83 PRB

[Filed 06-Dec-2005]

In re Harwood (2005-534)

2006 VT 15

[Filed 03-Feb-2006]

ENTRY ORDER

2006 VT 15

SUPREME COURT DOCKET NO. 2005-534

JANUARY TERM, 2006

In re George Harwood, Esq.	}	Original Jurisdiction
	}	
	}	
	}	
	}	Professional Responsibility Board
	}	
	}	PRB No. 2005.184

In the above-entitled cause, the Clerk will enter:

¶ 1. On November 30, 2005, a hearing panel of the Professional Responsibility Board issued a decision ordering that respondent George Harwood, Esq., be disbarred from the office of attorney and counselor at law effective forty-five days from the date of the order. Respondent has not appealed from that order, and this Court has declined review on its own motion. Therefore, pursuant to Administrative Order 9, Rule 11.D(5)(c), the order of disbarment is final, and shall have the full force and effect as an order of this Court.

FOR THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess Associate Justice

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83 PRB

[Filed 06-Dec-2005]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: George Harwood, Esq. PRB File No 2005.184
Decision No. 83

Respondent is charged with violation of Rules 1.15(a), 8.4(c), 8.4(d) of the Vermont Rules of Professional Conduct (FN1) for commingling and misappropriating client funds over a seven year period and for making false statements in his sworn response to Disciplinary Counsel's trust account management survey. The parties filed a Stipulation of Facts and Recommended Conclusions of Law. This matter was heard on September 14, 2005, on the issue of sanctions. Present for the hearing were the Hearing Panel, Lon T. McClintock, Esq., Kristina Pollard, Esq. and Donald Keelan, Disciplinary Counsel, Michael Kennedy, Esq., Respondent, George Harwood, Esq. and Respondent's counsel, Christopher Davis, Esq.

BASED upon the parties' Stipulation and the testimony and evidence presented at hearing, the Panel finds Respondent violated Rules 1.15(a), 8.4(c), 8.4(d) of the Vermont Rules of Professional Conduct by commingling and misappropriating client funds and by making false statements in his sworn response to Disciplinary Counsel's trust account management survey. After considering the Recommended Conclusions of Law, the parties' memoranda and oral arguments, and the aggravating and mitigating circumstances present in this case, the Panel orders that George Harwood be disbarred.

I. FINDINGS OF FACTS

Respondent was first admitted to practice in 1985 in New Jersey and Pennsylvania. He moved to Vermont in 1989 and, following his 3-month clerkship, was admitted to the Vermont Bar. Prior to attending law school Respondent served in the Peace Corps and worked in restaurant management. During the period relevant to this disciplinary matter, Respondent worked as a solo practitioner in St. Albans. He shared office space and secretarial help with two other attorneys, but they had no common practice. Respondent's law practice regularly involved real estate transactions, including §1031 tax free exchanges. Respondent maintained a trust account (hereinafter "IOLTA account") at the Peoples Trust Company for the deposit of funds held in trust for clients and third parties. This account was

reconciled on a timely basis; Respondent used a computer program to track client funds held in the IOLTA account. The computer program permitted Respondent to separately track and account for all client funds deposited into and later withdrawn from the IOLTA account.

Respondent also maintained a business account at the same bank. Respondent did not reconcile this account on a regular basis and often did not know the balance held in the account. Respondent used his business account to pay his personal and family expenses. The average balance in the account was often minimal and from time to time checks drawn on the business account were returned unpaid due to insufficient funds. During the hearing Respondent was asked to explain why he was able to maintain an accurate and timely accounting of his IOLTA account, but not his business account. Respondent's only explanation was that he was a poor business manager who did not have adequate financial controls for his practice.

Beginning in 1997 Respondent began to commingle his funds with client funds in his IOLTA account. Respondent used his IOLTA account to pay checks from the business account that had been returned due to insufficient funds. Essentially, Respondent would learn that a check drawn on business account had been returned unpaid due to insufficient funds. Respondent needed to replace the returned check with one Respondent was confident would not be returned for lack of funds on deposit with the bank. Respondent regularly reconciled his IOLTA account and kept track of its balance, so Respondent knew a check drawn on his IOLTA account was not likely to be returned unpaid. Consequently, Respondent would deposit his own funds, in an amount equal to that needed to cover the returned check, into his IOLTA account and, simultaneously, write a check on the IOLTA account payable to the payee holding the returned check. By way of emphasis, Respondent only deposited as much money into the IOLTA as Respondent needed to write an IOLTA account check to pay the holder of the returned check. By doing so, Respondent used his IOLTA account to hold his funds and pay his general expenses.

