**ENTRY ORDER**

2013 VT 47

SUPREME COURT DOCKET NO. 2012-156

NOVEMBER TERM, 2012

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| In re William J. McCarty, Jr. | } | Original Jurisdiction |
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| | } | FROM: |
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| | } | Professional Responsibility Board |
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| | } | DOCKET NO. 2005-084 |

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

William McCarty, Jr. is suspended from the practice of law for three months from the date of this order for violating Rules 1.2(d), 4.1, 4.4, 8.4(c), 8.4(d), and 8.4(h) of the Vermont Rules of Professional Conduct by intentionally drafting legal documents designed to mislead and circumvent the legal process.

FOR THE COURT:

Marilyn S. Skoglund, Associate Justice

Concurring:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Brian L. Burgess, Associate Justice

Beth Robinson, Associate Justice

2013 VT 47

No. 2012-156

In re William J. McCarty, Jr.

Original Jurisdiction

From
Professional Responsibility Board

November Term, 2012

Bruce C. Palmer, Chair

Beth DeBernardi, Disciplinary Counsel, Burlington, for Petitioner.

Gary D. McQuesten of Valsangiacomo, Detora & McQuesten, PC, Barre, for Respondent.

PRESENT: Reiber, C.J., Dooley, Skoglund, Burgess and Robinson, JJ.

¶ 1. **SKOGLUND, J.** A panel of the Professional Responsibility Board (PRB) concluded that respondent William McCarty violated Vermont Rules of Professional Conduct for his participation in the wrongful eviction of Denise Brennan. The panel recommended that respondent be suspended from the practice of law for six months. Respondent contends that the panel had insufficient evidence to support a finding that he violated the rules; that laches should bar the disciplinary action; and that the resulting sanctions were excessive. We conclude that respondent violated the rules and find the defense of laches inapplicable in this case. However, we find a three-month suspension to be a more appropriate sanction.

¶ 2. Admitted to the Vermont Bar in 1967, respondent established his law practice in Brattleboro. For a number of years, respondent represented Sandra Glick in various legal

matters. Sandra Glick owned a home in Brattleboro. In July 2001, she entered into an oral agreement with Denise Brennan to rent Brennan a room in her home with access to most of the property. Brennan moved in days later. Shortly thereafter, on August 8, 2001, Sandra Glick was hospitalized for several weeks as a result of her bipolar disorder. With Sandra Glick hospitalized, Gabrielle Glick, Sandra Glick's adult daughter, became uncomfortable with Brennan living in her mother's home, as she had suspicions that Brennan had impermissibly used Sandra Glick's ATM card.

¶ 3. On August 10, 2001, Gabrielle Glick informed Brennan that she must vacate the premises in thirty days, or by September 9, 2001. Brennan began packing her belongings to comply with Gabrielle's request. Gabrielle then hired respondent to assist with the eviction process, as Gabrielle lived and worked in Massachusetts. On August 13, 2001, respondent sent a letter to Brennan, notifying her that he represented Gabrielle Glick and reiterating that she must leave the premises immediately, no later than September 9. Brennan received the letter on August 16, 2011.

¶ 4. Respondent then composed a second letter to Brennan, which was identical in all respects, except that it did not contain the date by which Brennan was to vacate the property (September 9) and stated that "[t]he desire is that you vacate immediately." Along with the second letter, respondent drafted another document entitled "Notice to Vacate," styled to look like a formalized court order in a suit brought by Sandra Glick, Landlord/Plaintiff against Brennan, Tenant/Defendant. The Notice was signed by respondent on behalf of Sandra Glick. \ The text of the Notice provided:

> Pursuant to the provisions of 9 V.S.A. § 4486, you, Denise Brennan are hereby notified to vacate the premises and to restore the premises to its condition at the beginning of the rental term.
>
> . . . .

> If you remain in possession after August 17, 2001, Landlord Sandra Glick will be compelled to bring an action for possession as authorized by 9 V.S.A. § 4468, et. al.

¶ 5. On August 17, 2001, Deputy Sheriff Lavalla, a longtime acquaintance of respondent, met Gabrielle Glick at respondent's office and picked up the second letter and the Notice to Vacate with the intention of serving Brennan.[1] Deputy Sheriff Lavalla and Gabrielle Glick went to Sandra Glick's home and served the papers on Brennan and informed her that she was to vacate the premises immediately.[2] Brennan tried to discuss the matter with Deputy Sheriff Lavalla, showing him previous documents which stated that she was not required to vacate the premises until September 9, 2001. Deputy Sheriff Lavalla refused to look at the papers and insisted that she leave immediately. He threatened to handcuff and arrest her if she did not leave.

¶ 6. Chaos ensued. Unable to reach respondent to make sense of the matter, Brennan became hysterical. She had nowhere to go and no one to care for her dog. After locking her belongings in a room in the house, Deputy Sheriff Lavalla took Brennan to the Brattleboro Hospital Emergency Room, at her request. Animal control took the dog. As a result of the sudden eviction, Brennan suffered serious emotional and physical consequences, including post traumatic stress disorder and intermittent homelessness. The circumstances also exacerbated her substance abuse issues.

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[1] Though respondent testified that he did not call the Deputy Sheriff's office, the panel concluded that respondent called and instructed the Deputy Sheriff to serve the papers on Brennan. Respondent's billing records reflect that he signed off on "calls to Deputy Lavalla" on August 13 and "calls to and from Sheriff regarding service and schedule" on August 15, 2001. Respondent testified that these were likely "duplicate entries" and one of his staff members made the calls.

[2] Deputy Sheriff Lavalla does not recall being personally informed by respondent that he was to remove Brennan. Rather, he testified that the office manager handled the matter. He further testified that he understood the papers to mean that Brennan was to vacate the premises that day—though he never read the whole document, stopping after seeing that Brennan was to vacate "forthwith."

¶ 7. Oral rental agreements, such as between Brennan and Sandra Glick, are legally enforceable. See 9 V.S.A. § 4451(8). The landlord must provide adequate notice to terminate a tenancy. See generally 9 V.S.A. § 4467(h) ("A rental arrangement whereby a person rents to another individual one or more rooms in his or her personal residence that includes the shared use of any of the common living spaces . . . may be terminated by either party by providing actual notice to the other of the date the rental agreement shall terminate, which shall be at least 15 days after the date of actual notice if the rent is payable monthly . . . ."). It is only when the tenant does not vacate by the specified date that the landlord may commence a civil action in the superior court. The landlord must prove entitlement to possession and obtain a judgment from the court awarding possession to the landlord. 12 V.S.A. § 4761. The judgment must be served on the tenant, and if the tenant does not leave, the landlord may then apply to the superior court for a writ of possession. Id. § 4854. Once the writ is served on the tenant, the tenant then has five business days to vacate the premises. Only if the tenant does not vacate within that time may a sheriff forcibly remove the tenant. Id.

¶ 8. Respondent had done landlord-tenant work for previous clients. Respondent knew that Brennan was legally entitled to stay on the premises until September 9. Nonetheless, "he was anxious to have Ms. Brennan leave the property as soon as possible in order to protect . . . and safeguard" his client's property. Based on his testimony and the testimony of others, the hearing panel concluded that respondent intentionally removed the date of termination from the second letter to deceive Brennan and effectuate an immediate eviction.

¶ 9. The panel also found that respondent instructed Deputy Sheriff Lavalla to remove Brennan on August 17, 2001, even though Lavalla did not recall being informed by respondent himself. Lavalla testified that the office manager handled the matter. Nevertheless, he understood from the papers that Brennan was to vacate the premises that day.

¶ 10. Respondent did not express any surprise that Brennan left on August 17, but instead testified that he was "relieved" she vacated the premises. Thereafter, respondent made no attempt to inform Glick, Brennan, or Deputy Sheriff Lavalla that Brennan was not legally required to leave the premises. Nor did he make any further inquiry regarding Brennan's remaining property in Glick's home.

¶ 11. Accordingly, the panel found that respondent violated Rules 1.2(d), 4.1, 4.4, 8.4(c), 8.4(d), and 8.4(h) of the Vermont Rules of Professional Conduct. All told, his acts of deception in drafting misleading correspondence and making false statements violated rules prohibiting a lawyer from engaging in fraudulent behavior, making false statements, and violating others' rights. As a result of respondent's violations concerning this incident, past infractions, public concern, and respondent's personal circumstances, the panel recommended that respondent be suspended from the practice of law for six months. On appeal, respondent argues that the panel failed to use the proper standard of proof; that there is insufficient evidence to support its factual findings; that laches should bar the disciplinary action; and that the resulting sanction is excessive. Respondent, however, does not dispute that the facts, if found to be true, would support the underlying violations.

¶ 12. Respondent first argues that the panel was required to employ a higher standard of proof to prove his alleged fraudulent activity. He contends that the hearing panel did not acknowledge the higher standard of proof associated with fraud and that disciplinary counsel did not meet its burden in showing that he committed fraud. However, respondent is not charged with common-law fraud. See Estate of Alden v. Dee, 2011 VT 64, ¶ 32, 109 Vt. 401, 35 A.3d 950 (proving common-law fraud must be done by clear and convincing evidence). Rather, he is alleged to have conducted dishonest, fraudulent, or deceitful activity in violation of Professional Conduct Rule 8.4(c). All formal charges of misconduct "shall be established by clear and

convincing evidence." A.O. 9, Rule 16(C). Without evidence to the contrary, we presume the panel employed the appropriate standard of review.

