STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: Jeremy Dworkin, Esq.
PRB Docket No. 2019-009

Decision No. 227

Disciplinary Counsel alleges that the Respondent, Jeremy Dworkin, Esq., violated the Rules of Professional Conduct by making a false statement to an opposing party in a lawsuit. Evidence was presented by the parties at a hearing held on June 4, 2019. The parties completed their submission of post-hearing proposed findings of fact and legal memoranda on July 17, 2019.

Based on the credible evidence presented, the Hearing Panel finds and concludes that while some evidence supporting the charge was presented, the evidence was not clear and convincing – the applicable standard of proof – and therefore the charge will be dismissed.

FINDINGS OF FACT

Respondent has been practicing law for more than forty years. Throughout the time period referenced in the Petition of Misconduct and continuing to the present Respondent has worked as a sole practitioner with a specialty in family law.

In late 2015 Respondent began representing B.P. in a family law proceeding. B.P. is the mother of a child. The child's father is J.B.H. Respondent represented B.P. in connection with disputes that B.P. had with J.B.H. over child visitation and child support ("the Family Division proceeding").

As of the fall of 2015 J.B.H. was in arrears on his child support payments to B.P. Respondent filed a motion on behalf of B.P. requesting that the Family Law Division enforce the child support order and find J.B.H. in contempt. B.P.'s motion alleged that J.B.H. was approximately $35,000 in arrears on his child support obligation and requested a 10% penalty

and interest on the amount allegedly owed by J.B.H. J.B.H. filed a motion to modify the child support order in the case.

The court scheduled a hearing on the motions for October 31, 2017. At the time of the hearing, J.B.H. was representing himself in the proceeding.

Prior to the June 4th hearing, J.B.H.'s mother, J.H., who did not reside in Vermont, became aware of the pending motions. J.H. communicated regarding the matter with a friend, J.C., with whom she was in a romantic relationship. J.C. offered to provide support to J.B.H. in connection with the June 4 hearing. J.B.H. was not being represented by an attorney in the proceeding at that time. J.C., who was not an attorney, traveled to the courthouse on the day of the scheduled hearing. J.C.'s purpose in accompanying J.B.H. to court was to provide support to J.B.H. and to try to facilitate a settlement of the claims against J.B.H.

On the day of the hearing J.C. and Respondent introduced themselves to each other in the hallway outside the courtroom. Respondent had not previously met or communicated with either J.C. or J.H. Prior to the hearing J.C. and Respondent discussed a potential settlement of B.P.'s motions for enforcement and for contempt against J.B.H. and J.B.H.'s related motion to modify child support that would include the payment of money by J.H. on behalf of J.B.H to resolve B.P.'s claims. While Respondent and J.C. conversed, B.P. was seated in the hallway nearby but did not overhear the entirety of the conversation between Respondent and J.C.

Following the initial conversation between J.C. and Respondent, J.C. placed a phone call to J.H. from the hallway outside the courtroom and reported to her his understanding of the communications between himself and Respondent. Like J.C., J.H. was not a lawyer. Following his report to J.H., J.C. asked Respondent to speak with J.H. and the two of them proceeded to discuss a possible settlement. During the course of their phone conversation they discussed the payment of a discounted amount of money ($25,000) to settle the monetary claims and Respondent's insistence that the money be paid promptly due to B.P.'s assertion that she

urgently needed funds. They eventually agreed that a payment of $25,000 would be made within seven days. After Respondent and J.H. completed their conversation J.H. spoke to J.C. once again over the phone. After that final phone discussion, Respondent and J.B.H. informed the court in the Family Division proceeding of the settlement agreement.

