

105 PRB

[Filed 04-Feb-2008]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No 2007.137

Decision No: 105

This matter is before the Hearing Panel pursuant to a stipulation of facts and recommended conclusions of law executed by Disciplinary Counsel and by Respondent and her attorney. The Panel accepts the stipulation and recommendations and orders that Respondent be admonished by Disciplinary Counsel and placed on probation for using funds of one client held in her trust account to cover a check written on behalf of another client in violation of Rules 1.15(d)(2) and 1.3 of the Vermont Rules of Professional Conduct.

Facts

Respondent acted as the closing attorney in connection with a residential home purchase. The buyers' deposit of \$10,000.00 was being held by the realtor pending closing. At the closing on November 30, 2006, Respondent generated the standard form required by the Department of Housing and Urban Development (HUD statement). She also generated a disbursement statement which noted the funds she needed to collect in order to close the transaction. This included funds from the purchasers, a bank loan and the deposit held by the realtor.

The lending institution and the buyers wired the necessary funds to Respondent's trust account. At the closing, Respondent made a checkmark on the disbursement statement indicating that she had received the deposit, but in fact she closed the transaction without

collecting the deposit. Respondent issued checks on her trust account in the total amount of \$524,412.12, but had collected only \$514,412.12.

Respondent did not learn of the error until January 2007, when a bank employee called to inform her that checks had been drawn against insufficient funds on her account. None of the checks bounced since funds in the account belonging to other clients were used to fund the transaction. Respondent had never sought nor received permission to use funds belonging to clients other than the buyers to fund this transaction. The bank also notified Disciplinary Counsel of the overdraft.

Upon learning of the problem Respondent contacted the buyers and the realtor and arranged to have the deposit sent to her which she then deposited in her trust account.

Respondent was admitted to practice in 1995 and has no prior discipline. Respondent has agreed to submit to an audit of her trust accounting system by an accountant selected by Disciplinary Counsel.

Conclusions of Law

Rule 1.15(d) of the Vermont Rules of Professional Conduct provides that:

A lawyer shall not use, endanger, or encumber money held in trust for a client or third person for purposes of carrying out the business of another client or person without the permission of the owner given after full disclosure of the circumstances.

In this case Respondent collected \$10,000 less than the amount she needed to fund the real estate closing. Nevertheless, she issued checks drawn on her trust account for the full amount shown on the HUD Statement. None of the checks bounced because money in her trust

account belonging to other clients was used to carry out the buyers' business. Respondent did not have the permission of these other clients to use their funds in this way.

Rule 1.3 of the Vermont Rules of Professional Conduct requires that an attorney act with reasonable diligence in representing a client. Respondent had a duty to collect the full amount needed to fund the closing.

We find that Respondent's conduct violates Rules 1.15(d)(2) and 1.3 of the Vermont Rules of Professional Conduct.

Sanction

In determining the sanction in this matter it is appropriate to apply the ABA Standards for Imposing Lawyer Discipline. *In re Warren*, 167 Vt. 259 (1997). This is a two step process. It is first necessary to arrive at a presumptive sanction by looking at the duty violated, the lawyer's mental state and the presence of any actual or potential injury.

Respondent violated her duty to act with reasonable diligence in representing her clients and her obligation not to use funds of one client to carry out the business of another. Her mental state was one of negligence and there was no actual harm, though there was the potential for harm had Respondent not been able to collect the deposit money from the realtor. Section 4.14 of the *ABA Standards* provides that "[a]dmonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client." Similarly, Section 4.44 provides that "[a]dmonition is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client."

Under both sections of the Code, admonition is the appropriate sanction. We now look to aggravating and mitigating factors to determine if the sanction should be modified. There is one mitigating factor, the absence of prior discipline, *ABA Standards, §9.32(a)*, and no aggravating factors.

We find that admonition is the appropriate sanction and accept the recommendation of the parties. We also accept the recommendation for probation which shall be under the following conditions.

Probation

1. Probation shall be for a period of one year commencing on the date this decision becomes final.
2. The probation shall be supervised by a probation monitor acceptable to Disciplinary Counsel.
3. During the period of probation Respondent shall submit to an audit of her trust accounting system conducted by an accountant selected by Disciplinary Counsel.
4. All expenses of probation shall be the responsibility of Respondent.
5. Respondent shall accept and implement all reasonable suggestions offered by the accountant.
6. Respondent shall permit Disciplinary Counsel to discuss the results of the audit and any recommendations with the accountant.
7. Respondent's probation shall be renewed or terminated after one year as provided in A.O. 9, Rule 8(A)(6).

Order

Respondent shall be admonished by Disciplinary Counsel for violation of Rules 1.3 and 1.15(d)(2) of the Vermont Rules of Professional Conduct and shall be placed on probation in accordance with the terms set forth above.

Dated: February 4, 2008

Hearing Panel No. 4

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