¶ 13. Respondent next asserts that the evidence does not support the panel's findings of fact. Specifically, respondent alleges that the panel improperly concluded that he colluded with Deputy Sheriff Lavalla to evict Brennan on the basis that they had known one another for thirty years, they both belong to the Vermont Chapter of the Marine Corps League, and their wives worked together for the hospital auxiliary.

¶ 14. Findings of fact shall not be set aside unless clearly erroneous. On review, we will uphold the panel's findings unless they are clearly in error. A.O. 9, Rule 11(E); In re Pressly, 160 Vt. 319, 322, 628 A.2d 927, 929 (1993). Based on respondent's testimony, the panel found that respondent "desired to have Ms. Brennan leave immediately" and was "relieved" when she was removed. The panel concluded that respondent drafted the second eviction letter and the Notice to Vacate to compel Brennan to vacate the premises. Further reinforcing its finding, the panel looked to the credible testimony of others. Gabrielle Glick testified that she took time off work and came to Vermont because she believed Brennan would be removed from the property on August 17, 2001. Deputy Sheriff Lavalla also understood that it was his job to ensure that Brennan vacated the property that day. "Against the backdrop of the clear understanding of all of the other parties," the panel concluded that respondent's "testimony that he did not intend the second letter and Notice to Vacate to communicate that Ms. Brennan was required to leave forthwith, or that she and Deputy Sheriff Lavalla had only to read it carefully to understand that" was not credible. Put another way, the panel found that respondent drafted documents in a manner intending to fraudulently deceive and conspired with Deputy Sheriff to accomplish an eviction even though no writ of possession had ever been issued by the court. The panel did not base its conclusion solely, or even primarily, on the fact that Deputy Sheriff Lavalla and respondent had a prior relationship. Rather, the panel reached its conclusion

based on the credibility of the witnesses and totality of the facts. Because the panel's decision is "clearly and reasonably supported by the evidence," we find no reason to disturb its findings. See In re Berk, 157 Vt. 524, 527, 602 A.2d 946, 947 (1991)(quotations omitted).

¶ 15. Appellant next contends that the charges should be dismissed on the grounds of laches. Laches is an equitable defense that bars relief when a party fails "to assert a right for an unreasonable and unexplained lapse of time." Comings & Livingston v. Powell, 97 Vt. 286, 293, 122 A. 591, 594 (1923). A lapse of time is not enough. "Laches involves prejudice, actual or implied, resulting from the delay. It does not arise from delay alone, but from delay that works disadvantage to another." Id. at 294, 122 A. at 594.

¶ 16. The underlying wrongful eviction that prompted disciplinary action took place in August 2001. Respondent was first notified that there was an investigation regarding his conduct in the eviction matter in October 2004. In August 2005, disciplinary counsel informed respondent that a hearing panel found probable cause to charge him with six violations of the rules. Nonetheless, formal charges were not brought against respondent until July 2010. Respondent argues that this significant time delay prejudiced his case. Specifically, he claims that the four witnesses involved in the eviction, namely Deputy Sheriff Lavalla, Sandra Glick, Gabrielle Glick, and his assistant were "unavailable" during the 2011 hearing.

¶ 17. There is no statutory or rule-based limitation in attorney disciplinary proceedings, and delay, alone, does not warrant dismissal. See In re Wright, 131 Vt. 473, 489, 310 A.2d 1, 9 (1973) (finding that no statute of limitations applies to attorney disciplinary proceedings); see also A.O. 9, Rule16(I). The purpose of attorney discipline proceedings is to protect the public by assessing the attorney's fitness to practice law. See ABA Ctr. for Prof'l Responsibility, Standards for Imposing Lawyer Sanctions, § 1.1 (1986)(amended 1992) [hereinafter ABA

Standards]. Absent a showing of prejudice, a mere delay in bringing a disciplinary action does not justify dismissal.[3]

¶ 18. Respondent has not adequately established prejudice here. Respondent asserts that several witnesses have become "unavailable" or have dulled memories as a result of the time lapse. Though many courts recognize that evidentiary prejudice can result from witnesses whose memories have faded, or who have died, we cannot substantiate respondent's laches defense on the facts presented. See In re Siegel, 708 N.E.2d 869 (Ind. 1999).

¶ 19. Respondent's first claim of prejudice is that Deputy Sheriff Lavalla was unavailable to testify in front of the 2011 hearing board panel. It is uncontested that Deputy Sheriff Lavalla suffered a transient ischemic attack (TIA) in 2006, which reduced his ability to recall the events of 2001 with clarity. The hearing panel found that respondent failed to show resulting prejudice from this because Lavalla testified before the TIA in the 2004 civil proceeding brought by Brennan concerning the wrongful eviction,[4] and further found that a transcript of his prior testimony would be "available to refresh Lavalla's recollection with

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[3] A few jurisdictions do not permit the defense of laches to bar an attorney disciplinary proceeding. These courts either use the delay as a factor to be considered in the disciplinary sanction determination, see, e.g., In re Eisenberg, 423 N.W.2d 867, 872 (Wis. 1988), or do not permit delay to serve as a mitigating factor, especially where the public interest is served, see, e.g., Attorney Grievance Comm'n of Md. v. Snyder, 793 A.2d 515, 533-34 (Md. 2002). As far as we can determine, only one court has permitted the equitable defense of laches to bar an attorney disciplinary action, Tenn. Bar Ass'n v. Berke, 344 S.W. 2d 567, 571-72 (Tenn. Ct. App. 1960), where the vast majority of courts leave the ultimate question of whether laches is available in legal malpractice unaddressed. See In re Tenenbaum, 918 A.2d 1109, 1113-14 (Del. 2007); In re Johnson, 2004 MT 6, ¶¶ 20-21, 84 P.3d 637 (2004); In re Siegel, 708 N.E.2d 869, 871-872 (Ind. 1999); Ching v. State Bar of Nevada, 895 P.2d 646, 648-49 (Nev. 1995); In re Wade, 814 P.2d 753, 764 (Ariz. 1991); Harris v. State Bar of Cal, 800 P.2d 906, 910, (Cal. 1990). Courts have found similarly in other professional disciplinary proceedings, such as physician disciplinary actions.

[4] In 2004 Brennan brought a wrongful eviction action against Sandra Glick, Deputy Sheriff Lavalla, and respondent. Respondent was dismissed as a party because the court concluded that the "Vermont Residential Rental Agreements Act (VRRAA) provides for a cause of action against landlords who illegally evict tenants, but not against the landlords' attorneys." The jury awarded Brennan damages roughly in the amount of $290,000 in addition to attorney's fees and costs.

respect to any forgotten evidence favorable to [r]espondent." Respondent contends that Lavalla's previous testimony was not adequate because respondent was not a party in the prior litigation nor were there charges of unprofessional conduct in the 2004 proceedings.

¶ 20. Vermont Rule of Evidence 612 entitles a witness to use a writing or object to refresh memory. As found by the hearing panel, respondent could have used Lavalla's testimony from the 2004 civil suit to refresh Lavalla's recollection with respect to any forgotten facts, but he did not. While it is true that respondent was dismissed from the prior civil suit and his professionalism was not under review in that instance, Lavalla still testified to the underlying facts surrounding the eviction. Because Lavalla's recollection may have been sufficiently refreshed by his previous testimony, we agree with the panel that without attempting to refresh Lavalla's memory, respondent cannot declare Lavalla unavailable for the purposes of the hearing.

¶ 21. Next, respondent asserts that he was prejudiced by the death of Sandra Glick. This argument is unavailing. Though Sandra Glick was the landlord in this case, she was hospitalized and incapacitated during the eviction. She did not witness the events that gave rise to the disciplinary proceedings; nor is there evidence to suggest that Sandra Glick would provide exculpatory testimony for respondent in this matter. As such, we do not find that respondent was prejudiced by the death of Sandra Glick.

¶ 22. Third, respondent argues that Gabrielle Glick, a resident of Massachusetts, was unavailable because she was outside the court's subpoena power. However, the parties stipulated that Gabrielle's deposition could be substituted for her live testimony, and in effect, respondent waived any objection to her absence. In any event, Gabrielle Glick has always been a resident of Massachusetts with respect to this proceeding. Because her availability has not changed as a result of the delay, we find no prejudice.

¶ 23. Finally, respondent argues that he is prejudiced by the unavailability of his office assistant. According to respondent, his assistant left without notice some time ago and cannot be located. It is unclear, however, what respondent's assistant would have added to the discussion, and respondent fails to provide further support other than allegations that she was the individual "who would have drafted the documents involved in this matter." Regardless of who drafted the documents, respondent signed the papers, and he makes no allegation that his assistant would have drafted these documents contrary to his direction. Because respondent does not specify how he is harmed by his assistant's absence, we fail to see the resulting prejudice. In sum, respondent fails to demonstrate how the delay prejudices the proceedings and, therefore, the defense of laches does not apply.

¶ 24. As a final matter, respondent asserts that the sanction imposed by the hearing panel is excessive. The panel recommended a six-month suspension from the practice of law. Disciplinary counsel maintains that respondent should be disbarred on the basis of prior discipline,[5] dishonest motive, refusal to acknowledge the wrongful nature of his conduct, the vulnerability of the victim, his substantial experience, and his indifference in providing restitution for his actions. Respondent argues that at most he should receive a public reprimand for the violations.

