STATE OF VERMONT

PROFESSIONAL RESPONSIBILITY BOARD

In Re: John Darcy Toscano, Esq.

PRB File No. 2009.114

Decision No. 126

The parties filed a Stipulation of Facts and the matter was heard on the issue of violation of the Code of Professional Responsibility and sanctions on July 22, 2009, before Hearing Panel No. 4 consisting of Bruce C. Palmer, Esq., William Piper, Esq. and Florence Chamberlin.

The Hearing Panel accepts the stipulated facts and reprimands Respondent for permitting a bank owed money by one of his clients to make automatic withdrawals from his trust account and for permitting the funds of one client to be used to carry out the business of another client in violation of Rules 1.15(d)(1) and 1.15(d)(2) of the Vermont Rules of Professional Conduct. In addition Respondent is placed on probation for a period of one year.

Facts

Respondent represented KR in connection with credit card debt which she owed to the Bank of America (BOA). In October 2008, Respondent negotiated an agreement under which

BOA accepted $3200.00 to settle an account on which his client owed $20,977.58 and $2100.00 on an account on which she owned $13,490.96. KR was to make four monthly payments of $800.00 on the first account and four monthly payments of $525.00 on the second account. Both agreements with BOA provided that in the event the payments were not made as scheduled, the entire balance, initially $34,468.54, would become due immediately.

At KR's request it was agreed that she would pay the installments to Respondent and he would pay BOA. Respondent made arrangements with BOA to make automatic withdrawals from his client trust account in the amount of the agreed monthly installments on the two credit card account. This arrangement between Respondent and BOA was oral. There was never a written agreement between Respondent and BOA governing or limiting BOA's access to Respondent's trust account.

On November 24, 2008, Respondent received a check on the amount of $1475.00 from KR. She informed him that she had settled a third account with BOA and had agreed to make monthly payments on that account as well. She told Respondent that she had instructed BOA that the payments on the third account would also pass through Respondent's account. The agreement on the third BOA account was confirmed by a letter from BOA to KR dated December 7, 2008. There was no communication between BOA and Respondent. On this third account, BOA agreed to accept $1930.00 on an outstanding balance of $12,852.27.

On December 3, 2008, BOA withdrew $800.00 from Respondent's trust account. On December 5, 2008, BOA withdrew $160.00, which was for the third debt which KR had settled directly with BOA. On December 23, 2008, BOA withdrew $525.00 from Respondent's trust account.

BOA did not contact Respondent before any of these withdrawals. Between November 24 and December 23, 2008, Respondent deposited $1475.00 in his trust account on behalf of KR. During that same period BOA withdrew $1485.00 from his trust account. In all, there were nine separate occasions between November 3, 2008, and January 5, 2009, when BOA made withdrawals from Respondent's client trust account without notifying him and without confirming that funds of KR were indeed in the account. The $10.00 discrepancy was a result of the fact that KR thought that BOA would withdraw $150.00 in payment of the third account when in fact it withdrew $160. This should have resulted in an overdraft of $10.00, when in fact the overdraft was $21.98. Thus, even factoring in KR's $10.00 mistake, Respondent's trust account was short $11.98 of her money. At the hearing Respondent was unable to explain this discrepancy in his trust account.

Respondent cooperated fully with Disciplinary Counsel's investigations into the overdrafts on his trust account. Respondent was admitted to practice in Massachusetts in 1980 and in Vermont in 2004. He has no prior discipline.

Conclusion of Law

In discussing the responsibilities of attorneys, the Vermont Supreme Court stated that "protecting client property is a fundamental principle." *In re Anderson*, 171 Vt. 632, 635, (2000) (mem.).

To some degree this principle is codified in Rule 1.15(d) of the Vermont Rules of Professional Conduct which provides as follows:

(d) Except as provided in paragraph (e):

> (1) a lawyer shall not disburse funds held for a client or third person unless the funds are "collected funds." For purposes of this rule, "collected funds" means funds that a lawyer reasonably believes have been deposited, finally settled, and credited to the lawyer's trust account.
>
> (2) 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.

