criminal matter and his motion for a new trial were still pending. They were not, and the panel considered his deception to be a substantial aggravating factor as well. In addition to the patterns of misconduct described above and Andres' deceptive conduct at the hearing, the Board considered Andres' substantial experience as a criminal lawyer and the vulnerability of his victim as aggravating factors. In terms of mitigating factors, the panel recognized that Andres had suffered other substantial penalties as a result of his behavior, including his criminal conviction, incarceration, adverse publicity, and the interim suspension of his license. The panel weighed Andres' interests and the penalties that had been imposed against him against the interest of the bar and the public, and found that a lengthy suspension was required to protect the interests of all concerned. The panel thus suspended Andres' license to practice law for three years, effective April 28, 2003. Andres appealed.

Andres first argues that the sanction imposed by the Board is excessive. He asserts that no complaint was filed by an aggrieved individual or client, and his misdemeanor criminal conviction did not involve a moral turpitude, nor did it constitute a serious crime. He argues that in no other Vermont case has an attorney been suspended for conduct not involving harm or potential harm to his clients.

We find these arguments unpersuasive. Rule 8.4(h) of the Vermont Rules of Professional Conduct prohibits attorneys from engaging in conduct that adversely reflects on their fitness to practice law. As explained in Standard 5.0 of the ABA Standards,

[t]he most fundamental duty which a lawyer owes the public is the duty to maintain the standards of personal integrity upon which the community relies. The public expects the lawyer to be honest and to abide by the law; public confidence in the integrity of officers of the court is undermined when lawyers engage in illegal conduct.

An attorney may be sanctioned for actions committed outside of his professional capacity, In re Berk, 157 Vt. 524, 530 (1991) (per curiam), and Rule 8.4(h) does not require a complaint by an aggrieved individual or client before sanctions may be imposed. Cf. ABA Standard 9.4(f) (A failure of an injured client to complain is not considered a mitigating factor in determining disciplinary sanction). The comments to Rule 8.4(h) specify that offenses involving violence indicate a lack of those characteristics relevant to law practice. Indeed, we indicated in an earlier case involving Andres that his conviction for a street fighting adversely reflected on his reputation as a member of the bar, and violated a disciplinary rule identical to the one at issue in this appeal. See In re Andres, 170 Vt. 599, 602 (2000) (mem.). The question of whether Andres' crime involved a moral turpitude is irrelevant under Rule 8.4(h).

In determining the sanction to be imposed, the Board properly looked to the ABA Standards for guidance. See In re Warren, 167 Vt. 259, 261 (1997) (per curiam). The Standards provide four factors to consider in evaluating the appropriate sanction: the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct, and any aggravating or mitigating factors. ABA Standard 3.0. The Board made detailed findings as to each of these factors.

ABA Standard 5.1 provides that, absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, sanctions are generally appropriate in cases involving the commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation. Suspension, rather than disbarment, is appropriate

when a lawyer knowingly engages in criminal conduct that does not constitute a serious criminal conduct, but that a seriously adversely reflects on the lawyer's fitness to practice. ABA Standard 5.12. Suspension is also appropriate under several other ABA Standards. For example, ABA Standard 7.2 provides that suspension is an appropriate sanction 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 . . . the legal system. ABA Standard 8.2 provides that suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

In determining the length of the suspension, the Board considered both aggravating and mitigating factors. Standard 9.21 provides that aggravating circumstances are any considerations, or factors that may justify an increase in the degree of discipline to be imposed. Aggravating factors present in this case included: the submission of false evidence and false statements or other deceptive practices during the disciplinary process, Andres' substantial experience in the practice of law, the vulnerability of his victim, and his pattern of misconduct. See Standard 9.22 (listing aggravating factors). The Board considered Andres' criminal conviction, his incarceration, adverse publicity, and the interim suspension of his license as mitigating factors. See Standard 9.3 (listing mitigating factors). Weighing all of these considerations, the Board concluded that a lengthy suspension was warranted. We agree that a three-year suspension is appropriate. See In re Berk, 157 Vt. at 527-28 (A [T]his Court makes its own ultimate decisions on discipline, although Board's recommendations on sanctions will be accorded deference.).

We reject Andres' assertion that the Board and Bar Counsel inappropriately focused on the media coverage generated by this case in determining a disciplinary violation and sanction. As discussed above, the record indicates that the Board properly relied on the rules, Andres' pattern of misconduct, and the ABA Standards in arriving at its conclusion. Given Andres' history of assaultive behavior, his intentional violation of probation, and the numerous aggravating factors found by the Board, a three-year suspension is appropriate. As the Board explained, Andres' behavior indicated not only a disregard for the criminal law generally, but also an intentional disregard of explicit judicial orders directed at him personally.

We are unpersuaded by Andres' assertion that the Board erred by holding a merits hearing before there was a final disposition in the criminal case. Contrary to Andres' assertion, the Board found that there had been a final decision in Andres' criminal case. It explained that Andres' two motions for a new trial had been denied, and his appeal to this Court had been dismissed. Indeed, the Board found that Andres had misrepresented the status of the criminal proceedings, and it considered this a substantial aggravating factor in imposing sanctions. We find no error in the timing of the merits hearing.

Finally, Andres argues that he should receive credit for the interim suspension of his license. He asserts that if attorney discipline is intended to be remedial, rather than punitive, then the determination of the remedial period of suspension necessary to achieve the appropriate effect should include the period of interim suspension. We reject this argument. The Board considered the interim suspension as a mitigating factor in determining the sanction to be imposed. The rules do not require that any sanction be retroactive to the date of an interim suspension, and Andres identifies no persuasive support for such an argument. We find no basis to disturb the Board's conclusion as to the commencement of the three-year suspension.

Robert K. Andres is hereby suspended from the practice of law for a period of three years commencing on April 28, 2003.

BY THE COURT:

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Frederic W. Allen, Chief Justice (Ret.),

Specially Assigned