¶ 25. Imposition of a sanction is a matter left to this Court's discretion. "This Court makes its own determination as to which sanctions are appropriate, but we nevertheless give deference to the recommendation of the Hearing Panel." In re Blais, 174 Vt. 628, 630, 817 A.2d 1266, 1269 (2002) (mem.).

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[5] Respondent has five prior disciplinary actions. In June 1987, respondent was admonished for failure to cooperate with Bar Counsel. He received a public reprimand for neglect of several client matters. In 1995, respondent received admonishment from the Professional Conduct Board for refusing to turn over a client's file to new counsel. He was disciplined again in 1995 for his failure to return client property upon the conclusion of representation and his refusal to admit the wrongful nature of his conduct. Finally, in 1999, respondent was disciplined for lying to the court.

¶ 26. "The American Bar Association's Standards for Imposing Lawyer Sanctions guide our" disciplinary sanctions. See In re Fink, 2011 VT 42, ¶ 35, 189 Vt. 470, 22 A.3d 461. "The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged . . . their professional duties to clients, the public, the legal system and the legal profession." ABA Standards § 1.1; see also In re Hunter, 167 Vt. 219, 226, 704 A.2d 1154, 1158 (1997) (The purpose of sanctions is not "to punish attorneys, but rather to protect the public from harm and to maintain confidence in our legal institutions by deterring future misconduct.").

¶ 27. Under this framework, we consider the duty violated, the lawyer's mental state, the actual or potential injury, and any aggravating or mitigating circumstances. ABA Standards § 3.0. Depending on the importance of the duty violated, the level of the attorney's culpability, and the extent of the harm caused, the standards provide a presumptive sanction, which can then be adjusted based on aggravating or mitigating factors. See V.R.Pr.C. Scope.

¶ 28. Here, respondent owed a duty to his client, the public, and his profession. Like all attorneys, he had a duty to avoid conduct "involving dishonesty, fraud, deceit or misrepresentation," V.R.Pr.C. 8.4(c), as well as to maintain the standards of personal integrity. ABA Standards § 5.0. As an officer of the court, respondent had an obligation to abide by the legal rules of both substance and procedure that affect the administration of justice. ABA Standards § 6.0. Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system. Having a duty to uphold and obey the law, as both a citizen and professional, respondent, here, intentionally violated the legal process by circumventing the statutorily prescribed eviction process.

¶ 29. Respondent purposefully drafted a Notice to Vacate, stylized as a legitimate court document. The Notice was designed to create the impression that Brennan was required to leave the premises immediately, even though by law and agreement, she did not have to leave until later the next month.

¶ 30. These actions gave rise to serious consequences—Brennan lost her home without warning, causing her to enter a period of homelessness and exacerbating serious physical and mental conditions. Respondent's actions also had grave consequences for Sandra Glick who became embroiled in the wrongful eviction lawsuit, ending with a judgment of approximately $290,000 against her. The legal system was also injured, for any time an attorney purposefully ignores legal procedures for his client's benefit, the legal system is undermined and thereby harmed.

¶ 31. Under the ABA Standards, an intentional violation of a duty, giving rise to actual injury, calls for a presumptive sanction of disbarment. ABA Standards § 7.1. In the present case, however, the panel found, and we agree, that the circumstances, taken together, support suspension rather than disbarment, which is generally "reserved for cases in which the attorney was convicted of a felony and often where there has been loss or the potential for loss of client funds." The panel specifically looked to In re Rice, PRB Decision No. 64 (Sept. 13, 2004), where Attorney Rice avoided the legal process to assist his client in hiding assets from creditors. Based on the ABA Standards, a panel of the PRB suspended Rice for thirty days due to the presence of aggravating factors similar to the case at hand. Like respondent, Rice was an experienced attorney, had received prior discipline, and failed to acknowledge the wrongful nature of his conduct. Here, the panel concluded that respondent's conduct was more severe than Rice's in that he intentionally drafted deceptive documents to circumvent the legal process, which produced serious injury for Brennan, Sandra Glick, and the legal system, all of which are aggravating factors that call for a longer suspension.

¶ 32. Specifically, the panel considered the following additional aggravating factors: respondent's substantial experience as a lawyer; his prior discipline; his failure to acknowledge the wrongful nature of his conduct; and the vulnerability of the parties involved, namely Brennan and Sandra Glick. The panel also gave considerable attention to respondent's five prior disciplinary actions and his failure to acknowledge responsibility or wrongdoing.

¶ 33. The panel considered mitigating factors as well. While the panel did not find respondent's previous chemical dependency to be a mitigating factor, as he had been sober for more than a year after a successful rehabilitation at the time of the incident, it took notice of respondent's recovery and found this mitigated his prior disciplinary offenses that occurred before his rehabilitation. The panel also highlighted the fact that there have been no known subsequent violations since the wrongful eviction. Accordingly, the panel afforded "some weight in mitigation to the delay, coupled with the testimony that Respondent has changed and his formerly aggressive behavior has ceased."

¶ 34. On balance, we agree with the panel that a suspension is the most appropriate sanction. We find that respondent's actions were severe. Respondent's manipulation of the legal system created dire consequences for both his client and Brennan, and he altogether disregarded his duties to uphold the law and maintain professional integrity. Further augmenting the violations arising out of this case are the five previous disciplinary actions, making respondent's continued refusal to acknowledge wrongdoing particularly egregious. Nonetheless, there are mitigating factors. This matter has been delayed for a long period of time and, in the interim, respondent has not had other violations brought against him. Because the sanctions are not designed to be punitive in nature but rather are imposed to protect the public and the profession, we give strong consideration to the fact that respondent has not violated the rules in the last eleven years and find that a three-month suspension is appropriate. See In re Keitel, 172 Vt. 537, 538, 772 A.2d 507, 510 (2001)(mem.) ("The purpose of sanctions is not punishment. Rather,

they are intended to protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar.") (quotation and alteration omitted).

William McCarty, Jr. is suspended from the practice of law for three months from the date of this order for violating Rules 1.2(d), 4.1, 4.4, 8.4(c), 8.4(d), and 8.4(h) of the Vermont Rules of Professional Conduct by intentionally drafting legal documents designed to mislead and circumvent the legal process.

FOR THE COURT:

Associate Justice

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In Re: William M. McCarty, Jr. Esq.
PRB File No. 2005.084

Decision No. 141
Order on Sanctions

This matter was heard on February 16, 2012, before Hearing Panel No. 4 consisting of Bruce Palmer, Chair, William Piper and Florence Chamberlin. Disciplinary Counsel Beth DeBernardi was present as was Respondent and his attorney, Gary McQuesten.

At a prior hearing before this panel, on March 3, 2011, we addressed the issue of Respondent's liability for violation of the Rules of Professional Conduct. We found that Respondent violated Rules 1.2(d), 4.1, 4.4, 8.4(c), 8.4(d) and 8.4(h) in connection with his actions that resulted in the wrongful eviction of Denise Brennan from the property of her landlord, Sandra Glick. We found that Respondent violated his duties to Ms. Brennan, Ms. Glick and to the public. We incorporate those findings of fact and legal conclusions from the prior hearing as part of this Order on Sanctions.

In determining the appropriate sanction in this matter we look to two sources, the ABA Standards for Imposing Lawyer Sanctions (hereinafter ABA Standards) and case law. In applying the ABA Standards, we are required to assess the duty violated, the lawyer's mental state, the actual or potential injury and any aggravating or mitigating circumstances. We therefore must find additional facts relating to Respondent's mental state, the injuries caused and the aggravating and mitigating circumstances.

## Facts

Most of the evidence presented falls into three broad categories: (1) the circumstances of Denise Brennan, both prior to and after the eviction, (2) Respondent's personal and professional circumstances at the time of the violations and (3) the effect of Respondent's conduct on his client and the public.

We turn first to the circumstances of Denise Brennan. Ms. Brennan has a Bachelor's degree in accounting and has worked in real estate and as a property manager. She worked for ten years as a New York State tax auditor. She owned a home in a rural area near Troy, New York, but she moved to Vermont in the summer of 2000. In July of 2001, she became a tenant under an oral lease with Glick. She left Ms. Glick's home on August 8, 2001. We discussed the circumstances of her leaving in our findings from the prior hearing.

With respect to the circumstances of the eviction, Respondent's counsel did elicit evidence that Ms. Brennan had used a local lawyer in the past and questioned why she failed to seek legal advice when the sheriff came to deliver the eviction papers. However, we note that we have already found at the prior hearing that Respondent designed his actions to circumvent applicable legal procedures, and we do not consider Ms. Brennan's decision not to call a lawyer a mitigating factor.

During the two-year period following the eviction, Ms. Brennan was frequently homeless and stayed in many different places. She stayed at times in a shelter in Brattleboro and with friends in the area. She also traveled between Vermont and New York and was also hospitalized and treated at the Samaritan Hospital in Troy, New York, the Brattleboro Memorial Hospital and at the Brattleboro Retreat.

When Ms. Brennan left the Glick home, she had a dog, and had no place for the dog to go. Eventually, an animal control officer took the dog. She was also unable to make arrangements for the care of her dog during those periods that she was homeless or hospitalized, and she was concerned that authorities might destroy her dog. Eventually a nurse at Samaritan Hospital adopted the dog, but Ms. Brennan went through periods of emotional distress about the dog's welfare and lost the companionship of her dog.