Disciplinary Counsel asks us to conclude that Respondent's arrangement with BOA is a *per se* violation of Rule 1.15(d)(1). We are inclined to agree with him. Respondent's arrangement with BOA allowed BOA unfettered access to his trust account.

This reality is clearly underscored by the fact that when BOA settled the third account with KR, BOA began withdrawing money from Respondent's trust account before it had confirmed the arrangement by letter to KR and before KR discussed the matter with Respondent. By virtue of the one authorization Respondent gave to BOA, the bank was able to access his trust account according to the planned settlement with KR and without regard to whether she had conveyed the funds to Respondent. As a result Respondent had no control over when BOA accessed his account and for how much. This is in direct contravention to Rule 1.15(d)(1) which requires a reasonable belief on the part of the attorney that the funds have been

credited to his account prior to disbursement. In this case disbursement was scheduled without regard to the presence of collected funds.

Respondent also violated Rule 1.15(d)(2). When BOA took the final payment of $160 on November 29, 2008, the overdraft should have been $10.00, which was the amount that KR's check to Respondent was short. In fact, the overdraft was $21.98. Respondent could offer no explanation for the discrepancy of $11.98. It is, however, clear that $11.98 of KR's money had been used by Respondent for other clients without KR's express consent in violation of this Rule.

Sanctions

In determining the appropriate sanction we look to the ABA Standards for Imposing Lawyer Sanctions and Vermont case law. *In re Warren*, 167 Vt. 259, 261 (1997); *In re Berk*, 157 Vt. 524, 532 (1991).

The ABA Standards provide a two step process. In order to arrive at a presumptive sanction, we first consider the duty violated, the lawyer's mental state and the actual or potential injury caused by the misconduct. We then look to the presence of aggravating and mitigating factors to determine whether the presumptive sanction should be modified, ABA Standards, § 3.0.

<u>The Duty Violated</u>

Respondent had a duty to safeguard the funds of KR and of his other clients and to refrain from using one client's funds for the benefit of another. He also had the underlying duty to

maintain his client trust account in a safe and secure manner. His arrangement with BOA made this impossible.

Respondent's Mental State

Respondent knew that he had made the arrangement with BOA to access his trust account, but it did appear from his testimony that he did not have the intention to put other client's funds at risk. While his actions may have been naïve and misguided, we cannot find that his mental state was other than one of negligence. This is actually underscored by the fact that despite the complaint of misconduct and despite his preparation for hearing, Respondent had not, as of the date of the hearing in this matter, cancelled BOA's access to his trust account.

Injury

Respondent's misconduct caused actual injury and had the potential to cause significant injury. Though there was no harm to a client, the Vermont Supreme Court has made it clear that " ' lawyer misconduct in handling and protecting client trust account does injure both the public at large and the profession by increasing public suspicion and distrust of lawyers.''' *In re Farrar*, 2008 VT 31 (mem.), 183 Vt. 592, 594 (quoting *In re Anderson*, 171 Vt. 632, 635 (2000) (mem.).

Of no less significance is the fact that there was the real potential for harm here. We realize the amounts of money actually involved here are very small, but we do not consider this to be relevant for two important reasons. First, it was only happenstance that KR shorted Respondent by only $10.00. Had it been for the entire amount due that month, the shortfall would have been in the hundreds of dollars. Second, had BOA then called the entire balance of

one or more of the accounts, the shortfall would have been in the thousands of dollars. Had there been money belonging to other clients in the account at the time, their funds would have been at risk. Thus there was the potential for significant injury.

On arriving at the presumptive sanction, we consider two sections of the ABA Standards. Section 4.13 provides that public reprimand "is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client." Section 4.12 provides that suspension "is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client." While we have found that Respondent's mental state was one of negligence, we do believe that an attorney with his years of experience should have known that the arrangement he made with BOA could put client funds at risk, especially after KR's third settlement when BOA removed funds from his account before he knew of the agreement. Thus, under the ABA Standards we believe that a presumptive sanction of either suspension or reprimand could be appropriate.