In 1999 Respondent began advancing himself fees from client funds held in the IOLTA account. This conduct was not described in detail in the parties' Stipulation of Facts, but was explained by Respondent during his hearing testimony. If Respondent needed cash and was confident that he was about to earn a fee from a client, he would withdraw an amount equal to the fee from the IOLTA account and deposit the money into his business account and pay his expenses. Sometimes, Respondent used these client funds to pay personal expenses. Respondent testified that he did not draw more from the IOLTA account than the amount of the fee he was confident he would earn and would be entitled to pay himself within the very near future. For example, if a real estate matter was expected to close in a day or two, Respondent would pay himself his fee a few days prior to closing, deposit the money into his business account and then pay business and/or personal expenses. Respondent did not consult with his client, or obtain his client's consent prior to advancing himself client money. In essence, Respondent was borrowing money from his clients without notice to or consent from the clients. There is no dispute that Respondent was eventually entitled to the fees wrongfully advanced from the IOLTA account.

Beginning in 2002, and continuing through the beginning of October 2004, Respondent withdrew money from the IOLTA account and deposited the money into his business account to pay business and personal expenses. Unlike Respondent's prior practices, Respondent's withdrawals were not

covered by a simultaneous deposit of Respondent's money, nor were the withdrawals made in anticipation of fees that were certain to be earned in the near future. Respondent deposited the money he withdrew from IOLTA account into his business account and used the money to pay both business and personal expenses. Each time Respondent withdrew client funds from the IOLTA account, Respondent intended to replenish them. Periodically, Respondent would deposit his own money back into the IOLTA account; initially, Respondent replenished the account within a matter of days. Respondent used his computer to track his IOLTA withdrawals, just as he tracked client funds. Respondent set up two accounts in his computer program so that he could track his IOLTA account withdrawals and reimbursements. Respondent tracked some of his withdrawals and reimbursements under the names "Harwood" and "Paquette."

Between September 2002 and October 2004, there were at least twenty-eight occasions on which Respondent used client funds in the IOLTA account to fund his business account. The total amount removed from the IOLTA account was $35,839.25.

Respondent never asked his client's permission to use their money to pay his own expenses. Respondent did not notify clients that their trust account monies would be used from time to time to pay business and personal expenses.

Respondent knew the practices described above violated of the Vermont Rules of Professional Responsibility while he engaged in these practices. Respondent knew that it was improper to: use the IOLTA account to pay business and personal expenses; withdraw client trust money to pay attorney's fees that had not yet been earned; and use client trust money to pay general business and/or personal expenses.

Respondent's practice of using client funds to pay his expenses was the result of a combination of factors. Respondent's practices coincided with his move to a new office with higher overhead expenses. For example, he began sharing the expenses of an experienced secretary who worked for him and the lawyers with whom he shared space. At about the same time, Respondent's wife lost her job and the health benefits provided by her employer. Respondent used his business account to pay for health insurance coverage.

Respondent considered altering his financial practices because the income from his law practice could not meet his business and personal expenses. He was reluctant, however, to seek funds elsewhere as he was embarrassed by his inability to manage his financial affairs. Respondent chose to use client funds in his IOLTA account to meet his cash needs rather than obtain a loan or line of credit from a conventional lender.

Respondent does not allege that his conduct was the result of a physical or mental condition requiring medical treatment. Throughout the time that Respondent engaged in the practices described above, Respondent was in reasonably good health; Respondent's judgment was not affected by any medical or psychological illness or condition.

In October 2004 Respondent made the decision to stop using client funds in the IOLTA account to meet his cash needs. Respondent last withdrew client funds from the IOLTA account to pay his business expenses on October 6, 2004. During the months of January and February 2005,

Respondent cashed in an IRA and a life insurance policy, and took a loan from his mother to reimburse his IOLTA account. By February 2005, Respondent had fully reimbursed his IOLTA account.

In 2004 the Professional Responsibility Board [PRB] initiated a program to address the problems of attorney theft of client funds and mismanagement of trust accounts. The PRB randomly selected one hundred attorneys to receive a survey concerning the attorneys' management of trust (IOLTA) accounts. Responding to the survey was mandatory, not optional, and the attorneys were required to provide responses under oath. Disciplinary Counsel reviewed the survey responses and, based upon those responses, selected ten attorneys for audit by a certified public accountant. The purpose of the audit was to determine whether the selected attorney was managing his IOLTA account in accordance with the Vermont Rules of Professional Responsibility.

Sometime during the month of October or November 2004,(FN2) Respondent received survey from the PRB or Disciplinary Counsel.(FN3) Respondent completed the survey and certified, under oath, that his responses were true and accurate. Based upon Respondent's survey responses, Disciplinary Counsel selected Respondent for audit. In February 2005, the CPA retained by Disciplinary Counsel contacted Respondent and scheduled Respondent for an audit for March 11, 2005. On or about March 4, 2005, Respondent, acting through counsel, contacted Disciplinary Counsel to report the misconduct described above.