Deputy Sheriff Lavalla put her belongings in a locked room at the Glick property when she was evicted. He took her to the emergency room at the hospital because she had no other place to go, and the staff there then let her use the phone to call friends to find a place to stay. During the months following her eviction, Ms. Brennan attempted to retrieve her belongings from the Glick home. She called Respondent's office, leaving her number, but did not receive a call back. She also went to Respondent's office, but he was not there. Although she made inquiry, Deputy Sheriff Lavalla also was not available. In October, she finally arranged with Deputy Sheriff Lavalla to retrieve her belongings. Ultimately, Ms. Brennan was able to retrieve some of her property, but not all, and later saw some of it for sale in a local thrift shop.

Ms. Brennan had problems with alcohol and was diagnosed with depression both prior to and after the wrongful eviction, including the period during the week leading up to the eviction. She testified that, after the eviction, her doctors diagnosed post traumatic stress disorder, a diagnosis that she had not received prior to the date of the eviction. Clearly, Ms. Brennan was an individual with emotional and substance abuse issues immediately prior to the eviction. She credibly testified, however, that the eviction greatly exacerbated her emotional and substance abuse issues.

It was the better part of two years before Ms. Brennan was finally able to find a place of her own to live. During this period, Ms. Brennan owned her home in the Troy, New York area, but she was attempting to sell it. She also could not live in the house because it was not winterized and, at some point, the pipes in the home had frozen and burst. She got rides to New York to work to empty the house prior to its sale. Ultimately, she was unable to sell the house, her lender foreclosed on it and she lost her home.

Also during this time, alcohol abuse continued to be a problem for Ms. Brennan, and this clearly contributed to some degree to the extent and long duration of her period of personal difficulties and continued homelessness. We cannot attribute all of Ms. Brennan's difficulties to Respondent's actions, but we are convinced from the evidence that some portion stemmed from the wrongful eviction that exacerbated and prolonged her emotional and other difficulties.

We now turn to Respondent, who graduated from law school in 1967 and came to Vermont to begin his law practice. He first worked four to five years with a firm doing insurance defense work, then worked on his own as a solo practitioner doing plaintiff's work. He had a large case load with long hours each week and a lot of pressure. He was active in the legal community including the Windham County Bar Association, the Vermont Trial Lawyers Association and the American Board of Trial Attorneys.

Respondent also has a history of alcohol abuse that escalated in the 1980's and 1990's. His present law partner, Bettina Buehler testified about the conditions in Respondent's office between 1994 and the late 1990's. Things were chaotic; it was a hostile work environment. Respondent was often verbally abusive to his assistants and

was inappropriate in his dealing with the staff after he had been drinking. Ms. Buehler often had to deal with employees who had been on the receiving end of his abusive and inappropriate behaviors. The staff would have to schedule client meetings in the morning since he would leave later to drink. Ms Buehler made the connection between his drinking and his behavior and told him his behavior was inappropriate and adversely affecting the office. In response, Respondent threw a chair.

After that, Ms. Buehler called Respondent's wife and they did an alcohol intervention. His wife found an institution in Georgia, and on June 25, 2000, they sent him there. He ended up staying until late September of that year, and testified that this was the beginning of a change in his life. He realized that this was an opportunity to change behaviors that were adversely affecting him, his practice and his wife and family. He therefore committed himself to the program.

When Respondent returned to the office, it was with better coping and anger management skills. He went to AA meetings and saw a therapist to deal with his alcoholism and his anger. It was still a very busy practice. Much had been put off or continued in his absence, so there was an abundance of work. Both Respondent and his partner testified that it took two years to work their way through the backlog, and there was pressure from his workload during that period.

It was in August of 2001 when Gabrielle Glick came to see Respondent about her mother's tenant, Denise Brennan. This was almost one year after Respondent's return from the rehabilitation center but before the expiration of the two years that he believed was required to get the practice under control. At that time, Respondent had an assistant who he authorized to draft letters and simple pleadings with minimal guidance from

Respondent. Respondent said he was not thoroughly reviewing his assistant's work. However, we note that Respondent was responsible for all the legal documents leaving his office under his signature.

Because of the wrongful eviction, Ms. Brennan sued Sandra Glick, Deputy Sheriff Lavalla and Respondent. The Court dismissed the case against Respondent on summary judgment. Ms. Brennan settled with the sheriff for $10,000 plus legal fees. In her claim against Sandra Glick, the jury awarded Ms. Brennan damages of $280,000, consisting of $5,000 for conversion of personal property, $275,000 for the wrongful eviction, plus $33,697 in costs and $118,822 in attorney's fees. Ms Brennan has not collected on this judgment because Sandra Glick has died. While Respondent testified that he was personally responsible for Sandra Glick's attorney fees, having failed to purchase or maintain any malpractice insurance, we note that Sandra Glick was required to participate in the civil suit for a substantial period, and that the civil trial generated publicity in the local community.[1]

Another area of Respondent's history that we need to consider is the nature and extent of his prior discipline, which can be a factor in determining the sanction. Respondent was first disciplined in 1987. He received a private admonition for failure to cooperate with Disciplinary Counsel.

His next discipline was for neglect of client matters occurring in 1989 and 1990. The Professional Responsibility Board found that Respondent in that matter "refused to acknowledge the wrongful nature of his conduct, blaming his client, has associate,

[1] Disciplinary Counsel introduced evidence of newspaper and other publicity concerning the trial over the hearsay and relevancy objections of Respondent's Counsel. The Hearing Panel admitted those exhibits solely as evidence that the trial generated some publicity and only for that limited purpose. The Hearing Panel did not consider the substantive content of those exhibits other than to establish that the stories related to the wrongful eviction case and trial.

everybody else, and his busy schedule for the mistreatment of his clients." The Board gave him a public reprimand for his actions and lack of remorse that the Vermont Supreme Court upheld on appeal. *In re McCarty*, 162 Vt. 535, 649 A.2d 764 (1994).

The third disciplinary matter was in 1995, PCB Decision No. 82. The Board admonished Respondent for failure to turn over his client's file to new counsel and for wrongfully attempting to exonerate himself from potential liability by having the client stipulate that he had done an excellent job and had achieved an excellent result. The Board found the following mitigating factors: no actual injury, no harmful intent, free and full disclosure to Bar Counsel, cooperation with disciplinary process and good character and reputation. In aggravation, they found substantial experience in the practice of law and prior discipline.

Respondent's fourth discipline in 1995 also resulted in public reprimand and probation. Respondent failed to return client property following the termination of the representation or to provide his client with an accounting. *See* PCB Decision No. 90, April 1995. In language similar to that used in the second case discussed above, the Board found that Respondent failed to acknowledge the wrongful nature of his conduct, showing "little or no concern for the consequences of his actions." The Supreme Court affirmed the Board's decision. *In re McCarty*, 164 Vt. 604, 665 A.2d 885 (1995). The Board found as aggravating factors Respondent's prior three disciplines, the fact that he had a selfish motive, his refusal to acknowledge the wrongful nature of his conduct, his substantial experience in the practice of law and the vulnerable state of his client.

The actions resulting in the final case of prior discipline occurred in 1990 and the disciplinary decision was issued in 1999. *In re PCB Decision No. 141.* This case arose

out of a divorce in which Respondent failed to obtain a fee agreement. The client did not pay, and Respondent moved to withdraw telling the court that his client no longer required his services. This statement was false. In aggravation, the Board considered Respondent's prior discipline, his vulnerable client, his refusal to acknowledge the wrongful nature of his conduct and his lack of remorse. The Board was also concerned about the long delay between the misconduct and the disciplinary action, treated this as a mitigating factor and imposed a sanction of private admonition.

Respondent presented three witnesses to testify as to his character, legal and general temperament and skills, and his present demeanor. Attorney Peter Joslin, an insurance defense lawyer who has practiced for approximately 36 years, quite often has been Respondent's adversary. He testified that, while their dealings were heated at times, he never had any concerns about Respondent's truthfulness or candor. He also noted that Respondent's demeanor had been "softer" in their dealings in more recent years. Mr. Joslin on cross-examination noted that he was not aware of Respondent's record of discipline by the Professional Conduct Board.

Attorney Lawrin Crispe testified that he knew Respondent well due to the forty years they had both practiced in the Greater Brattleboro area. He noted that, when a younger lawyer, he often sought out Respondent for help, advice or guidance. He had a number of matters with Respondent and spoke of his work for local civic organizations and his church. He never had occasion to question his professionalism or ethics, and trusts and holds him in the highest regard. He noted, however, Respondents tough demeanor and commanding personality that at times could be intimidating, and was concerned to hear of five prior disciplinary matters.

Arthur O'Dea is a former Vermont Superior Court judge and now practices as a mediator. He also testified to the high regard with which he has held Respondent over the many years they have practiced and about his respect for Respondent's professionalism and ethics. Mr. O'Dea likewise noted Respondent could be a tough, aggressive advocate, and was not always courteous or polite, but that he in recent years had mellowed considerably, and that he saw a big change in Respondent once he ceased drinking. Mr. O'Dea also was not aware of Respondent's history of discipline by the Professional Conduct Board, but stated, curiously, that it did not surprise him given the number of years Respondent has practiced.

Finally, Respondent also testified as to his participation in various legal organizations such as the American Board of Trial Advocates, various local and national bar associations and submitted a resume documenting these memberships.

**Sanction**

Disciplinary Counsel argues that this is a disbarment case, and we will consider this argument and her recommendation carefully.

