121 PRB

[Filed 6/4/2009]

STATE OF VERMONT

PROFESSIONAL RESPONSIBILITY BOARD

In Re: Alan Sheredy, Esq.

PRB File No. 2008.139

Decision No. 121

The parties have filed a Stipulation of Facts and Joint Recommendations as to Conclusions of Law and Sanctions. Respondent has waived certain procedural rights including the right to an evidentiary hearing. The Hearing Panel accepts the stipulation and recommendations and publicly reprimands Respondent for failure to reconcile his trust account resulting in comingling of his funds with those of his clients in violation of Rules 1.15 and 1.15A of the Vermont Rules of Professional Conduct.

Facts

Respondent is a solo practitioner who focuses on real estate work. He was admitted to the Vermont Bar in 1979. In November of 2007, Respondent's trust account was chosen to be

audited as part of the audit program conducted by Disciplinary Counsel. A Certified Public Accountant performed the audit in January of 2008 and as a result of the audit, Disciplinary Counsel opened an investigation into Respondent's trust account management.

In the course of the investigation, Respondent admitted that since 1978, it has been his practice to "maintain a positive balance" of his own funds in his trust account to provide a cushion against the various errors that, in his experience, can occur in the process of closing real estate transactions. On the date of the audit, there was approximately $1200 of Respondent's own money in his trust account.

Respondent also admitted that for approximately ten years, not all deposits to his trust account were properly recorded in his trust account ledger, and at the time of audit, the ledger balance was approximately $4000 less that the actual balance in the trust account.

Over the years, Respondent had received and reviewed his monthly trust account statements, but he did not compare or reconcile his bank statements to his trust accounting system. Had he made the reconciliation, he would have realized that the balance on the bank statement was more than the balance reflected in his trust account ledger, and he would have realized that some deposits had not been properly recorded in his ledger.

Respondent cooperated with the audit and Disciplinary Counsel's investigation and, at the suggestion of the CPA who performed the audit, he has made several changes to his trust accounting system. He has also reconciled his trust account.

Neither the audit nor the investigation revealed any evidence to suggest that Respondent intended to misuse client funds or to put client funds at risk. Respondent has no previous

discipline and there is no evidence to suggest that he had a dishonest or selfish motive for maintaining his own funds in his trust account and for failing to reconcile his bank statements to his ledgers.

While the investigation was pending, Disciplinary Counsel received a notice of overdraft to the trust account. This did not result from unethical conduct and in the past six months there have been no other overdraft notices.

Conclusions of Law

Rules 1.15 and 1.15A require a lawyer to make timely reconciliations of his or her trust account. *PCB Decision No. 61 (Jan. 2004).* By his own admission, Respondent failed to reconcile his trust account and failed to reconcile the bank statements to his ledgers for a period of ten years.

Respondent also violated the provisions of Rule 1.15 when he comingled his own funds with those of his clients in order to provide a cushion in real estate transactions. *In re Farrar*, 2008 VT 31 (March 2008).

Sanction

In reaching our decision to accept the recommended sanction, we have followed the example of previous panels and the Supreme Court and have looked to both the ABA Standards for Imposing Lawyer Sanctions and Vermont case law. *See In re Andres*, 117 Vt. 511, 513 (2004).

To arrive at a presumptive sanction under the ABA Standards, we look first to the duty violated, the lawyer's mental state and any actual or potential injury. This sanction can then be modified by consideration of aggravating or mitigating sanctions. *ABA Standards § 3.0.*

Duties Violated

Respondent had a fundamental duty to protect and preserve his client's property. In order to meet this obligation, he had to maintain his client's funds wholly separate from his own, and to maintain complete, up-to-date and accurate records for each client for whom he was holding funds. This Respondent failed to do.

Injury

While there was no misappropriation of client funds in this case, there was the potential for serious injury. By co-mingling his funds with his client's funds, he created a situation whereby his creditors could have attached client funds, or he could have inadvertently used client funds for his own purposes. *Farrar,* 2008 VT ¶7-8.

In addition, "lawyer misconduct in handling and protecting client trust accounts does injure both the public at large and the profession by increasing public suspicion and distrust of lawyers." *In re Anderson,* 171 VT 635, 769 (2000).

Respondent violated his duty to protect client funds and caused potential injury to his clients and actual injury to the profession. In this situation, the ABA Standards provide that the presumptive sanction is suspension. "Suspension is generally appropriate when a lawyer knows

or should know that he is dealing improperly with client property and causes . . . potential injury to a client." *Section 4.12.*

Having arrived at a presumptive sanction, we now look at aggravating and mitigating factors to determine whether suspension is indeed the appropriate sanction. In mitigation, Respondent has no prior disciplinary offenses, has cooperated with the investigation, and had no dishonest or selfish motive. In aggravation, he has substantial experience in the practice of law, and the misconduct was ongoing for several years.

We now turn to Vermont case law, and it is here that we find the strongest support for our decision to accept the recommended sanction of public reprimand. The facts of this case are strikingly similar to *In re Farrar*, 2008 VT 31, a case in which the Supreme Court overruled a Hearing Panel decision imposing admonition and imposed public reprimand.

Like Respondent, Attorney Farrar intentionally maintained a balance of his own funds in his trust account, in his case as a kind of savings account. There was the same potential for injury as in the present case and the aggravating and mitigating circumstances were very similar. Attorney Farrar had no selfish or dishonest motive and cooperated with the disciplinary process. Similarly, he had substantial experience in the practice of law and the co-mingling had been going on for a number of years.

In *Farrar* the Supreme Court stated: "On balance, we conclude that the mitigating factors outweigh the aggravating factors, and that a public reprimand is the appropriate sanction in this case." *Id at ¶12.* We find nothing to distinguish the present case from *Farrar* and accept the recommendation for public reprimand.

Order

Attorney Alan Sheredy is hereby PUBLICLY REPRIMANDED for violation of Rules 1.15 and 1.15A of the Vermont Rules of Professional Conduct.

Dated: June 4, 2009

Hearing Panel No. 1

/s/

_____

Lawrence Miller, Esq., Chair

/s/

_____

Susan Ritter, Esq.

/s/

_____

Diane Drake