

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2014.038

Decision No. 177

The parties have filed a Stipulation of Facts, Recommended 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 the recommended conclusions of law and orders that Respondent be admonished by Disciplinary Counsel for violation of DR 6-101-101 and DR 9-102(B)(4) of the Code of Professional Responsibility and Rule 1.15(d) (previously designated Rule 1.15(b)) of the Rules of Professional Conduct for failure to promptly deliver funds that were owed to a client.

Facts

Respondent was admitted to practice in Vermont in 1979 and is currently admitted to the Vermont Bar. The misconduct in this matter occurred in 1982, but was not discovered by Respondent until mid-2014 and was self reported to Disciplinary Counsel.

The issue arose out of a real estate transaction that took place in 1982 shortly after Respondent had opened his own solo practice. He represented the seller of an undeveloped parcel of land. At the time of the closing Respondent escrowed approximately \$1000 in his trust account to comply with the Vermont Land Gains Tax law. Under the law, if the buyer built a primary residence on the property within two years of closing there would be no tax due and the escrowed funds would be paid to the

seller, Respondent's client. If the buyer did not build a primary residence within the two year period, the tax would be due and the escrowed funds would be sent to the Vermont Department of Taxes. As holder of the escrowed funds, Respondent had to wait for two years after the closing to determine whether the buyer had built a primary residence within the applicable time period.

In 1987, five years after the closing, Respondent learned that the buyer had not built a primary residence within the two years and remitted the amount of the tax to the Vermont Department of Taxes, leaving a balance in his trust account of a few hundred dollars which represented interest earned between the time of closing in 1982 and the time of disbursement to the Vermont Department of Taxes in 1987.

Several months after paying the tax due, Respondent asked the Department of Taxes whether any interest was due on the tax payment. Respondent continued to hold the balance of the funds in his trust account, waiting to hear back from the Department of Taxes, but he never received a reply.

Respondent left the funds in his trust account and the sum continued to earn interest. Respondent knew that the money was in the account because he got monthly statements for the next few years, but he took no action to resolve the issue.

In 1989 Respondent closed his law office to take a government position. It is Respondent's recollection that the post office forwarded the bank statements to him for a period of three to six months and then stopped.

In 1993 Respondent returned to private practice, at a succession of law firms. When he took his present position in 2013, Respondent shredded his old legal files from his private practice in the 1980's and 1990's.

Later in 2013, Respondent learned that his name was on the State's Unclaimed Property list. He looked into the matter and determined that the State was holding the funds which had been in his trust account in the 1980's.

Respondent promptly filed the necessary paperwork to receive the funds which at that time amounted to \$689.36. He then worked diligently to determine which transaction the funds related to. His search was hampered by the fact that he no longer had his files. Respondent eventually determined that the funds represented interest on the real estate traction described above and forwarded the funds to his client in early 2014.

The client suffered minor injury. Had the interest been forwarded to him at the expiration of the two year period, it would have been approximately \$100. The additional funds represent compounded interest over the twenty year period that the funds were sitting in the trust account.¹

There are a number of mitigating factors present. Respondent has no prior disciplinary record, he has made full and free disclosure of the matter, including self-reporting and has cooperated fully with the disciplinary proceeding, he had no selfish or dishonest motive and has expressed remorse. While at this point Respondent has substantial experience in the practice of law, we do not consider this an aggravating factor since the misconduct happened only three years after he had been admitted and a few months before he began solo practice.

Conclusions of Law

The misconduct in this matter occurred between 1984 and 2013 and thus more than one version of the ethical rules applied.

¹ This situation would not arise under the Rules of Professional Conduct which require that interest on lawyer's trust accounts be paid to the Vermont Bar Foundation.

In 1971 the Supreme Court adopted the Code of Professional Responsibility which applied through September of 1999. The Rules of Professional Conduct apply from September of 1999 through the present.

DR 6-101 of the Code of Professional Responsibility provides that a lawyer shall not neglect a legal matter entrusted to him. Respondent violated this Rules when he failed to pay the taxes due to the State of Vermont after the expiration of the two year period, instead waiting five years to remit the funds.

Both DR 9-102(B)(4) and Rule 1.15(d) provide that a lawyer shall promptly pay or deliver to the client funds which the client is entitled to receive. Respondent violated these Rules by failing to promptly remit the interest due to his client. The violation of DR 9-102(B)(4) is for the period through September of 1999, and Rule 1.15(d) for the subsequent period.

Sanction

The parties' recommendation of admonition by Disciplinary Counsel is consistent with both the ABA Standards for Imposing Lawyer Sanctions and Vermont case law and we accept the recommendation.

ABA Standards

The Vermont Supreme Court has consistently looked to the ABA Standards for guidance in determining the appropriate sanction in a disciplinary case. *In re Blais*, 174 Vt. 628, 817 A.2d 1266 (2002). Under these standards we look at the duty violated, the lawyer's mental state, and any injury to determine the appropriate sanction and then we look to aggravating and mitigating factors to determine if the sanction should be increased or decreased.

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 violated his duty to his client to promptly deal with the client’s property which he was holding. He was negligent in his failure to take action in this matter. The injury in this case was minor. Had respondent paid the interest to the client at the time that the tax payment was due to the State of Vermont, the amount involved would have been very small. It was only the twenty years of compounded interest that raised the figure to \$689. While there is some injury in the client’s loss of the use of this money for this long period, we find it to be a minor injury, and thus admonition is consistent with the ABA Standards.

In addition, there are a number of mitigating factors and no aggravating factors. Respondent has no prior disciplinary record, *ABA Standards §9.32(a)*; he has made full and free disclosure of the matter, including self-reporting the violation, and has cooperated fully with the disciplinary proceeding, *ABA Standards §9.32(e)*; he had no selfish or dishonest motive, *ABA Standards §9.32(b)*, and has expressed remorse, *ABA Standards §9.32(l)*.

Vermont Case Law

There are several cases arising out of violation of the trust account rules which have facts similar to those in the present case. The attorney in *In re PRB File No. 115* (August 2008) had a poor trust accounting system and failed to reconcile his trust account resulting in approximately \$8000.00 of earned fees and expense reimbursements owed to the attorney being held in his trust account for long periods.

In a later case, failure to reconcile a trust account revealed a shortfall of \$11,000 which the attorney quickly recertified with a deposit to the account. *In re PRB Decision No. 120*, (February 2009).

In both of these cases, there was no harm to clients, the attorney changed his accounting practices to comply with the trust account rules and the Hearing Panels ordered admonition by Disciplinary Counsel.

Order

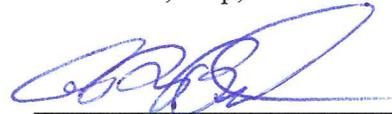
Based upon the foregoing we order that Respondent be Admonished by Disciplinary Counsel for violation of DR 6-101-101 and DR 9-102(B)(4) of the Code of Professional Responsibility, and Rule 1.15(d) of the Rules of Professional Conduct.

Dated: 9/10/14

Hearing Panel No. 7



Mark Hall, Esq., Chair



Alan P. Biederman, Esq.



Stephen V. Carbone