First, we note that Respondent owed a duty both to the public and to his client not to engage in the conduct at issue, which was conduct "involving dishonesty, fraud, deceit or misrepresentation." Vermont Rules of Professional Conduct 8.4(c). We have also found that his conduct calls into question his fitness as a lawyer. Disbarment could result from such conduct under the general rules of the ABA Standards that our Court has long looked to for guidance in imposing sanctions in disciplinary matters. *See In re Warren*, 167 Vt. 259, 261(1997); *In re Berk*, 157 Vt. 524, 532 (1991).

In addition, Section 5.0 of the ABA Standards provides:

"The most fundamental duty which a lawyer owes the public is the duty to maintain standards of personal integrity upon which the community relies. The public expects the lawyer to be honest and to abide by the law."

The ABA Standards at Section 5.11(b) provides that, absent aggravating or mitigating circumstances, disbarment is generally appropriate when "a lawyer engages in any . . . intentional conduct involving dishonesty, fraud, deceit or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice." Respondent also owed a duty to the public to follow the law. Section 6.0 of the ABA Standards provides: "Lawyers are officers of the court, and the public expects lawyers to abide by the legal rules of substance and procedure which affect the administration of justice. Lawyers must always operate within the bounds of the law. . . ."

Section 6.21 of the ABA Standards further provides: "Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party, or causes serious or potentially serious interference with a legal proceeding." While Respondent did not violate any court order or rule, his conduct did run afoul of the clear procedural requirements for evictions under Vermont statutes. He arranged for a deputy sheriff to serve documents that were created by his office, signed by him and designed to evict Ms. Brennan without following the Vermont Landlord Tenant Statute. Respondent intentionally avoided the clearly required eviction procedures and, as a result, Ms. Brennan was not afforded the safeguards for tenants contained in the statute. She had no opportunity to present any evidence or defense. While she could have sought legal advice, she had no duty to do so. The relevant duty

was Respondent's not to misuse the legal process.

Respondent also violated his duties to his client, Sandra Glick. Section 4.41(b) of the ABA Standards provides, once again absent aggravating or mitigating circumstances, that disbarment is generally appropriate "when a lawyer knowingly fails to perform services for client and causes serious or potentially serious injury to a client." Ms. Glick's daughter engaged Respondent to evict Ms. Brennan from her mother's property. Respondent owed both mother and daughter the duty to act within the law in carrying out the eviction. Respondent instead chose to circumvent to legal process and he was successful in removing Ms. Brennan, but not without cost to Sandra Glick who was found liable for civil damages for the wrongful eviction.

Under the ABA Standards, one of the factors that can distinguish disbarment from suspension or reprimand is the existence and extent of the injury caused by the violation. The disbarment section of Section 6.2 quoted above speaks of "serious injury or potentially serious injury to a party" or "serious or potentially serious interference with a legal proceeding." The language in the suspension section is the same with the exception of the removal of the word "serious." Under Section 4.4 of the ABA Standards, the difference between disbarment and suspension is also whether the injury is characterized as serious.

We would characterize Respondent's actions and the results of his actions here as "serious." Ms. Brennan and Sandra Glick were vulnerable women due to their emotional and other circumstances and suffered injuries as a direct result of Respondent's actions. Ms. Brennan was removed from her home with no notice, few belongings and there was testimony that this eviction had serious health and other consequences. Sandra Glick

became embroiled in the wrongful eviction suit and a substantial judgment was entered against her. There is also serious injury to the legal system when an attorney intentionally ignores legal procedures. The fact that it was for his client's benefit and not his own is irrelevant.

Here, however, we think there are countervailing factors that support suspension rather than disbarment as the appropriate sanction. In general, disbarment has been reserved for cases in which the attorney was convicted of a felony and often where there has been loss or the potential for loss of client funds, e.g. *In re Ruggerio*, PRB Decision No.88 (2006)(criminal conviction for embezzlement from trust account); *In re Harwood*, PRB Decision No. 83 (2005)(misuse of client's trust funds). However, not even conviction of a felony will automatically draw disbarment as a sanction.

There have been two relatively recent cases in which the attorney was convicted of a felony. Both attorneys were suspended, not disbarred. Both attorneys also suffered from substance abuse and both presented evidence of substantial mitigating factors. *See In re van Aelstyn*, PRB Decision No. 112 (2008)(extortion and stalking); *In re Neisner*, PRB Decision No. 119 (2009), *In re Neisner,* 2010VT 102 (impeding a police officer).

While Respondent's conduct was serious and caused substantial injury to both his client and the public, it was not criminal behavior and he was never charged with or convicted of any crime. The case that bears the closest resemblance to the present case is *In re Rice*, PRB Decision No. 64 (2004). Like Respondent, Rice intentionally avoided legal process in order to assist his client, in the case of Rice for the purpose of hiding assets from creditors. In *Rice*, the Hearing Panel made an analysis of the relevant ABA Standards in much the same way that we have, and found that absent aggravating and

mitigating factors the provisional sanction in that case would be reprimand or suspension. The panel suspended Rice for a period of thirty days due to the presence of aggravating factors, which factors are similar to some we find in the present case.

Like Respondent, Rice had substantial experience in the practice, prior discipline, and like Respondent, he failed to acknowledge the wrongful nature of his conduct. While Respondent's conduct was similar to that in *Rice*, we believe it to be more serious. The fact that Respondent created fraudulent legal process to circumvent the statute, and the fact that there was resulting injury to Ms. Brennan, Sandra Glick and to the legal system, all are aggravating factors that call for a longer suspension. The extent and the nature of Respondent's prior discipline further suggest a longer suspension for the protection of the public is necessary. *ABA Standards 9.22(a).*

Like the case before us, each of the cases of prior discipline involves intentional acts on the part of Respondent. The first case, his failure to cooperate with Disciplinary Counsel, was clearly an intentional act. While the second case involved neglect of client matters, Respondent blamed others for the problem and refused to acknowledge any wrongdoing. This refusal to acknowledge wrongdoing and lack of remorse are also found in most of the cases and consistent with Respondent's behavior here. He has never acknowledged wrongdoing on his part, has blamed his office assistant for misinterpreting his instructions and the sheriff and Ms. Brennan for their failure to fully read and comprehend the documents he prepared.

At our first hearing determining liability for violation of the Code of Professional Responsibility, Respondent expressed relief that Ms. Brennan had left but did not acknowledge that he had any responsibility for what occurred to her subsequent to the

eviction. Deputy Sheriff Lavalla told Respondent that Ms. Brennan had left voluntarily, and he testified during the first hearing that he was relieved she had left. Respondent also did nothing to assist in transfer of her belongings. At the hearing on sanctions, he said he felt terrible about what had happened, but attributed it to others and said he was sorry that the sheriff had not read what he (or, perhaps, an assistant) had written. He insisted, "I did not do anything to Denise Brennan." It is difficult to find any acknowledgment of the wrongful nature of his conduct in these statements. Had Respondent expressed some concern for Ms. Brennan or even the understanding and sympathy of a fellow alcoholic, we might not have considered this an aggravating factor. *See ABA Standards 9.22(g).* In the absence of such concern, understanding and sympathy, we must consider it aggravating.

Also in aggravation, Ms. Brennan and Sandra Glick were both vulnerable victims. *ABA Standards 9.22(h),* Respondent has substantial experience in the practice of law, *ABA Standards 9.22(i),* and not only has Respondent been indifferent to making restitution to Ms. Brennan, *ABA Standards 9.22(j),* it also appears that he has been largely indifferent to Ms. Brennan's plight. He knew the required procedures for eviction and chose not to follow them in the interest of expediency.

Respondent testified at some length about his alcoholism and his partner testified about the effect on the office staff and the general atmosphere of Respondent's office during the time he was drinking, and that it took two years after his return from treatment to clear the backlog caused by his absence. Section 9.32(i) of the ABA Standards permits us to consider these as mitigating factors:

> " [M]ental disability or chemical dependency including alcohol or drug abuse when

(1) there is medical evidence that the Respondent is affected by a chemical dependency or mental disability;

(2) the mental disability or chemical dependency caused the misconduct;

(3) the respondent's recovery from the mental disability or chemical dependency is demonstrated by a meaningful and sustained period of successful rehabilitation; and

(4) the recovery arrested the misconduct and a recurrence of the misconduct is unlikely."

Respondent does not meet this test. He had stopped drinking a little more than a year before he met with Sandra Glick's daughter and prepared the fraudulent eviction papers. There was no medical or other evidence that he was affected by alcoholism at that time and no evidence that it caused the misconduct. Rather, Respondent's absence from the office for treatment for a period of three months and his failure for more than a year to bring his practice under control are, by his own testimony, the more important factors. Alcoholism caused the absence that led to the chaos in the office but it did not cause the misconduct.

Such evidence is in stark contrast to *In re Neisner,* 2010 VT 102 and *In re van Aelstyn,* PRB Decision No. 112 (2008), cited above. In both of those cases, there was clear evidence of the effect of the chemical dependency on the behavior that led to the misconduct. In both of these cases, the attorneys were able to acknowledge the effect of the dependency on their behavior and the substantial changes that they had worked to achieve to both understand the nature of their dependency and to modify their behavior. We do not see quite that level of self-understanding or motivation for self-improvement in Respondent. Even if we were to find a causal connection between Respondent's drinking and the misconduct, we find no assurance from any of his testimony that "a

recurrence of this misconduct is unlikely." ABA *Standards 9.32(i)(4).*

However, we do note Respondent's recovery from chemical dependency and that he has now been sober for a sustained period after a successful rehabilitation, and find this mitigates the weight to be afforded to the aggravating factor that he had prior disciplinary offenses before his rehabilitation. We further note as a mitigating factor that there have been no additional violations of the Rules of Professional Conduct in the more than eleven years since the eviction that is the subject of this proceeding unfolded. The fact that Respondent has been sober and has kept up his treatment during all of that time suggests that he is less likely to violate his professional responsibilities today than he was in the past.