Respondent acknowledges that some of his responses to the PRB survey were inaccurate and misleading. One question on the survey asked "have you deposited any non-client funds in any trust accounts? If so, please explain." Respondent answered that the only non-client funds he had deposited into his IOLTA account were minimal amounts intended to cover bank services and charges. In fact, when Respondent answered this survey question, Respondent knew that from 1997 to 2002 Respondent had regularly deposited personal funds into his IOLTA account in advance of writing checks on that account to pay business expenses. Respondent also knew that from 2002 to 2005 he had periodically deposited personal funds into the IOLTA account to replenish client funds he had previously removed from the account.

During the hearing, Respondent was asked about survey question 20. The question asked whether Respondent regularly reconciled his business account. Respondent answered the question in the affirmative, indicating he regularly reconciled his business account. At the time Respondent answered the question, Respondent knew he had not been regularly reconciling his business account.

Another question on the survey asked if Respondent had ever borrowed money from clients. Respondent answered in the negative. At the time Respondent answered the survey question, Respondent knew he had, in effect, been borrowing money from clients for several years. Respondent admitted that he intended to mislead Disciplinary Counsel when he answered this question.

Respondent has no disciplinary record. He cooperated fully with Disciplinary Counsel. He has expressed remorse for his misconduct. Respondent's guilt and shame has caused Respondent to suffer depression for which he is receiving medical treatment.

Prior to this proceeding, he enjoyed a reputation of fine character in the legal community. Respondent served the Vermont Bar and his community in a variety of positions of trust and responsibility. These activities include serving as: a member of the Vermont Bar Foundation; President of the local United Way organization, and chairperson of the local planning commission. As a result of this misconduct, the Supreme Court imposed an interim suspension of Respondent's license to practice law on March 29, 2005, which will remain in effect until the conclusion of this disciplinary action.

Respondent has substantial experience in the practice law. His use of his IOLTA account for business expenses is not an isolated instance, but involves a pattern of misconduct. Respondent makes a point of the fact that he used his IOLTA account only for business expenses and not personal expenses. Respondent's argument on this point is not entirely accurate. First, Respondent testified that he regularly used his business account to pay his personal expenses. By drawing money from the IOLTA account, Respondent was able to maintain a positive balance in his business account, leaving funds available to pay both business and personal expenses. As a sole practitioner, drawing money from the IOLTA account for business expenses in fact left other funds in the business account available to meet his personal expenses. Consequently, Respondent was using client funds for his personal benefit.

II. CONCLUSIONS OF LAW

A. Applicable Rules of Professional Conduct

Rule 1.15(a) of the Vermont Rules of Professional Conduct requires lawyers to hold client funds separate from their own. The Rule provides:

> 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, B and C. 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.

An attorney may not commingle his funds with those of his client, nor may he use client funds for business expenses. Over a period of seven years Respondent commingled his funds with client funds. Respondent periodically deposited his funds into the IOLTA account for the express purpose of paying Respondent's expenses - i.e., covering the checks returned due to insufficient funds. In addition, Respondent used client funds held in trust to pay Respondent's expenses. With respect to the requirements of Rule 1.15(a) there is no difference between Respondent's early practice of placing funds in his IOLTA account in advance of writing checks to third parties and his later systematic withdrawals made without anticipation of prompt reimbursement. Both practices violate Rule 1.15(a).

Rule 8.4(c) of the Vermont Rules of Professional Conduct states that it is "professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Clients expect,

and are entitled to expect, that their funds will be segregated from their attorney's own funds, that client funds will not be available to the attorney's creditors, and that the attorney will use the funds only as agreed or directed by the client. Each use of client funds for business or personal expense without the client's knowledge or permission involves deceit, dishonesty, and fraud in violation of Rule 8.4(c).

Respondent's untruthful response to questions on the PRB survey also violated Rule 8.4(c). Respondent knew that his answers were not truthful when he completed the survey. Respondent made these untruthful answers to mislead Disciplinary Counsel and conceal his unlawful conduct. Respondent's misleading answers were provided for the express purpose of concealing seven years of improper use of his IOLTA account and client funds.

Rule 8.4(d) of the Vermont Rules of Professional Conduct provide that it is "professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice." See also Vt. A.O. 9 Rule 7(C) (2005) ("Failure to . . . respond to a request from disciplinary counsel . . . without reasonable grounds for refusing to do so" is grounds for attorney discipline.). Rule 8.4(d) is typically applied to misconduct that interferes with a judicial proceeding or compromises the integrity of the legal profession. The integrity of the legal system is founded on the premise that attorneys will be truthful and honest in their dealings with the courts, with clients, and with those whose job it is to ensure that appropriate standards of professional conduct are maintained. The legal system and the profession also require attorneys to cooperate with the disciplinary system and provide information when requested. See Vt. A.O. 9 Rule 7(C) (2005). Failure to do so compromises the integrity of the profession and the operation of the legal system and violates Rule 8.4(d). Respondent provided false and misleading responses to the PRB survey questions in an attempt to deflect Disciplinary Counsel's attention from Respondent and conceal his wrongful practices. See Vt. A.O. 9 Rule 7(C) (2005) (attorney may be disciplined for failing to provide requested information without good cause). Although unsuccessful, Respondent attempted to impede Disciplinary Counsel's proper inquiry into Respondent's compliance with the Rules of Professional Responsibility regarding IOLTA accounts and client funds held in trust, thereby violating Rule 8.4(d).