This much of what transpired prior to the hearing on June 4th is not in dispute. However, the parties are at odds over Disciplinary Counsel's allegations that Respondent told J.C. and J.H. over the course of their settlement discussions that the parties needed to reach a settlement of the monetary claims that day to avoid J.B.H. going to jail. *See* Petition of Misconduct, ¶¶ 9, 10, 14. J.C. testified that Respondent made a statement along those lines to him and that he subsequently conveyed this statement to J.B.H.'s mother, J.H., when he conveyed Respondent's settlement proposal to her over the phone. J.H., in turn, testified that J.C. conveyed that statement to her initially in their phone call and that Respondent subsequently reiterated the statement when he subsequently discussed the potential settlement with her over the phone. She further testified that she reached the settlement agreement with Respondent on the basis of that representation and expressed her concern to Respondent during their discussion about the possibility of her son going to jail that day.

Respondent testified that he never made any such statement to either J.C. or to J.H. and that they never stated to him a belief that J.B.H. would go to jail unless a settlement was reached.

Based on the evidence that was presented at the hearing, the Panel is unable to find by clear and convincing evidence – the applicable standard of proof – that Respondent made the alleged statements or failed to correct a misunderstanding of the law.

CONCLUSIONS OF LAW

Rule 4.1 of the Rules of Professional Responsibility states that "[i]n the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person." V.R.Pr.C. 4.1. Disciplinary Counsel alleges that Respondent made an

erroneous statement of law, under the pertinent law of contempt, to J.C. and J.H. – that J.B.H. would go to jail unless the pending motions against him were settled on the day of the hearing. Disciplinary Counsel further maintains, in the alternative, that J.C. and J.H. communicated to Respondent their belief that J.B.H. would go to jail unless a settlement was reached and that Respondent violated Rule 4.1 by failing to correct their misunderstanding of contempt law as it applied to J.B.H.'s situation at that time.

"The Hearing Panel's findings as to each element of a charge of professional misconduct must be supported by clear and convincing evidence." *In re PRB Docket No. 2016-042*, 2016 VT 94, ¶ 1, 203 Vt. 635, 154 A.3d 949 (2016) (citing A.O. 9, Rule 16(C)); *see also In re McCarty*, 2013 VT 47, ¶ 12, 194 Vt. 109, 75 A.3d 589. The "clear and convincing evidence" standard is lower than the "beyond a reasonable doubt" standard that applies in criminal proceedings but higher than the "preponderance of the evidence" standard that applies in most civil proceedings. It requires the trier of fact to have "a firm conviction as to the truth of the allegations to be established." *In re N.H.*, 168 Vt. 508, 512, 724 A.2d 467, 470 (1998); *see also id.* (clear and convincing evidence standard is "a very demanding measure of proof"). The fact that evidence is conflicting does not rule out a determination that clear and convincing evidence has been presented. *See id.* ("Clear and convincing does not mean, however, that the State's evidence must be wholly uncontradicted or unimpeached."). Nevertheless, the trier must have a high degree of confidence to make a finding under the clear and convincing evidence standard. "Clear and convincing evidence is a 'very demanding' standard, requiring somewhat less than evidence beyond a reasonable doubt, but more than a preponderance of the evidence." *In re E.T.*, 2004 VT 111, ¶ 12, 177 Vt. 405, 865 A.2d 416 (2004)). "The burden of proof in proceedings seeking discipline or transfer to disability inactive status is on disciplinary counsel." A.O. 9, Rule 16(D).

Although there was evidence presented, through the testimony of J.C. and J.H., that Respondent made the alleged statements and that J.H. expressed her concern to Respondent about the possibility of her son going to jail if a settlement were not reached that day, the Panel concludes that the evidence on those issues was not clear and convincing.

To begin with, there was no corroborating evidence for either J.C.'s and J.H.'s account of what transpired, on one hand, or Respondent's, on the other. There were no contemporaneous written notes or other memorialization of the conversations between Respondent, J.C., and J.H. The only other people who might have overheard the conversations in question were unable to provide corroboration. J.B.H. did not testify in the disciplinary proceeding. Respondent's client, B.P., testified that she did not hear every word that transpired between Respondent and J.C. Therefore, she was not in a position to provide definitive corroboration. Moreover, B.P.'s testimony to the effect that "she was a little worked up that day" further suggested that she may not have been able to focus completely on whatever portions of the conversation were within earshot.

