

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2014.169

Decision No. 181

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 in part and orders that Respondent be admonished by Disciplinary Counsel for violation of the following Rules of Professional Conduct: Rule 1.15A(a)(3), for failure to notify clients of receipts and disbursements from his trust account, and Rule 1.15(a)(1), for depositing client funds in his operating account. The charge of violation of Rules 1.15 through 1.15B by failing to reconcile his trust account on a regular basis is dismissed.

Facts

Respondent is a sole practitioner admitted to practice law in Vermont in 1998. His practice areas include criminal defense, debtor defense, family law and estate planning.

Respondent's client's trust account was randomly selected for compliance examination as part of Disciplinary Counsel's audit program. A Certified Public Accountant (CPA) performed the audit which covered a thirteen month period. The CPA provided a written report to Disciplinary Counsel which reported the following non-compliance with Rules 1.15 through 1.15B of the Vermont Rules of Professional Conduct:

1. Respondent did not consistently notify each client when funds were disbursed from the client's trust account.

2. Respondent not reconcile trust account activity to bank statements on a monthly basis.
3. On two occasions Respondent incorrectly deposited client funds into his operating account rather than his trust account. The total amount involved was \$481.00.

As a result of the compliance report Disciplinary Counsel opened an investigation.

With respect to notifying clients of disbursements from the trust account,

Respondent now has a system in place for notifying clients of all disbursements.

With respect to the finding that Respondent made two deposits to his operating account that should have been placed in his trust account, the amounts were carried on the trust account ledger and the deposit of these funds to the operating account was inadvertent. Respondent discovered the error when he did his December 2013 reconciliation and transferred-\$481.00 from his operating account to his trust account to cover the shortfall.

With respect to regular reconciliation of the trust account, Respondent's practice was to reconcile the account twice a year. Since the audit, he reconciles the account on a monthly basis. There are no facts about how and with what frequency Respondent used his trust account in the course of his practice.

Client funds were never improperly used or in jeopardy and 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 dishonest or selfish motive, he made a timely and good faith effort to rectify the consequences of the misconduct, and he has cooperated with the disciplinary proceedings.

Conclusions of Law

Rule 1.15A(a)(3)

Rule 1.15A(a)(3) of the Vermont Rules of Professional Conduct provides that when a lawyer holds funds of a client in a trust account he or she shall maintain “records documenting timely notice to each client or person of all receipts and disbursements from the account or accounts.” Respondent’s failure to provide this notice to clients violated this rule.

Rule 1.15(a)(1)

Rule 1.15(a)(1) provides that “[a] lawyer shall hold property of clients or third parties that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property.” Respondent violated this rule when he made two deposits of client funds to his operating account.

Timely Reconciliation

Disciplinary Counsel argues that the trust account rules, as interpreted by prior hearing panel cases, create an affirmative duty for a lawyer to regularly reconcile his or her trust account. Rules 1.15 through 1.15A contain specific requirements for trust account management, and we have found that Respondent violated two of these provisions. There is no specific requirement in these rules for regular account reconciliation, and we do not believe that the cases cited create such a requirement.

While these cases talk about the need for attorneys to reconcile their accounts, it is in the context of the violation of one of the specific rules. We do not believe that these cases establish lack of regular account reconciliation as a separate and distinct violation absent a violation of one of the specific rules.

The charge in *In re PRB Decision No. 115* (2008) was a violation of 1.15(a) and 1.15A. The panel narrowed their decision to a violation of Rules 1.15(a) and 1.15A(a)(2). The panel found that the attorney had not reconciled his account for a substantial period, and that had he done so he would have found the errors that led to the violations. In *In re PRB Decision No. 175* (2014) the attorney did not regularly reconcile her trust account which again led to the violation of specific trust account rules.

Having said this, we do not want to minimize the value of regular account reconciliation. It is the established method by which an attorney can insure that the specific rules are being followed, and Respondent's current practice of monthly reconciliation is a good one.

We refuse to expand the rules to create a separate violation for failure to regularly reconcile trust accounts. The provisions of Rules 1.15 through 1.15C are specific and give precise notice to attorneys as to what accounting practices are required. A rule requiring regular reconciliation lacks this specificity. What is regular for a solo practitioner who rarely uses his or her trust account is different from that of the large firm with a substantial real estate practice. Should the Board determine that a requirement for reconciliation is necessary, it would be better addressed by the rule making process than by panel decision.