Rule 8.4(h) of the Vermont Rules of Professional Conduct provides that it is "professional misconduct for a lawyer to . . . engage in any other conduct which adversely reflects on the lawyer's fitness to practice law." Respondent's conduct of commingling his funds with client funds, using client funds to pay Respondent's business and personal expenses, and answering the PRB survey falsely and deceptively, adversely reflects on Respondent's fitness to practice law. Respondent testified that he knew his conduct constituted violations of the Rules of Professional Responsibility while he engaged in this conduct. Significantly, Respondent's conduct was intentional, and not the result of inadvertence, mistake, or a health condition affecting Respondent's judgment. Clear and convincing evidence demonstrates Respondent violated Rule 8.4(h).

B. ABA Standards

The parties agree that Respondent's conduct warrant the imposition of a substantial sanction. Disciplinary Counsel argues that disbarment is the

only appropriate sanction for Respondent's conduct. Respondent argues that the ABA Standards for Imposing Lawyer Sanctions and Vermont case law support imposition of a suspension, and not disbarment. After considering the parties' respective arguments, the ABA standards and Vermont precedent, the Panel concurs that this case warrants a substantial sanction.

The Supreme Court has held that the ABA Standards may be considered when determining the appropriate sanction in a disciplinary matter. In re Andres, Supreme Court Entry Order, July 6, 2004, citing In re Warren, 167 Vt. 259, 261 (1997) see also In re Bucknam, 160 Vt. 355, 365 (Vt. 1993) ("While they are not controlling, the American Bar Association Standards For Imposing Lawyer Sanctions provide guidance for determining the appropriate sanction.").

The first step in applying the ABA Standards is to consider the presumptive sanction by looking at the duty violated, the lawyer's mental state and the actual or potential injury caused by the misconduct. Having thus reached a presumptive sanction, it may be modified by consideration of aggravating and mitigating circumstances. ABA Standards § 3.0.

1. Duty Violated

Respondent had a duty to preserve the integrity of his client's money by maintaining client funds in an IOLTA account dedicated solely to client funds. Respondent breached this duty in two ways. First, Respondent commingled his funds with client funds. Second, Respondent treated client funds as his own, misappropriating client funds to pay business and personal expenses. Respondent also had a duty to make truthful responses to inquiries from the disciplinary system. See Vt. A.O. 9 Rule 7(C) (2005). Respondent breached his duty to the judicial system and attempted to cover up his violations of the disciplinary rules by providing untruthful and misleading answers to the PRB survey.

2. Mental State

Respondent testified that he was in good health and of sound mind at all times prior to being notified by Disciplinary Counsel that Respondent's practice was selected for audit by a certified public accountant. Throughout the 7-year period that Respondent was commingling his funds with and misappropriating client funds, Respondent knew that he was violating the Rules of Professional Responsibility. There is no evidence that Respondent's mental state compromised his ability to understand and comply with the Rules of Professional Responsibility when he engaged in this wrongful conduct.

3. Injury

The tragedy of many cases involving a lawyer's use of client funds for personal expenses is that very often there is no money left to make the clients whole, and they suffer substantial injury as a result. The fact that Respondent was able to repay the money does not negate all injury. There was the potential for injury. See In re Nawrath, 170 Vt. 577, 581-582 (2000). Respondent was fortunate that he was able to meet his client's demands for their funds, including tendering client funds at real estate closings. Respondent may not have been able to meet these demands for funds given the significant amount of money he had withdrawn from the IOLTA account. See id.