Two additional considerations cause the Panel to give less weight to the testimony of J.C. and J.H. as corroboration of each other's account than it would otherwise. First, J.H. is the mother of J.B.H., an individual who was on the other side of a contested Family Division proceeding dispute from Respondent and his client. She, and by association J.C., were not disinterested third parties. The Panel must take that into account. Secondly, J.C. and J.H. were in a relationship with each other at the time and have continued to be friends. Under these circumstances, the Panel cannot consider their corroborating testimony to be as strong as it would be if they were unrelated to each other. In the final analysis the evidence boiled down to

two conflicting accounts that were both plausible with little to convince the Panel that one or the other account was the truth.[1]

Finally, because the communications took place in a context where a motion for contempt had been filed against J.B.H. and was going to be addressed at the scheduled hearing, the Panel cannot rule out the possibility that J.C. and J.H. may have misinterpreted statements by Respondent relating to the contempt motion. Under 15 V.S.A. § 603(h), a party in a Family Division proceeding may be held in contempt, with incarceration one of various remedies that may be ordered by the court for violation of a payment obligation, provided that a court also concludes that the individual has a present ability to pay. *See id.* § 603(h)(4) & (i).[2] A general statement that incarceration is one of the remedies provided by the statute, without more explanation, would not necessarily be a misstatement of law. Moreover, a general reference to the remedy of incarceration during the conversation might conceivably – and understandably – have resulted in a conclusion on the part of J.C. and J.H., who were not lawyers, that a loved one was at risk of going to jail. While that is not necessarily what happened, the Panel is concerned

[1] Disciplinary Counsel argues that Respondent's insistence on a short timeline of seven days to make the settlement payment corroborates the account of J.C. and J.H. But this argument ignores the fact that Respondent's client wanted (and apparently needed) to be paid promptly and that the imminent hearing on the motions for enforcement and contempt (scheduled for hearing that day) – which might have resulted in the court imposing an obligation on J.B.H. considerably greater than $25,000 – provided both ample reason for Respondent to demand prompt payment and incentive for J.H. to agree to make the payment of $25,000 within seven days. Disciplinary Counsel also asserts that Respondent had an incentive to make the alleged statements in order to secure money from which he could get paid by his client. Disciplinary Counsel's Proposed Findings and Memorandum, at 10. This amounts to speculation. Respondent was duty-bound to pursue his client's interest in prompt payment. Likewise, Disciplinary Counsel's reliance on the fact that J.C. and J.H. were not lawyers and therefore less likely to comprehend an erroneous statement of law, *id.*, does not prove that the alleged statements were made. J.C. and J.H. came forward to engage Respondent in settlement discussions. Respondent would not have been serving his client's interests if he had not participated in settlement discussions with them.

[2] That statute provides for incarceration "unless he or she complies with purge conditions established by the court," and further provides that "[a] court may order payment of all or a portion of the unpaid financial obligation as a purge condition, providing that the court finds that the person has the present ability to pay the amount ordered and sets a date certain for payment. If the purge conditions are not met by the date established by the court and the date set for payment is within 30 days of finding of ability to pay, the court may issue a mittimus placing the contemnor in the custody of the Commissioner of Corrections." *Id.* § 603(h)(4).

that a communication by Respondent might have been misinterpreted and that a reaction stemming from fear and concern might have clouded the memories of J.C. and J.H. The Panel cannot rule that out under the circumstances as presented.

For all these reasons, the Panel concludes that there is not clear and convincing evidence to support the central allegation of the petition of misconduct and therefore, the charge will be dismissed.

ORDER

Based on the foregoing, the Petition of Misconduct in the above matter is hereby DISMISSED WITH PREJUDICE.

Dated this 22 day of August of 2019.

Hearing Panel No. 9

By: _____
Karl C. Anderson, Esq., Chair

By: _____
M. Kate Thomas, Esq.

By: _____
Thomas J. Sabotka, Public Member