

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2013-049

Decision No. 163

The parties have filed a Stipulation of Facts, Proposed Conclusions of Law and a Recommendation for Sanctions pursuant to Rule 11(D)(1) of Administrative Order 9. The Respondent has waived certain procedural rights including the right to an evidentiary hearing. The panel accepts the stipulated facts and recommendations and orders that Respondent be admonished by Disciplinary Counsel for keeping in his trust account more money than necessary to pay bank fees, resulting in comingling, and for failure to promptly deliver funds client were entitled to receive in violation of Rules 1.15(a)(1), 1.15(b) and 1.15(d) of the Vermont Rules of Professional Conduct.

Facts

Respondent is licensed to practice in Vermont, having been admitted in 1986. In June of 2012, Respondent's trust account was selected for audit as part of the audit program conducted by Disciplinary Counsel. A Certified Public Accountant conducted the audit, checking for compliance with Rules 1.15 through 1.15B of the Rules of Professional Conduct, and provided a written report to Disciplinary Counsel. As a result of the audit, Disciplinary Counsel opened an investigation into Respondent's trust account management.

The report noted that:

There were approximately \$5000 in outstanding checks that were at least five years old, and several small client ledger balances in the trust accounting system that appear to have been left over from closed transactions.

The report also noted that:

The firm maintained a balance of \$1,000 in the Citizens bank trust account, based on recollection that it had been told by a bank representative when the account was opened that \$1,000 was the minimum balance required to maintain the account.

The report further stated:

In our opinion, except for the material noncompliance described above, the Attorneys have complied, in all material respects, with the aforementioned requirements during the period of October 1, 2009 through July 25, 2012.

Upon receipt of the auditor's report, Respondent took steps to bring his trust account into compliance.

Respondent did perform regular account reconciliations and made periodic efforts to resend uncashed checks, but was unaware of the requirement to file annual unclaimed property reports of the excess balances in the trust account.

Respondent, through his firm, applied for and was accepted to take part in the Voluntary Compliance Program under the Unclaimed Property Division of the Office of the State Treasurer.

Most of the outstanding checks were for small amounts (\$7 to \$150) which have been entered in the Voluntary Compliance Program, but more than half of the \$5000 was the result of three timely issued but uncashed checks: \$2939 in two checks to a mortgage broker in connection with the same transaction and a \$112 reimbursement to a client. These checks were reissued and the payees have confirmed to Respondent's firm verbally that they will be cashing the checks.

Respondent instructed that a check for \$950 be written to the firm from the trust account, leaving a balance of \$50 to cover any fees that may be assessed against the account.

Respondent has advised Disciplinary Counsel that he and the firm have instituted new policies to ensure that in the future their trust account will comply with the Rules of Professional Conduct.

- a. Prior to closing a real estate file, a zero balance will be verified. If funds remain, they will be returned to the appropriate party, most often at closing.
- b. Currently, as in the past, all IOLTA accounts are reconciled on a monthly basis. This will continue and any outstanding checks will be reviewed.

Respondent's client's funds were never improperly used or in jeopardy. There is no evidence that any client or third party was injured as a result of these violations.

The following mitigating factors are present. Respondent has no prior disciplinary record; he had no selfish or dishonest motive; he has made a timely and good faith effort to rectify the consequences of the misconduct and he has cooperated with the disciplinary proceedings. Respondent's substantial experience in the practice of law is an aggravating factor.

Conclusions of Law

The parties have joined to recommend that we find violation of Rules 1.15(a)(1), 1.15(b) and 1.15(d) of the Vermont Rules of Professional Conduct.

Rule 1.15(a) provides that:

A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in accordance with Rules 1.15A and B. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of six years after termination of the representation.

Rule 1.15(b) provides that:

A lawyer may deposit the lawyer's own funds in an account in which client funds are held for the sole purpose of paying service charges or fees on that account, but only in an amount necessary for that purpose.

Respondent kept \$1000 of the firm's money in the trust account in a mistaken belief that his bank required it. In so doing he commingled his funds with those of his clients in violation of Rule 1.15(a)(1). He violated Rule 1.15(b) by keeping more of his firm's money in the trust account than necessary to pay for bank fees.

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

Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

Respondent had in his trust account approximately \$5000 in outstanding checks that were at least five years old and several small client ledger balances in the trust accounting system that appear to have been left over from closed transactions. He violated Rule 1.15(d) by failing to promptly deliver these funds to the clients entitled to receive them.

Sanctions

We accept the parties' recommendation of admonition by Disciplinary Counsel which is consistent with prior Vermont cases involving similar trust account violations.