Respondent's conduct did harm the legal profession. Misappropriation of client funds is a serious violation of the trust that must exist in the attorney-client relationship. Such a violation erodes the public's confidence in the profession and undermines the integrity of the judicial system. See In re Friedman, 23 P.3d 620, 631 (Alaska 2001) (Respondent "caused actual injury to the public, because "the public suffers injury whenever a lawyer fails to maintain personal integrity by improperly handling funds held in trust."); Bambic v. State Bar, 40 Cal. 3d 314, 323, 707 P.2d 862, 867-68 (1985) (Misappropriation of client funds "is 'a gross violation of professional ethics which undermines the public's confidence in the legal profession.'"); People v. Costello, 781 P.2d 85, 87 (Colo. 1989) ("misuse of funds by a lawyer strikes at the heart of the legal profession by destroying public confidence in lawyers"); In re Fair, 780 A.2d 1106, 1115 (D.C. 2001) ("Even negligent mishandling [of] . . . client funds . . . undermines public confidence in the bar.'"); In re Pass, 105 Ill. 2d 366, 371, 475 N.E.2d 525, 527 (1985) ("Respondent's conduct presents a serious breach of professional responsibility and serves to undermine the public trust and confidence in the legal profession."); In re Veith, 252 Kan. 266, 270, 843 P.2d 729, 733-34 (1992) ("Misappropriation affects both the bar and the public . . . and endangers public confidence in the legal profession."); Louisiana State Bar Assn. v. Powell, 439 So.2d 415, 417 (La. 1983) ("The misuse of a client's funds by an attorney represents the gravest form of professional misconduct [and] . . . strikes at the heart of public confidence in the legal profession."); Attorney Grievance Comm'n v. Casalino, 335 Md. 446, 452, 644 A.2d 43, 46 (1994) ("Any time a lawyer commits an act of dishonesty, fraud or deceit, the public loses confidence in the integrity of those officers and the judicial system as a whole."); In re Deragon, 398 Mass. 127, 130, 495 N.E.2d 831, 832 (1986) (commingling is a serious offense and erodes public confidence); In re Samborski, 644 N.W.2d 402, 408 (Minn. 2002) (Respondent "misappropriated thousands of dollars . . . [and] made false statements to conceal his misappropriation and neglect, undermining the public's trust and confidence in the legal profession."); State Counsel for Discipline v. Wintroub, 267 Neb. 872, 886, 678 N.E.2d 103, 113 (2004) ("Misappropriation of client funds by an attorney . . . endangers public confidence in the legal profession."); In re Harris, 182 N.J. 594, 609, 868 A.2d 1011, 1020 (2005) ("The public will soon lose confidence in our legal system if those who practice law in our courts are not honest and competent. The reputation of the entire bar requires that all 'attorneys comply with the highest standards of professional conduct.'"); In re Fraley, 2005 OK 39, 35, 115 P.3d 842, 851 (2005) ("[W]hile restitution is encouraged in individual cases, it 'does not significantly retard the subtle, but progressive, erosion of public confidence in the integrity of the bench and bar.'"); In re Discipline of Tidball, 503 N.W.2d 850, 854 (S.D. 1993) ("Using client funds . . . is a serious violation of an attorney's professional ethics which is likely to undermine the public's confidence in the legal profession."); In re Discipline of Babilis, 951 P.2d 207, 217 (Utah 1997) ("The honesty and loyalty that all lawyers owe their clients are irrevocably shattered by an intentional act of misappropriation, and the corrosive effect of such acts tends to undermine the foundations of the profession and the public confidence that is essential to the functioning of our legal system."); Lawyer Disciplinary Bd. v. Battistelli, 206 W. Va. 197, 201, 523 S.E.2d 257, 263 (1999) (sanction for misappropriation of client funds necessary to . . . "restore public confidence in the ethical standards of the legal profession.").

4. Presumptive Sanctions Pursuant to the ABA Standards

Respondent's commingling of his funds with client funds was intentional and potentially harmful to Respondent's clients. Respondent's conduct falls within § 4.12 of the ABA Standards, which provides: "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." See In the Disciplinary Matter Involving Triem, 929 P.2d 634, 647 (Alaska 1996) ("The commentary to [§ 4.12] reveals that commingling of client and personal funds and the failure to remit client funds promptly are the most common circumstances for which suspension is imposed.").

Respondent's misappropriation of client funds falls squarely within § 4.11 of the ABA Standards. Section 4.11 provides: "Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client." See People v. Tilton, 119 P.3d 1112 (Colo. 2005); In re Carey, 809 A.2d 563, 565 (Del. 2002); Atty. Griev. Comm'n v. Mininsohn, 380 Md. 536, 571, 846 A.2d 353 (2004); In re Zamora, 130 N.M. 161, 165, 21 P.3d 30, 34 (2001).

Respondent's untruthful and deceptive responses to the PRB survey falls within § 7.1 of the ABA Standards. Section 7.1 provides: Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

The Introduction to § 7.0 of the ABA Standards explains that the Rules of Professional Responsibility "include many ethical standards that are not fundamental to the professional relationship but which define certain standards of conduct." ABA Standards § 7.0 Introduction. These standards were developed to protect the public, but a violation of these standards is "less likely to cause injury to a client, the public, or the administration of justice than the other standards" provided by the Rules. Id. "In general . . . a sanction of disbarment or suspension will rarely be required, and a sanction of reprimand, admonition or probation will be sufficient." Id. There are, however, instances when disbarment is the appropriate sanction for a violation of a duty owed to the profession. See ABA Standards § 7.1.