Respondent further argues that the long delay between the misconduct and the eventual sanction hearing should be considered as a mitigating factor. *ABA Standards 9.32(j).* Respondent raised this issue at the previous hearing in his motion to dismiss on the grounds of laches. We denied that motion since Respondent was unable to show that it was unreasonable or unexplained and he offered no evidence that it prejudiced his defense of the charge of misconduct. Still, we wonder why, if Respondent's character made him so unfit as to merit Disciplinary Counsel's argument that he should be disbarred, proceedings did not go forward much earlier. In one of Respondent's prior cases, *In re PCB Decision No. 141* (1999), a long delay in the proceedings, was considered a mitigating factor. We also afford some weight in mitigation to the delay, coupled with the testimony that Respondent has changed and his formerly aggressive behavior has ceased.

We cannot afford great weight to the character testimony from attorneys who had

known him in practice for many years and who testified that they knew him to be honest and ethical. They did not know much or anything about his prior discipline and were equivocal, at best, about whether that would affect their opinions significantly. Was this a case of a first or second discipline, we might be inclined to give weight to such character testimony. With five prior findings of misconduct that were unknown to the witnesses, however, this evidence is of only little weight as a mitigating factor.

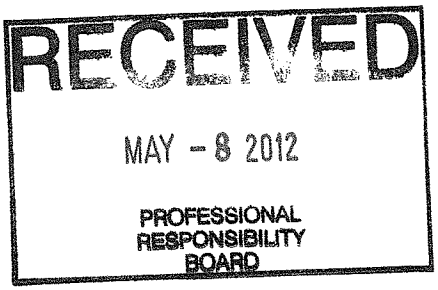
Weighing all the facts and relevant factors, we find that a six-month suspension is an appropriate sanction given the seriousness of Respondent's violations and the aftermath of his actions. We do not choose this sanction in any way as punishment, but instead as a means of protecting the public. With a six-month suspension, Respondent will be required to apply for reinstatement under Administrative Order 9, Rule 22(D). He will have to demonstrate to a subsequent hearing panel, by clear and convincing evidence, that he then 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."

**Order**

Respondent, WILLIAM M. McCARTY, Jr. is hereby suspended from the practice of law for six months commencing on the date that this decision becomes final.

Respondent shall promptly comply with the provision of A.O.9, Rule 23.

Dated: MAY 8, 2012 Hearing Panel No. 4




Bruce C. Palmer, Esq., Chair

William Piper, Esq.

Florence Chamberlin

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STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In Re: William M. McCarty, Jr. Esq.
PRB File No. 2005.084

Decision No. 141
Violation of the Vermont Rules of Professional Conduct Only

This matter was heard on March 3, 2011, before Hearing Panel No. 4 consisting of Bruce Palmer, Esq., Chair, William Piper, Esq. and Florence Chamberlin. Disciplinary Counsel Beth DiBernardi was present as was Respondent and his attorney, Robert Reis. Respondent is charged with violation of Rules 1.2(d), 4.1, 4.4, 8.4(c), 8.4(d) and 8.4(h) of the Vermont Code of Professional Responsibility in connection with his efforts to have a tenant evicted from property owned by his client. We find a violation of each of these Rules. A hearing on an appropriate sanction will be scheduled.

Prior to the hearing, Respondent moved to dismiss the Petition of Misconduct due to alleged laches, waiver and prejudice to Respondent as a result of the lapse of about nine years between the time of the alleged misconduct and the filing of the petition.

Respondent renewed his motion to dismiss by pleadings filed after the hearing. We consider the motion in the context of our decision.

**Facts**

Respondent was admitted to practice in Vermont in 1967 and has an office in Brattleboro.

Sandra Glick had been a client of Respondent's for a number of years. Sandra Glick suffered from bipolar disorder and on occasion was incapacitated by manic

episodes. Sandra Glick owned a house in Brattleboro and, in July 2001, entered into an oral agreement with Denise Brennan to rent Ms. Brennan a room. Ms. Brennan moved into the house with Ms. Glick on July 5, 2001. The configuration of the premises was such that Ms. Brennan had access to most of the property.

After Denise Brennan moved into the house, Sandra Glick suffered an acute manic phase of her illness and, on August 8, 2001, she was hospitalized for several weeks.

Gabrielle Glick, who lives in Massachusetts, is Sandra Glick's adult daughter. She was not comfortable having Ms. Brennan living in her mother's house after her mother had been hospitalized. She believed that Ms. Brennan had used Sandra Glick's ATM card without her permission.

On August 10, 2001, Gabrielle Glick left a note for Ms. Brennan on the kitchen table of the premises specifying that she must vacate the premises in thirty days, or by September 9, 2001. Ms. Brennan received the note and began packing her belongings in order to move out by the deadline.

Gabrielle Glick then hired Respondent to evict Ms. Brennan from her mother's home. On August 13, 2001, Respondent sent to Ms. Brennan, by both Certified Mail and First Class mail, a letter informing her that he was representing Sandra Glick, confirming some of the details of Gabrielle Glick's letter and stating, "[t]he desire is that you vacate immediately, however, you are not to be on the premises any later than 9 September 2001." Ms. Brennan received the letter on August 16, 2001.

Gabrielle Glick testified that she spoke to Respondent about five times concerning removing Ms. Brennan from her mother's property. Respondent also wrote a second

eviction letter to Ms. Brennan identical in all material ways to the August 13, 2001, letter with the exception of the fact that, in Respondent's second letter, the date by which Ms. Brennan was to vacate (September 9, 2001) was deleted from the text and, instead, Respondent stated in the letter only that "[t]he desire is that you vacate immediately."

In addition, along with Respondent's second letter, he also included another document, entitled it "Notice to Vacate" and styled it to look like a pleading in a Windham Superior Court case brought by Sandra Glick, Landlord/Plaintiff v. Denise Brennan, Tenant/Defendant, with the docket number left blank. Respondent signed the document on behalf of Sandra Glick.

The text of the Notice to Vacate underneath the stylized caption is as follows:

> Pursuant to the provisions of 9 V.S.A. §4486, you, Denise Brennan are hereby notified to vacate the premises known as 412 Western Avenue, Brattleboro. Vermont.
>
> This termination takes effect asforthwith [sic].
>
> You, the tenant, are ordered to remove all of your property from the premises and to restore the premises to its condition at the beginning of the rental term.
>
> If you remain in possession after August 17, 2001, Landlord Sandra Glick will be compelled to bring an action for possession as authorized by 9 V.S.A. § 4468, et. al.

Respondent was personally acquainted with Deputy Sheriff Charles Lavalla of the Windham County Sheriff's Department. Respondent and Mr. Lavalla were careful to state that the relationship was not a particularly close one. However, their testimony was that they have known each other for about thirty years, both belong to the Vermont Chapter of the Marine Corp League, and their wives worked together for the hospital auxiliary. Respondent's wife was a close friend of Lavalla's mother, and when Lavalla

and his wife were injured in an automobile accident in Chicago, they engaged Respondent to represent them. On one occasion Respondent and Lavalla also had lunch together in the Virgin Islands.

In 2001, Mr. Lavalla had been a Deputy Sheriff in Windham County for about 11 years and regularly served process for the Sheriff's Office, including eviction papers. He testified at the hearing that he had suffered a transient ischemic attack several years prior to the hearing and testified that his memory was not as good as it once was. However, he was able to testify to many of the events that took place in 2001 and the transcript of his former testimony from a civil proceeding was available to the parties.

On August 17, 2001, Deputy Sheriff Lavalla met Gabrielle Glick at Respondent's office and picked up Respondent's second letter to Ms. Brennan and the document styled like a pleading. He received instructions to serve the papers on Ms. Brennan either from Respondent or from a member of his staff. Respondent testified that he was not the one who called the Sheriff's office; however, Respondent's billing records reflect under Respondent's initials the notations "calls to Deputy Lavalla" on August 13 and "calls to and from Sheriff regarding service and schedule" on August 15, 2001. Respondent testified that these were probably "duplicate entries," that he did not make the calls, that instead one of his office staff would have done so, and that at the time of billing this would have been corrected. Other work done by Respondent's staff, however, is indicated on the billing sheet as "para." The panel finds that it was Respondent who called Deputy Sheriff Lavalla.

While at Respondent's office, Deputy Sheriff Lavalla conversed with Respondent. Respondent's recollection was that it was a general conversation not regarding the

eviction. Lavalla testified that he was not sure that he remembered talking to Respondent; however, Disciplinary Counsel refreshed Lavalla's recollection from his prior testimony, where he had testified that he had talked to Respondent who told him that this was to be Ms. Brennan's last day and that he was to secure the property.

The parties also stipulated to the introduction of former testimony of Gabrielle Glick from the prior civil proceeding. Gabrielle Glick testified that she believed, based on conversations with Respondent, that Ms. Brennan would be out of her mother's house that day. She therefore took time off from work and came up from Massachusetts in order to be present when Ms. Brennan left. She testified that she would not have done so had she not believed and understood that Ms. Brennan was to be removed from the property that day.

When Deputy Sheriff Lavalla and Gabrielle Glick arrived at the property, he gave Respondent's second letter and the "Notice to Vacate" document styled like a pleading to Ms. Brennan and told her that she was to vacate the premises immediately.