We turn now to the aggravating and mitigating factors. In aggravation, Respondent has substantial experience in the practice of law. *ABA Standards, 9.22(a)*. In mitigation, he has no prior disciplinary record, *ABA Standards, 9.32(a);* he had no selfish or dishonest motive, *ABA Standards, 9.32(b),* and has cooperated with the disciplinary process, *ABA Standards, 9.32(e).* The application of these factors does not offer a compelling argument for either suspension or reprimand and so we turn to prior Vermont cases.

In the past few years the treatment of trust account violations has become more stringent, and we therefore focus on these cases which fall into three categories. The first is the single act

of negligence with no harm to clients which usually results in admonition. The second line of cases result in reprimand and involve commingling of the attorney's funds in the trust account for a longer period of time, again with no harm to clients. In the third category are the disbarment cases, usually embezzlement or use of client funds for the lawyer's own purposes. These cases involve criminal activity and usually harm to clients and we do not consider them here.

Respondent argues that admonition is the appropriate sanction here, but we find his misconduct to be more serious than that seen in the recent admonition cases, which in large part arise out of inattention to banking details in real estate transactions.

In *PRB Decision No 93* (2006), the attorney made disbursement of closing funds after the three day rescission period without checking with her bank to determine if the funds had been wired.

In *PRB Decision No. 105*. (2008), another real estate closing case, the attorney prepared the HUD closing statement and a list of funds that needed to be collected from various sources. The realtor's deposit was on the list and checked off but the attorney failed to get the check from the realtor and as a result there were insufficient funds of that client to cover the checks written. The error was discovered, funds deposited and no client lost money.

PRB Decision No 115. (2008) involved a sole practitioner with poor bookkeeping practices which resulted in the comingling of funds. No client lost money and probation was imposed to insure that the trust account was maintained properly in future.

In PRB Decision 120 (2009) the attorney failed to reconcile his trust account. He routinely made input errors in a computer program he used to prepare settlement statements which resulted in his trust account being $11,000 short. The attorney made the funds up from his own monies.

The two most recent cases in which reprimand was imposed are closer to the present case. In *In re Farrar, supra*, the attorney was reprimanded for placing

his own funds in his trust account, using it as a type of savings account. As in the present case, no client was injured, but there was the potential for injury to clients and actual injury to the public perception of lawyers. In *In re Sheredy*, PRB Decision 121 (2009), the attorney kept his own funds in his trust account to provide cushion against errors. He had reviewed his trust account statements but did not reconcile them to his bank statements.

In considering the above cases, we believe that reprimand is the appropriate sanction in this matter. We do, however, have concerns about Respondent's on-going management of his trust account and his banking practices, and we therefore include a one year period of probation during which time Respondent shall reconcile his trust account with his client ledgers to determine the source of the discrepancy and shall put in place proper trust account management practices.

Order

John D. Toscano is hereby reprimanded for violation of Rules 1.15(d)(1) and 1.15(d)(2) of the Vermont Rules of Professional Conduct and is placed on probation on the following terms:

Probation

1. Respondent is placed on probation as provided in Administrative Order 9, Rule 8A(6), for a minimum term of twelve months, which term may be renewed for an additional period as provided by A.O.9 Rule 8(A)(6)(a). The term of probation shall commence on the date which this decision becomes final.
2. At the commencement of probation, Respondent shall select as a probation monitor either a Certified Public Accountant or other person with appropriate accounting skills who is acceptable to Disciplinary Counsel as required by A.O.9 Rule 8(A)(6)(b). In the event that the approved probation monitor shall become unavailable during the term of probation, Respondent shall submit an alternate name to the Office of Disciplinary Counsel for approval as a substitute.
3. Respondent shall reconcile his trust account with his client ledgers in a manner approved by the probation monitor and shall determine the source of the discrepancy brought to light in this matter.
4. Respondent shall establish acceptable trust account management procedures as recommended by the probation monitor.
5. The probation monitor shall report progress to Disciplinary Counsel on a quarterly basis.
6. Probation may be terminated after twelve months by the filing of an affidavit pursuant to A.O.9 Rule 8 (A)(6)(b).
7. All expenses of probation shall be borne by Respondent.

Dated: November 4, 2009 Hearing Panel No. 4

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Bruce C. Palmer, Esq., Chair

/s/

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William Piper, Esq.

/s/

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Florence Chamberlin