ABA Standards § 7.1 expressly provides for disbarment when a lawyer "knowingly engages in conduct that is a violation of a duty owed to the profession with the intent to obtain a benefit for the lawyer." Id. In the present case, Respondent testified that he knew his responses to the PRB survey were false and misleading. Respondent also understood that if he provided truthful responses, Disciplinary Counsel might investigate Respondent's handling of client funds and his IOLTA account. Respondent provided false and misleading answers to the PRB survey with the intent to escape scrutiny by Disciplinary Counsel. Under these circumstances, § 7.1 of the ABA Standards applies, rather than the sections recommending suspension, reprimand and admonition.

5. Aggravating & Mitigating Factors

Respondent has substantial experience in the practice of law, having been admitted to practice law in 1985 in New Jersey and Pennsylvania, and

then in Vermont in 1989. ABA Standards § 9.22(i). Respondent engaged in a pattern of practice over the course of seven years whereby he commingled his funds with client funds, and then misappropriated client funds to pay business and personal expenses. ABA Standards §§ 9.22(c) and (d). His conduct involved more than neglect or mismanagement, it involved conscious and systematic misuse of client funds. Respondent's conduct involved forethought in that Respondent used his computer to track the funds he misappropriated. Respondent had a dishonest or selfish motive in his continued use of client funds, shown in part by Respondent's choice to use client funds rather than his personal resources to make up shortfalls in his business account. Respondent clearly found it more expedient to use client funds than to liquidate his personal assets or borrow money. ABA Standards § 9.22(b). Eventually, Respondent used his personal resources and borrowed money to reimburse the client funds wrongfully taken from his IOLTA account. Respondent may have been quick to reimburse his IOLTA account in the beginning, however, Respondent was slow to use his personal assets or borrow money and accumulated a substantial debt to the IOLTA account. By permitting this debt to the IOLTA to accumulate, Respondent has shown some indifference to making prompt restitution of client funds. ABA Standards § 9.22(j).

In mitigation, Respondent has made full and free disclosure to bar counsel. ABA Standards § 9.32(e). We do not, however, assign great weight to this factor in this case because Respondent did not self-report his violations of the Professional Rules. Respondent initially attempted to deceive Disciplinary Counsel about his misuse of his IOLTA account and misappropriation of client funds. Respondent's decision to cooperate came only after Disciplinary Counsel scheduled Respondent for a formal audit. When the audit was scheduled it must have been clear to Respondent that he could not hide his past improprieties. Respondent did, however, disclose his improper conduct and cooperated with the disciplinary process that followed.

Respondent feels real remorse for his conduct. ABA Standards § 9.32(l). He wrote each of his clients and explained his conduct and his suspension from the practice of law pending the outcome of these disciplinary proceedings. He has also been under interim suspension for a period of approximately six months. ABA Standards § 9.32(k). Respondent has no prior discipline, ABA Standards § 9.32(a), and appears to have enjoyed a good reputation among his peers prior to his suspension. ABA Standards § 9.32(g).

Respondent argues that his payment of restitution is a mitigating factor in this case. ABA Standards § 9.32(d). The ABA Standards speak of a "timely and good faith effort to make restitution." The Commentary to § 9.32(d) explains that "lawyers who make restitution before initiation of disciplinary proceedings present best case for mitigation" Id.; see also In re Hunter, 171 Vt. 635, 638 (2000). Here, formal disciplinary proceedings had not been initiated, but Respondent had been targeted for investigation prior to Respondent making full restitution. Respondent responded to the PRB survey in November 2004. He was contacted by Disciplinary Counsel's accountant to schedule an audit of Respondent's financial records in February 2005. On February 28, 2005, Respondent deposited $16,867.17 into his IOLTA account to make the account whole. It appears that PRB survey and scheduled audit of Respondent's books played a part in motivating Respondent's reimbursement of his IOLTA account.

Respondent also argues that restitution should be considered a significant mitigating factor. A number of jurisdictions have held that restitution is not a significant mitigating factor. People v. Finesilver, 826 P.2d 1256, 1258 (Colo. 1992); Office of Disciplinary Counsel v. Lau, 85 Haw. 212, 217, 941 P.2d 295, 300 (1997) (refunding client money is laudable, but restitution is not a mitigating factor); In re Wilson, 81 N.J. 451, 409 A.2d 1153, 1156-57 (N.J. 1979); but see Disciplinary Board v. Kim, 59 Haw. 449, 454, 583 P.2d 333, 337 (1978) ("Depending on the facts of each particular case, restitution may or may not be a mitigating factor."); Atty. Griev. Comm'n v. Spery, 371 Md. 560, 571, 810 A.2d 487, 493 (2002) ("Respondent's lack of previous discipline, cooperation with the investigation, and restitution are mitigating factors, but do not justify a lesser sanction."); Lawyer Disciplinary Bd. v. Kupec, 202 W. Va. 556, 570, 505 S.E.2d 619, 633 (1998) (Restitution is a mitigating factor if made promptly, but is not a mitigating factor if "made after the commencement of disciplinary proceedings, or when made as a matter of expediency under the pressure of the threat of disciplinary proceedings.").