Ms. Brennan testified that she had been in the real estate business and knew what she had been served with was not a court-ordered writ of possession. She tried to discuss this with Deputy Sheriff Lavalla, and to show him the previous documents which stated that she was not required to vacate until September 9, 2001, and told him she was planning to leave in September and was packing her things. Deputy Sheriff Lavalla refused to look at the earlier papers and continued to insist that Ms. Brennan must leave immediately. He threatened her that he would handcuff and arrest her if she did not leave. This was overheard by Gabrielle Glick, according to her testimony.

The situation thereafter became chaotic. Ms. Brennan was very upset. Her dog

got loose. Eventually Deputy Sheriff Lavalla helped Ms. Brennan pack her things into a room in the house which he locked. An animal control officer was also called to take the dog because she had no place to go. Other police officers also arrived.

Ms. Brennan had no place to go. Eventually, Deputy Sheriff Lavalla took her to the Brattleboro Hospital Emergency Room, at her request.

Oral rental agreements, such as Ms. Brennan had with Sandra Glick, are legally enforceable and are governed by the provisions of Title 9 of the Vermont Statues Annotated, Chapter 137 (Residential Rental Agreements) and Title 12, Chapter 169 (Ejectment). The statutes provide that a landlord must provide adequate notice to terminate a tenancy, and if the tenant does not vacate by the specified termination date, the landlord may only then institute a civil action in the Superior Court. The landlord must prove entitlement to possession and obtain a judgment from the court awarding possession to the landlord. The judgment then must be served on the tenant, and if the tenant does not leave, the landlord may then apply to the Superior Court for a Writ of Possession. Once the Writ of Possession is served on the tenant, the tenant then has five business days to vacate the premises. Only if the tenant does not vacate within that time may a sheriff forcibly remove the tenant.

Respondent testified that he had done landlord/tenant work for other existing clients. It was not a significant part of his practice, but he understood the basic procedures. Knowing that Sandra Glick was in the hospital, and that there was a concern that Ms. Brennan had used her ATM card, he testified that he was anxious to have Ms. Brennan leave the property as soon as possible in order to protect the property and safeguard the personal property of his client. He described Sandra Glick as a fragile

woman and said he felt "protective" of her.

Respondent explained that he removed the date of termination from his second letter in order to emphasize the urgency of the situation. He also acknowledged it was unnecessary to send the second letter since Ms. Brennan had already been given the date in both his client's and his own initial letters. He also testified that the pleading-like Notice to Vacate document was meant only to again emphasize the urgency of the situation, and that a careful reading of the document would have revealed to Ms. Brennan that if she did not leave there would have to be further legal process, and that it was not intended that she leave on that day.

Deputy Sheriff Lavalla had been instructed what to do by Respondent, and further testified that he understood the papers to mean that Ms. Brennan was to be put out that day. Deputy Sheriff Lavalla further stated that he did not read the whole document. He stopped after reading "forthwith" and understood that word and the Notice to Vacate to mean that Ms. Brennan was to be out that day.

Respondent did not express any surprise that Ms. Brennan left on the seventeenth, but instead testified that he was "relieved" that she had vacated. There is no evidence Respondent took any steps to clarify to Ms. Brennan, to Gabrielle Glick or to Deputy Sheriff Lavalla that she was not legally required to leave the premises on August 17, 2001.

In reviewing this rather complicated web of facts it is perhaps helpful to recap those which are not in doubt.

Sandra Glick was a fragile and vulnerable woman who suffered from bipolar disorder and was hospitalized before the attempts to evict Ms. Brennan started. She had

been Respondent's client for a number of years and he felt protective of her.

Both Gabrielle Glick and Respondent were very concerned about the fact that Ms. Brennan remained in Sandra Glick's home with access to the entire property. They believed that Ms. Brennan had used Sandra Glick's ATM card without permission and feared that she might take personal property from the house.

Under the law of landlord/tenant in Vermont, there was no requirement to draft any letter of notice similar to the second letter Respondent wrote to Ms. Brennan which omitted the date of termination of the tenancy, and included the Notice to Vacate "forthwith."

Respondent desired to have Ms. Brennan leave immediately.

Gabrielle Glick talked to both Respondent and Respondent's staff about the case and believed that Ms. Brennan would be gone from the property by the end of the day on August 17. Deputy Sheriff Lavalla also believed that it was his job to see that Ms. Brennan was removed from the property on that day.

While Ms. Brennan did not believe that the papers which were served on her by Deputy Sheriff Lavalla constituted a Writ of Possession, she too came to believe that she had to vacate the property that day.

Against the backdrop of the clear understanding of all of the other parties, the panel cannot credit Respondent's testimony that he did not intend the second letter and Notice to Vacate to communicate that Ms. Brennan was required to leave forthwith, or that she and Deputy Sheriff Lavalla had only to read it carefully to understand that.

**Motion to Dismiss**

We now turn to Respondent's Motion to Dismiss on the grounds of laches. Prior to hearing, the Panel denied the motion without prejudice stating "[l]aches is a fact-based defense, and in order to persuade us that this case should be dismissed, Respondent must show by specific facts that both the delay in bringing the misconduct complaint was unreasonable and unexplainable and that he has been prejudiced by the delay." Respondent produced no evidence expressly relating to either the reasonableness of the delay or any prejudice to his defense because of delay. Respondent did argue that this case, the prior civil litigation among the other parties after he was dismissed from the case, as well as the Petition for Misconduct, have taken a personal and financial toll on him over a period of years. While this may be true, these facts do not warrant dismissal of this case, though they may be relevant to the sanction phase of this case.

Sandra Glick died prior to this hearing, but Respondent has offered no evidence as to the prejudice this might have caused him, if any. It was clear from the testimony that she was in the hospital during all times relevant to this case and did not participate in the events leading up to the eviction and, thus there is no evidence that she could have offered any testimony that could have assisted Respondent or the panel.

Gabrielle Glick did not appear at the hearing, but portions of her previous testimony were read into the record without objection from Respondent. It is also true that, as a resident of Massachusetts, Gabrielle Glick was beyond the power of subpoena, and apparently chose not to voluntarily appear.

Respondent also argues that the unavailability of a member of his office staff in 2001 prejudiced his case. Again Respondent made no offer of proof to show that he had searched for this staff member unsuccessfully, of the evidence she or he could have

offered or how that would fit with the testimony at the hearing. There is therefore no evidence that staff unavailability resulted in any prejudice.

Respondent also argues that, due to the passage of time, Deputy Sheriff Lavalla's memory of the events has dimmed. As with Gabrielle Glick, however, Deputy Sheriff Lavalla had offered testimony in connection with the prior civil litigation and a transcript of that testimony was available to refresh Lavalla's recollection with respect to any forgotten evidence favorable to Respondent.

The Vermont Supreme Court addressed the issue of laches in general in the case of *American Trucking Ass'ns v. Conway*, 152 Vt 363, 381-82 (1989), stating "[t]he equitable doctrine of laches is applied to prohibit the maintenance of actions where the party requesting relief had failed to assert his right for an unreasonable and unexplained period of time and where the delay has been prejudicial to the defending party."

The Vermont Supreme Court has not addressed specifically the issue of the application of laches to disciplinary proceedings, but refused to apply it in the case of *In re Wright*, 131 Vt. 44473 (1973) stating that "[l]aches is not a mere matter of time. Prejudice must result from the delay that works to the disadvantage and prejudice against the one who claims it."

In a case before the Professional Responsibility Board, *In re PCB Decision No 141* (1999), the Board refused to consider laches as an absolute defense in the matter and chose rather to consider the delay in determining the appropriate sanction.

Respondent has offered no evidence to show that the delay in bringing this case was unreasonable or unexplained, and it was not therefore incumbent on disciplinary counsel to explain that delay. He also offered no evidence that the delay prejudiced his

defense of the charge of misconduct. The Motion to Dismiss is therefore denied.

**Conclusions of Law**

Respondent has been charged with a number of violations of the Code of Professional Responsibility and we will consider them separately.

**Rule 1.2(d)**

Rule 1.2(d) of the Vermont Rules of Professional Conduct provides that a "lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ."

Respondent knew the procedure for evictions and knew that it required both thirty days advance notice to the tenant and the bringing of an action in the Superior Court if the tenant did not leave after receiving proper notice of termination of the tenancy.

Nonetheless, Respondent prepared a document, styled to look like a court pleading in an action in the Windham Superior Court, which was entitled Notice to Vacate and stated "[t]his termination takes effect asforthwith [sic]." There was no such action pending in the Windham Superior Court. He also redrafted the letter to Ms. Brennan to indicate that she was to leave immediately. Both of these documents were designed to achieve his and his client's goal that Ms. Brennan be removed from the property immediately, in contravention of the statutory procedure. Moreover, he put into place a sequence of actions and communications such that both Gabrielle Glick and Deputy Sheriff Lavalla understood from Respondent that Ms. Brennan was to be gone on that day. Respondent's argument that Ms. Brennan and the Deputy Sheriff had only to read the remainder of the document to understand that this was not a writ of possession, and that a civil action would result if she failed to leave is unavailing. If all Respondent

wanted to communicate to Ms. Brennan was that, if she didn't leave, civil litigation would result, that goal had already been achieved by his first letter dated August 13, 2001, in which he specified the date for Ms. Brennan to leave and went on to say "[a]bsent immediate compliance and confirmation, we will be compelled to resort to appropriate legal relief immediately."