The most recent Vermont Supreme Court case on trust account violations is *In re Farrar* 2008 VT 31 (2007). In this case Respondent deposited \$200 per month into his trust account as a type of savings account which he drew out periodically to pay office expenses. The Hearing Panel found a violation of

Rule 1.15 and issued a private admonition. *In re Farrar*, PRB Decision No. 101 (2007). The Supreme Court imposed public reprimand stating that “[c]omingling personal property with client property is a serious offense because of the likely negative consequences that may result to an attorney’s clients.” *Id.*

The court also noted that

While recognizing that the respondent did not act selfishly, we will not minimize his infraction merely because he was unaware that his acts violated the rules of professional conduct. *Id.*

Since the Supreme Court’s decision in *Farrar*, there have been a number of Hearing Panel decisions involving trust account violations. The decision in *In re PRB Decision No. 138* (2011) sums up some of these decisions.

The Vermont Court in *Farrar* did not characterize comingling as a strict liability offense, but the language of the decision makes it difficult to discern a fact pattern not resulting in discipline in which the commingling rule was not followed to the letter.

This conclusion is reinforced in looking at a series of trust account cases decided after *Farrar*. All resulted in private admonition and all involved negligence in handling trust accounts.

In re PRB Decision No 93 (2006) arose out of a real estate transaction involving a refinancing. There was a three day right of rescission, and at the expiration of the three days the attorney made disbursement of the funds without checking with her bank to determine if the funds had been wired. They had not been due to a bank error. The error was corrected and no injury resulted.

In re PRB Decision No. 105 (2008) is 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.

The attorney in *In re PRB Decision No 129*, (2010) maintained several trust accounts for real estate closings at the behest of the banks he worked for. There were two separate complaints here, and in each case the closing funds were deposited in one trust account and the checks for disbursement at the closing were drawn from another trust account. As a result in both cases the trust accounts were overdrawn and Disciplinary Counsel received the notice of overdraft. No client was harmed and the attorney made changes to his trust accounting practices.

Since this decision there have been two additional trust account cases decided by hearing panels.

In *In re Hibbits*, PRB Decision No. 145 (2011), the attorney a sole practitioner without a bookkeeper, came to Disciplinary Counsel’s attention after a check was returned for insufficient funds. She had no real trust account records and kept her own funds in the trust account. She received a public reprimand, and the panel ordered a one year probation to ensure that she continued to maintain adequate records.

In *In re PRB Decision No. 147* (2012), the hearing panel imposed an admonition. The attorney wrote checks on his trust account having been assured that the money had been wired but without checking with his own bank to verify receipt of the funds. As a result of a bank error the funds were not placed in Respondent’s account resulting in funds of other clients being used to cover the issued checks.

In looking at the above cases we find both admonition and reprimand imposed in cases involving comingling and failure to follow strictly the trust accounting rules. In determining whether to accept the parties recommendation for admonition we look to how the facts in this case compare to the above cases. The Panel finds that the present facts are closer to those in the admonition cases cited and that Respondent's conduct was not as serious as the two cases where reprimand was imposed.

Unlike *Hibbitts*, Respondent reconciled his accounts on a regular basis and unlike *Farrar*, while he had his own money in the trust account thinking it was required by the bank, he did not use his trust account on a regular basis for his own business purposes.

There are also several mitigating factors present. Respondent has no prior disciplinary record, *ABA Standards for Imposing Lawyer Sanctions*, §9.32(a), he had no selfish or dishonest motive, *ABA Standards* §9.32(b), he has made a timely and good faith effort to rectify the consequences of the misconduct, *ABA Standards* §9.32(d), and he has cooperated with disciplinary counsel, *ABA Standards* §9.32(e). The one aggravating factor, his substantial experience in the practice of law, *ABA Standards* §9.22(i), is not sufficient to increase the recommended sanction.

We must also consider Vermont Supreme Court Administrative Order 9 Rule (8)(A)(5)(b) which provides that admonition is appropriate “[o]nly in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer.”

While we are reluctant to classify any violation of the trust account rules as minor misconduct, in this case Respondent's client's funds were never improperly used or in jeopardy, there was no injury to any client, Respondent has changed his trust account management procedures to comply with the law and the panel believes that there is no likelihood of repetition.

Order

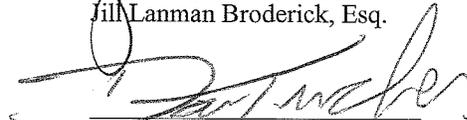
Based on the foregoing the panel orders that Respondent be admonished by Disciplinary Counsel for violation of Rules 1.15(a)(1), 1.15(b) and 1.15(d) of the Vermont Rules of Professional Conduct.

Dated: 10/17/13

Hearing Panel No. 4


William Piper, Esq., Chair


Jill Lanman Broderick, Esq.


David Tucker