Weighing the aggravating and mitigating factors, we believe that the aggravating factors are more substantial and outweigh the mitigating factors. Even in the absence of these aggravating factors, however, those in mitigation are not sufficient to reduce the presumptive sanction of disbarment in this case.

C. Vermont Precedent

There are two Vermont opinions from the Professional Conduct Board which consider misappropriation of client funds, and which impose substantially different sanctions. In the first case, In re Hutton, PCB Decision No. 12 (1991), 157 Vt. 649 (1991), the Court accepted the Board's recommendation of public reprimand with probation. In the second case, In re Mitiguy, PCB Decision No. 59 (1993), 161 Vt. 626 (1994), disbarment was recommended by the Board and accepted by the Court.

In the Hutton case, over the course of 2 years Respondent withdrew funds from his attorney trust account, totaling $5,145.00, to pay Respondent's personal expenses. Respondent voluntarily brought this matter to the attention of the Professional Conduct Board disclosing the series of improper withdrawals he had made from his trust account. In re: John G. Hutton, Jr., Esq., PCB File 89.15, 4-5. In Mitiguy, the Respondent took over $30,000.00 from an estate he was managing as executor, resulting in Respondent's conviction on six felonies. In re Mitiguy, 161 Vt. at 627. The Supreme Court noted: "Theft of client funds is one of the most serious ethical violations which an attorney can commit. It is an offense which demands imposition of the most serious sanction. Id. (citing In re Wilson, 81 N.J. 451, 409 A.2d 1153, 1155 (1979). In Hutton the Board noted that misappropriation of client funds normally results in suspension or disbarment, but the Board chose a lesser sanction because of the presence of substantial mitigating factors. These factors included the respondent self-reporting the violation, respondent's full cooperation with the Professional Conduct Board and the fact that no client money was lost.

These mitigating factors were not present in the Mitiguy case. The present case presents very different facts from Hutton. In this case the Respondent did not self-report his violations of the Rules of Professional Responsibility. When faced with the PRB survey questioning Respondent's trust account practices, Respondent chose to provide false and misleading

information, rather than report to Disciplinary Counsel what Respondent knew to be a violations of the Rules of Professional Responsibility. Respondent knew his books and accounts were to be audited when he decided to acknowledge his wrongdoing to Disciplinary Counsel. At the time Respondent admitted his wrongdoing, it was clear that the accountant would discover his improper use of the IOLTA account and client funds.

In comparing the misappropriation of funds in Hutton and Mitiguy, the Hutton case involved misappropriation of $5,145.00, whereas the Mitiguy case involved misappropriation of more than $30,000.00. The present case is more similar to Mitiguy, in that Respondent misappropriated more than $35,000.00 in client funds.

The respondent in Hutton did engage in a pattern of taking client funds over 2 years, but the respondent is not reported to have engaged in other unethical conduct. In the present case, Respondent engaged in a number of unethical practices over a period of seven years.

Like Hutton, Respondent fully cooperated with Disciplinary Counsel and client funds were eventually returned to the trust account and no client lost money. The Hutton Board also noted that he suffered from and was treated for clinical depression in the period prior to the misappropriation, though it is unclear if this was considered to be a mitigating factor. Even if the Hutton Board considered the respondent's depression a mitigating factor, there is no such mitigating factor in the present case. In the present case, Respondent did not present evidence that his conduct was, in whole or in part, a product of a mental condition. In the Mitiguy case disbarment was the sanction the Board recommended and the Supreme Court approved. The one aggravating factor present in Mitiguy that is not present here or in Hutton is the vulnerability of the victim. ABA Standards § 9.22(h). The other sanctions imposed on Mitiguy were much greater than that imposed on Respondent. Mitiguy was convicted of six felonies and sentenced to jail. In its opinion the Board acknowledged that he was a substance abuser and that he had sought residential treatment after detection, but did not consider this to be a mitigating factor.

Respondent urges us to follow the Hutton decision rather than Mitiguy which relies on Wilson for its authority. In the Wilson case, New Jersey adopted a bright line rule that misappropriation will almost always lead to disbarment. The court states "maintenance of public confidence in this Court and in the bar as a whole requires the strictest discipline in misappropriation cases. That confidence is so important that mitigating factors will rarely override the requirement of disbarment. If public confidence is destroyed, the bench and bar will be crippled institutions." 409 A.2d 1153, 1158-59.