Sanction

This case has much in common with a number of other cases finding violations of the trust account rules. These cases are generally brought to Disciplinary Counsel's attention by random trust account audits, as here, responses to trust account surveys, or overdraft notices sent to Disciplinary Counsel in real estate cases.

In all of these cases there is a finding similar or identical to that stipulated to in this

matter: Client funds were never improperly used or in jeopardy and there was no evidence that any client or third party was injured. Respondent had no prior disciplinary record, no dishonest or selfish motive, made a timely and good faith effort to rectify the consequences of the misconduct, and cooperated with the disciplinary proceedings.

In *In re PRB Decision No. 175* (2104), all of these factors were present. In *In re PRB Decision No. 173* there was no harm to a client, no prior disciplinary record, cooperation with disciplinary proceedings, no dishonest or selfish motive and remorse. *In re PRB Decision No 172* (2014) is similar. There is was no finding of harm to a client, no prior record, cooperation with the proceedings, no dishonest or selfish motive and remorse. See also similar findings in, PRB Decision Numbers 171 and 167 both decided in 2014.

The present case, and those cited above, raise concerns about the appropriate method for addressing trust account violations in which there is no injury and all or most of the mitigating factors cited here are present. Administrative Order 9, which governs the Professional Responsibility Program-states as its purpose the following:

The Professional Responsibility Program is established to provide a comprehensive system of regulation of the legal profession. Its objectives are: (1) to resolve complaints against attorneys through fair and prompt dispute resolutions procedures; (2) to investigate and discipline attorney misconduct; and (3) to assist attorneys and the public by providing education, advice, referrals, and other information designed to maintain and enhance the standards of professional responsibility.

Punishment attorneys in not one of the goals of this process a fact that the Supreme Court made clear in *In re Hunter*. “Disciplinary sanctions are not intended to punish

attorneys, but rather to protect the public from harm and to maintain confidence in our legal institutions by deterring future misconduct.” 167 Vt. 219, 226 (1997).

Given the purpose of the program and the clear statement that punishment is not a goal, we wonder if these relatively minor trust account violations in which there is no improper use of client funds and no injury to clients might be better handled by providing assistance, advice and education to these attorneys as suggested by paragraph 3 of the statement of purpose.

A.O. 9 Rule 4 establishes the Assistance Panels which are designed to fulfill this purpose and are often used in cases of conduct which may, in some instances, violate the rules but is better addressed by advice and education tailored to the needs of the attorney and the situation involved. We believe that Respondent in the present case, as well as those in the previous cases cited, might have been better served by consultation with an assistance panel than by disciplinary sanction.

Another avenue of approach is suggested in the Trust Accounting Manual¹ prepared by the Professional Responsibility Program. In discussing the type of compliance audit which occurred in this case, the manual suggests that one of the options open to Disciplinary Counsel upon receiving the report is to “work with the attorney to make necessary changes” p. 12. We do not know when or if Disciplinary Counsel takes

¹ MANAGING CLIENT TRUST ACCOUNTS RULES, REGULATIONS, AND TIPS can be found at <https://www.vermontjudiciary.org/LC/attydiscipline.aspx>

this approach in trust account cases, but we believe that it would be another alternative to formal disciplinary proceedings.

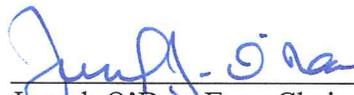
We accept the recommendation for admonition in this case since it is in line with previous cases, but hope that Disciplinary Counsel will in the future reconsider treating these cases as misconduct requiring sanction and refer the most minor of them to assistance panels or suggest counsel with the CPA doing the compliance report..

Order

Respondent shall be admonished by Disciplinary Counsel for violation of Rules 1.15A(a)(3) and Rule 1.15(a)(1). The charge of violation for failure to regularly reconcile his trust account is dismissed.

Dated: 12/30/14

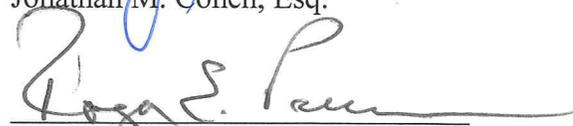
Hearing Panel No. 10



Joseph O'Dea, Esq., Chair



Jonathan M. Cohen, Esq.



Roger Preuss