

STATE OF VERMONT  
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2014.103

Decision No. 172

The parties have filed a Stipulation of Facts, Proposed Conclusions of Law and a Recommendation for Sanctions. 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 violation of Rule 1.15(f) of the Vermont Rules of Professional Conduct for disbursing funds in connection with a real estate closing without first confirming that a wire transfer had reached his account.

**Facts**

Respondent was admitted to practice in Vermont in 1983 and has a substantial real estate practice. In November of 2013, Respondent handled a real estate closing in his office for a Vermont lender. The lender was to wire the loan proceeds to Respondent's client trust account and sent him a message stating that the wire was being sent. Respondent did not confirm with his bank that the wire had been received. He conducted the closing as scheduled and issued checks on his trust account to disburse the funds for the closing.

Five days later, Respondent received a call from his bank notifying him that his trust account was overdrawn. He determined that the funds for the closing had not in fact been received. He contacted the lender and learned that the lender had forgotten to

submit the wire request to its accounting department. The lender corrected the oversight within thirty minutes of being notified by Respondent.

Respondent's usual practice is to have his office assistant contact the lender prior to closing to confirm that the funds have been received. His assistant was out sick that day and a retired former employee covered for her. The former employee had worked for Respondent for five years and was familiar with the procedure of contacting the bank, however, she forgot to contact the bank and Respondent forgot to remind her.

Respondent has handled approximately six thousand real estate closings during his career including about one thousand with this particular lender. He recalls only one other instance when this lender forgot to send a wire and in that instance his office checked prior to the closing, discovered the error and closed after the funds were actually received.

In December of 2013 Disciplinary Counsel received a notice from Respondent's bank that his trust account was overdrawn. The notice identified three checks that were presented against insufficient funds. The bank honored the checks and reported the overdraft. No client lost funds as a result of the overdrafts.

There are a number of mitigating factors. Respondent has no prior disciplinary record, he has cooperated with the disciplinary proceedings, he had no selfish or dishonest motive and has expressed remorse. The only aggravating factor is his substantial experience in the practice of law.

### **Conclusions of Law**

Rule 1.15(f) of the Rules of Professional Conduct provides that . . .

- (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 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.

Respondent violated Rule 1.15(f)(1) rule when he disbursed funds from his trust account without first confirming that the wire transfer had indeed reached his account. He violated Rule 1.15(f)(2) when he disbursed funds without confirming that they had been received which resulted in funds of other clients being used to cover the checks for the real estate closing without the permission of those clients.

Prior hearing panels have addressed the failure to confirm receipt of wired funds and have found a violation of these rules. In *In re PRB Decision No. 93* (Aug. 9, 2006), the funds were not wired due to failure on the part of the bank. The panel wrote “[a]t a minimum this rule requires that an attorney check with his or her bank to determine whether an anticipated wire of funds had actually occurred.”

In a later case, *In re PRB Decision No 147* (Jan.6, 2012), the attorney, as in the present case, received confirmation from the sending bank that the wire had been sent. Due to bank error the funds were not sent, the attorney failed to check with his own bank and funds were disbursed resulting in checks written on funds of other clients without their permission in violation of the rule.

These cases make it plain, and we confirm, that it is essential for an attorney to confirm receipt of funds in his or her trust account before making disbursements. Not to do so violates Rule 1.15(f).

### **Sanction**

The parties have joined to recommend that Respondent be admonished by

Disciplinary Counsel and we agree. It is consistent with both the ABA Standards for Imposing Lawyer Sanctions and prior Vermont cases.

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.”

Respondent was negligent in failing to insure that his office staff confirm with the bank that the wired funds had been received. There was no actual injury to clients and very little potential for injury.

Admonition is also consistent with prior Vermont cases. In both of the cases cited above, *In re PRB Decision No. 93* (Aug. 9, 2006), and *In re PRB Decision No 147* (Jan. 6, 2012), the attorneys received notice from the sending bank that the wire had been processed but failed to confirm with their own banks that the funds had been received. As in the present case, funds of other clients were used to cover the checks written at the closing, and each of the banks quickly corrected the error by sending the required funds. Both of these cases resulted in admonition by Disciplinary Counsel.

There is one other similar case, *In re PRB Decision No. 62*, (Jan. 21, 2004) which also involved a real estate closing. The attorney confirmed that the funds had been wired, but since he did not check with his own bank he was unaware that the funds had been intercepted by the Office of Foreign Asset Control. Checks were written at the closing which resulted in funds of other clients being used for that transaction.

This panel also considered Administrative Order 9, Rule 8(A)(5) which provides that admonition is appropriate only “in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and where there is

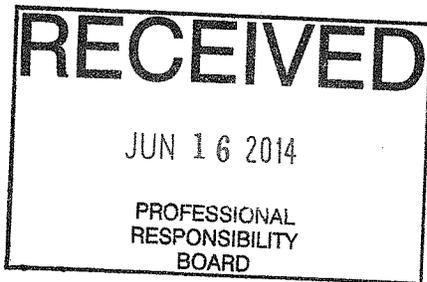
little likelihood of repetition by the lawyer.” Like this panel we consider that “an attorney’s failure to safeguard client funds is always a serious matter,” and we are reluctant to consider any failure to adhere strictly to the trust account rules to be “minor misconduct.” We do, however, believe that there was no real potential for harm to any client in the present matter, nor do we believe that there is any likelihood of repetition by the attorney, and for these reasons we conclude that the misconduct falls within A.O. 9 Rule 8(A)(5).

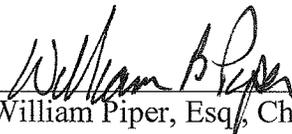
**Order**

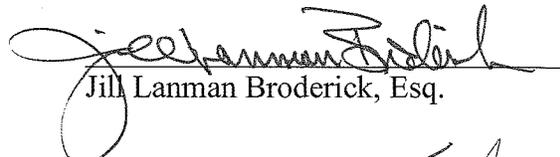
Respondent shall be admonished by Disciplinary Counsel for violation of Rule 1.15(f) of the Vermont Rules of Professional Conduct.

Dated: 6/16/14

Hearing Panel No. 4



  
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William Piper, Esq., Chair

  
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Jill Lanman Broderick, Esq.

  
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David Tucker