We agree with the reasoning of the Wilson court as to the absolute necessity of a serious response to misappropriation of client funds as an essential factor in preserving the integrity of the judicial system. "There is nothing clearer to the public, however, than stealing a client's money and nothing worse. Nor is there anything that affects public confidence more than the offense itself than this Court's treatment of such offenses." Id. at 1155. A lesser sanction will further erode public confidence in the legal system and the attorneys licensed to practice law. Some courts have reasoned that disbarment is required to repair the damage caused by a lawyer's misappropriation of client money. See e.g., Lawyer Disciplinary Bd. v. Battistelli, 206 W. Va. 197, 201, 523 S.E.2d 257, 263

(1999) (sanction for misappropriation of client funds necessary to . . . "restore public confidence in the ethical standards of the legal profession.").

Both Respondent and Disciplinary Counsel have cited cases from other jurisdictions supporting their arguments as to the appropriate sanction. It appears from reviewing these cases that disbarment is the appropriate sanction absent compelling circumstances. In the District of Columbia the court held that "in virtually all cases of misappropriation, disbarment will be the only appropriate sanction unless it appears that the misconduct resulted from nothing more than simple negligence." In re Addams, 579 A.2d 190, 191 (D.C. 1990); see also Attorney Grievance Commission v. Sperling 844 A.2d 3997 (Md. 2003); People v. Varallo, 913 P.2d 1 (Colo. 1996); In re Schwimmer, 108 P.2d 761 (Wash. 2005).

The cases Respondent cites supporting a sanction of suspension are considerably older than the Wilson line of cases. The recent cases imposing less than disbarment present very different fact situations. In a recent Nebraska case, the attorney was suspended for two years with two years probation for misappropriating client funds and commingling his personal funds with client funds. State Counsel for Discipline v. Wintraub, 678 N.W.2d 103 (2004). We distinguish this case on the mitigating factors. In Wintraub the misconduct occurred over a short period of time, during which the attorney was taking prescribed medications that seriously affected his ability to function. This is very different from the present situation. Respondent continued his practice of commingling and misappropriation of client funds over a seven-year period, during which Respondent was not suffering from a disability.

The District of Columbia imposed a six month suspension in a case involving commingling and negligent misappropriation. In re Davenport, 791 A.2d 602 (D.C. 2002). What distinguishes this case from the present circumstances is the court's finding that the misappropriation was negligent, rather than intentional. Id. We have found that Respondent's misappropriation of funds was intentional and for personal benefit.

We also note that there have been several recent cases of disbarment by consent in cases involving misappropriation. A.O. 9 Rule 19 provides that "[a]n attorney who is the subject of an investigation into allegations of misconduct may submit a resignation . . . because the attorney knows that if charges were predicated upon the misconduct under investigation the attorney could not successfully defend against them."

An attorney acting as the treasurer of the Chittenden County Democrats used approximately $1,500.00 of the organization's money for personal expenses. In re Lane, PRB Decision No. 42 (2002). These were not client funds, but money that he was holding in a fiduciary capacity and properly the subject of attorney discipline. See ABA Standards § 5.11. The matter was self reported and the funds repaid. Id. Two attorneys were recently disbarred by consent for misappropriation of large sums from their clients. In re Sinnott, PRB Decision No. 79 (involving misappropriation of $500,000.00); In re McGinn, PRB Decision No. 77 (2005) (misappropriation of $650,000.00).

Disbarment is the appropriate sanction in this case. Respondent knowingly and intentionally commingled funds, misappropriated client funds, and provided false and misleading answers to the PRB survey. The latter

two instances of misconduct require a presumptive sanction of disbarment under the ABA Standards for Imposing Lawyer Sanctions. §§ 4.11 and 7.1. We find no compelling mitigating factors in this case. The mitigating factors present here are significantly outweighed by the aggravating factors. Disbarment in this case is necessary to protect the public and to discourage other members of the Bar from engaging in similar misconduct.

Order

For the foregoing reasons, Respondent George Harwood is hereby DISBARRED from the office of attorney and counselor at law effective forty five days from the date of this order. Respondent is further ordered to promptly comply with the provision of Rule 23 of A.O. 9.

Dated 12/6/06

Hearing Panel No. 10

/s/

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Lon T. McClintock, Esq.

/s/

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Kristina Pollard, Esq.

/s/

_____

Donald Keelan

Footnotes

FN1. Some of the conduct described in this matter involves violation of the Vermont Code of Professional Responsibility. Beginning September 1, 1999, the Vermont Rules of Professional Responsibility applied. Although some of Respondent's conduct should be described as violating the Code, rather than the Rules, the parties have stipulated that all of Respondent's conduct constitute violations of the Rules, even though some of that conduct is governed by the Code, rather than the Rules, of Professional Responsibility

FN2. There is no record as to when the PRB survey was mailed to Respondent.

FN3. The record is not clear as to when the PRB survey was either mailed to, or received by, Respondent.