The only interpretation we can put on the Notice to Vacate is that it was intended to do more than the two prior letters, one from Gabrielle Glick followed by Respondent's first letter, and that it was in fact designed to deceive the tenant into believing that this was an order from the court granting possession of the premises, when in fact he knew that Sandra Glick was not yet so entitled under the Vermont Landlord Tenant statutes. Tellingly, Respondent also did nothing to correct any misimpression of the second letter and Notice to Vacate, and stated that he felt "relieved" when Ms. Brennan vacated.

The commentary to Rule 1.2 of the Vermont Rules of Professional Conduct provides some guidance here.

> *Scope of Representation*
>
> Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. . . . in questions of means, the lawyer should assume responsibility for technical and legal tactical issues. . . .
>
> *Criminal, Fraudulent and Prohibited Transactions*
>
> A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. . . . However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct.

Under this Rule, Respondent had the obligation to achieve his client's goals in

accordance with the law. We find no plausible reason for the creation of the Notice to Vacate other than to deceive Ms. Brennan into believing that she was under court order to leave the premises immediately. It was Respondent's duty to follow the law and to counsel his client in the law. Respondent was ultimately in charge of the legal tactics to be employed. He knew that his client's goal was immediate possession of the property, to which she was not legally entitled, and he successfully assisted her in that process. The tactics that he devised were not in accordance with the statute, a fact that Respondent knew. He changed the eviction letter to read "asforthwith" rather than September 9, 2011, and created a pleading in a non-existent court case. If there was confusion, Respondent was responsible for it. He created the situation, instructed the Deputy Sheriff and put the scheme into motion. In doing so, Respondent violated Rule 1.2(d).

Rule 4.1

Rule 4.1 of the Vermont Rules of Professional Conduct provides 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." Respondent's statement to Ms. Brennan in the Notice to Vacate that "This termination takes effect asforthwith," was false and material to his client's objective that Ms. Brennan should vacate immediately. Ms. Brennan had no obligation to vacate the premises "forthwith" nor could she be forced from the property without further legal proceedings. We find that Respondent violated Rule 4.1.

Rule 4.4

Rule 4.4 of the Vermont Rules of Professional Conduct provides that "in representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence

that violate the legal rights of such third person."

Respondent arranged to have Ms. Brennan evicted without following the statutory process and ultimately she left the premises without most of her belongings having been threatened with handcuffing and arrest if she did not leave. This embarrassed and burdened Ms. Brennan, and was in direct violation of her statutory rights as a tenant.

In the case of *In re Rice*, PRB Decision No. 64 (2004) the Hearing Panel found a violation of Rule 4.4, stating that "Respondent's intentional efforts to shield his client's assets from known creditors illustrates the fact that the requirement for zealous representation of one's client is not limitless. A lawyer has obligations to the public and to the integrity of the legal system which cannot be neglected even though to do so might be to the benefit of one particular client."

We find a violation of Rule 4.4 for similar reasons. Respondent's desire to assist a vulnerable client cannot be at the expense of third party no matter how harmful the attorney may believe the situation to be.

Rule 8.4(c)

Rule 8.4(c) of the Vermont Rules of Professional Conduct provides that "[i]t is professional misconduct for an attorney to engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

The Vermont Supreme Court recently clarified the scope of conduct which would violate this rule and the relationship of this Rule to Rule 4.1. The case involved two criminal defense attorneys who, while interviewing a potential exculpatory witness during a recess in a homicide trial, misled the witness about whether they were recording the telephone conversation. *In re PRB Docket Nos. 2007-046 and 2007-047*, 2009 VT

115(2009). The lawyers were charged with violation of Rules 4.1 and 8.4(c) . The Hearing Panel found, and the Supreme Court affirmed, the violation of Rule 4.1, since they had indeed made a false statement of material fact, but declined to find a violation of Rule 8.4(c).

In discussing the two rules the Court said: "[W]e are not prepared to believe that *any* dishonesty, such as giving a false reason for breaking a dinner engagement, would be actionable under the rules. Rather, Rule 8.4(c) prohibits conduct "involving dishonesty, fraud, deceit or misrepresentation" that reflects on an attorney's fitness to practice law, whether that conduct occurs in an attorney's personal or professional life." *Id.* at ¶ 12 (emphasis in original).

Respondent made false and deceptive statements in the August 16, 2001, documents when he wrote that Ms. Brennan's tenancy was terminated "forthwith." The Notice to Vacate that Respondent created and had served on Ms. Brennan by a Deputy Sheriff was designed to look like a document from a Windham Superior Court case. It misrepresented both the status of any litigation, which was then non-existent, and Ms. Brennan's obligation to leave the property which also did not exist at that time.

Thus, Respondent has met the first test of the Supreme Court opinion. In order to find a violation of Rule 8.4(c) we must also find that the conduct reflect adversely on Respondent's fitness to practice law. We believe that Respondent's conduct calls into question his fitness as a lawyer. Respondent created and had served by a Deputy Sheriff documents that he knew had no legal basis and were designed to and succeeded in evicting a tenant without following the statutory process. It is an elementary obligation of an attorney to follow the law. An intentional effort to bypass statutory provisions

designed specifically to protect the rights of the opposing party, here the tenant, cannot but reflect adversely on Respondent's fitness to practice law. An attorney is obligated to know the law, which Respondent did. More importantly the attorney is obligated to follow the law and not to use his training and understanding of the legal process to deceive third parties without that training and understanding. Respondent identified a goal, to evict Ms. Brennan as quickly as possible, and orchestrated the paperwork and the events necessary to obtain his objectives.

The hearing Panel Decisions in the above cited cases *In re PRB Decisions No.109 and 110* looked at several Vermont cases in which a violation of Rule 8.4(c) was found and noted that all of them "involve some level of deliberate and calculated deceit, as well as a selfish motive." p. 12.

In the case of *In re Griffin*, PRB Decision No. 76 (2005) the Hearing Panel found a violation of Rule 8.4(c) when an attorney forged a fee agreement with his client. In *In re Heald*, PRB Decision No. 67 (2004) the attorney failed to file state income tax returns for three years and made false statements on his attorney licensing statement.

Respondent's actions involved a similar level of calculated deceit, and while the motive was not to personally benefit Respondent as in *Griffin* and *Heald*, the actions were designed to benefit his client at the expense of her tenant and we find a violation of Rule 8.4(c).

Rule 8.4(d).

Rule 8.4(d) of the Vermont Rules of Professional Conduct provides that a "lawyer shall not engage in conduct that is prejudicial to the administration of justice."

In the case of *In re Harwood*, PRB Decision No. 83 (2005), affirmed, 2006 VT

15, the attorney was found to have co-mingled and misappropriated client funds over a seven year period. In finding a violation of Rule 8.4(d), the Hearing Panel wrote:

> Rule 8.4(d) . . . . is typically applied to misconduct that interferes with a judicial proceeding or compromises the integrity of the legal profession. Respondent's conduct falls in the latter category. The integrity of the legal system is founded on the premise that attorneys will be truthful and honest in their dealing with courts, with clients and with those whose job it is to ensure that appropriate standards of professional conduct are maintained. *Id.* at 6.

The principle has been applied in a variety of Vermont disciplinary cases. In *In re PRB Decision No. 91* (2006), the attorney used a confidential report from a juvenile proceeding in a separate court case, thereby making public confidential juvenile information. Although he made the disclosure unwittingly, the Hearing Panel found that the disclosure of information concerning a named juvenile was prejudicial to the administration of justice and found a violation of Rule 8.4(d).

In an earlier case, *In re Sunshine*, PRB Decision No. 28 (2001), the attorney was notified by a court that his client's case was to be dismissed if he failed to act. The Hearing Panel found that the attorney's failure to act which resulted in the dismissal of the client's case was prejudicial to the administration of justice.

Respondent's actions here were neither inadvertent as in *Decision No. 91* or a result of failure to act as in *Sunshine*. Respondent intentionally crafted a plan to avoid the clear provisions of the eviction procedure, and his plan was designed to circumvent the very safeguards for tenants contained in the statute. As a result of Respondent's actions Ms. Brennan had no opportunity to present any evidence or defense that she could have offered had she been afforded the protections of the statute. This conduct is prejudicial to the administration of justice and violates Rule 8.4(d).

Rule 8.4(h)

Rule 8.4(h) provides that a lawyer shall not "engage in any other conduct which adversely reflects on his fitness to practice law." We have already found in connection with Respondent's violation of Rule 8.4(c) that his conduct adversely reflected on his fitness to practice law. Fitness to practice is more that competency in the law. It involves a respect for and understanding of the importance of legal procedures established by statute and a willingness to abide by these procedures. In *In re Andres*, 170 Vt. 599 (2000), the attorney was found to have violated Rule 8.4(h) for engaging in a fight outside a bar. A willful failure to file income tax returns has also been found to violate Rule 8.4(h). *In re Massucco*, 156 Vt. 617 (1992).

Respondent's conduct exhibits the same disregard for obligations to follow the law and we find a violation of Rule 8.4(h).

**Order**

The Hearing Panel finds that Respondent has violated Rules 1.2(d), 4.1, 4.4, 8.4(c), 8.4(d) and 8.4(h) of the Vermont Rules of Professional Conduct. A Hearing on the appropriate sanction will be scheduled.

Dated: June 9, 2011 Hearing Panel No. 4

Bruce C. Palmer, Esq., Chair

William Piper, Esq.

Florence Chamberlin