101 PRB
[Filed 30-May-2007]

In re Farrar (2007-212)
2008 VT 31
[Filed 12-Mar-2008]

ENTRY ORDER

2008 VT 31
SUPREME COURT DOCKET NO. 2007-212

NOVEMBER TERM, 2007

In re Robert Farrar,
Esq. } Original Jurisdiction
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} Profe
ssional Responsibility Board
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} Dock
et No. 2006-189

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

¶ 1. A Hearing Panel of the Professional Responsibility Board found that respondent, Robert Farrar, violated Vermont Rule of Professional Conduct 1.15 by commingling his funds with client funds in his client trust account, and recommended that he be privately admonished and placed on probation. We accepted respondent's case for review. We adopt the Hearing Panel's conclusion that respondent violated Rule 1.15, but conclude that respondent's actions warrant a public reprimand.

¶ 2. The stipulated facts are as follows. Respondent was admitted to the Vermont bar in 1972 and has been a solo practitioner for the past thirteen years. He has one employee who is both his secretary and his bookkeeper. In October 2005, respondent received and completed a survey from the Professional Responsibility Program on client trust account management. Respondent answered affirmatively to the question, "Have you deposited any non-client funds in any trust accounts? If so, please explain." In explanation, respondent wrote: "For a while, I would put $200/week in trust and draw it out. That practice was discontinued."

¶ 3. A disciplinary investigation followed. Respondent made a full and free disclosure of his actions, and cooperated fully with the investigation. Respondent explained that in 2000, his

bookkeeper began transferring money each month from the firm's business account to the client trust account and then back to the business account to ensure that there would be sufficient funds in the business account each month to meet the firm's payroll obligations. The bookkeeper did this from 2000 to 2005. In addition, from September 2001 to April 2005, the bookkeeper would regularly transfer $200 from the firm business account to the client trust account as a type of savings for respondent. The bookkeeper reconciled the trust account on a monthly basis and at no time was respondent's money used to counteract a deficit in the client trust account. Respondent had no selfish or dishonest motive for commingling his money with his clients' property. Respondent stipulated to a statement of facts and to violation of Rule 1.15, which directs lawyers to hold client property "separate from the lawyer's own property." V.R.Pr.C. 1.15(a). Respondent and disciplinary counsel did not agree on an appropriate sanction. Disciplinary counsel recommended that respondent receive a public reprimand. Respondent requested that the Hearing Panel privately admonish him and place him on probation. As a condition of probation, respondent offered to write an article for the Vermont Bar Journal on proper trust account management and the potential dangers of commingling funds.

¶ 4. The Hearing Panel accepted respondent's stipulation that he violated Rule 1.15(a) and held a hearing to determine the appropriate sanction. The Panel concluded that in general violation of Rule 1.15 should result in suspension, but that suspension was not appropriate in this case, in light of the mitigating factors. The Panel considered the following mitigating factors: (1) respondent answered the questionnaire truthfully and completely; (2) respondent had no dishonest or selfish motive; and (3) respondent cooperated fully with the investigation. Thus, the Board privately admonished respondent and placed him on probation with the condition that he write an article on proper trust account management for small and solo practitioners to be submitted to the Vermont Bar Journal. The Panel explained that this condition of probation would aid in educating the bar about the dangers of commingling personal and client funds. We accepted review of the Hearing Panel's decision on our own motion.

¶ 5. On review, we will uphold the Panel's findings unless they are clearly erroneous. In re Pressly, 160 Vt. 319, 322, 628 A.2d 927, 929 (1993). Imposition of a sanction, however, is a matter left to this Court's discretion. "This Court makes its own determination as to which sanctions are appropriate, but we nevertheless give deference to the recommendation of the Hearing Panel." In re Blais, 174 Vt. 628, 630, 817 A.2d 1266, 1269 (2002) (mem.).

¶ 6. We agree with the Panel that respondent violated Rule 1.15 by depositing his own funds in his client trust account. We disagree with the Panel's recommended sanction, however, and publicly reprimand respondent.

¶ 7. Respondent contends that his misconduct warrants only a private admonition because there was no potential for injury to his clients, he cooperated fully with the investigation and he acted without any dishonest motive. We recognize the mitigating circumstances in this case, but conclude that a private admonition is not appropriate given the nature of respondent's offense. Private reproval should be used 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 when there is little likelihood of repetition by the lawyer." A.O. 9, Rule 8 (A)(5)(b). We are confident that

respondent is not likely to repeat his misconduct, but we cannot characterize respondent's acts as minor. See In re Anderson, 171 Vt. 632, 635, 769 A.2d 1282, 1285 (2000) (mem.) (adopting the Board's recommended sanction of a public reprimand for an attorney who took too long to report the mishandling of client trust accounts by a partner because the misconduct was not minor). As we have explained in the past, "protecting client property is a fundamental principle." Id. Commingling personal property with client property is a serious offense because of the likely negative consequences that may result to an attorney's clients. As another court explained: "The rule against commingling has three principal objectives: to preserve the identity of client funds, to eliminate the risk that client funds might be taken by the attorney's creditors, and most importantly, to prevent lawyers from misusing/misappropriating client funds, whether intentionally or inadvertently." In re Rivlin, 856 A.2d 1086, 1095 (D.C. 2004).

¶ 8. In addition, we are not persuaded by respondent's contention that there was no potential for injury to his clients because his secretary reconciled the accounts monthly and because he had no dishonest motive.[1] Respondent's practice of regularly placing his own money in his client trust account put his client's funds at risk, even if he never intended to misappropriate those funds. There was potential for injury to respondent's clients because respondent might have inadvertently used client funds or client funds could have been attached by respondent's creditors. See In re Anderson, 171 Vt. at 635, 769 A.2d at 1285 (noting that there was potential for injury where a partner failed to promptly report another partner's trust account irregularities); see also In re Nawrath, 170 Vt. 577, 581-82, 749 A.2d 11, 15 (2000) (explaining that there was potential for injury where an attorney negligently failed to file a mortgage). In addition to the potential pecuniary harm to respondent's clients, "lawyer misconduct in handling and protecting client trust accounts does injure both the public at large and the profession by increasing public suspicion and distrust of lawyers." In re Anderson, 171 Vt. at 635, 769 A.2d at 1285.

¶ 9. Respondent also argues that any sanction greater than private admonition would be unnecessarily severe given his lack of dishonest intent and full cooperation, and would discourage other attorneys from reporting their own misconduct and cooperating with disciplinary proceedings. Indeed, although the Hearing Panel found that respondent's commingling was serious, the Panel also considered "the importance of truthfulness and cooperation in dealing with Disciplinary Counsel," and thus recommended a private admonition. We are not convinced that the goal of encouraging attorneys to be truthful and cooperative with disciplinary counsel inquiries overrides the seriousness of the offense and the public interest in deterrence.[2] Respondent's honesty can be fairly recognized as mitigating against harsher corrective measures, such as suspension.

¶ 10. Furthermore, while recognizing that 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. "If a failure to understand the most central Rules of Professional Conduct could be an acceptable defense for a charged violation, even in cases of good faith mistake, the public's confidence in the bar, and more importantly, the public's protection against lawyer overreaching would diminish considerably." In re Smith, 817 A.2d 196, 202 (D.C. Ct. App. 2003). The prohibition against lawyers commingling private monies with client funds is a fundamental precept. "[M]istake about the applicability of an ethical rule cannot excuse or even

mitigate misconduct when the lawyer has violated a rule fundamental to governance of the legal profession." Id.

¶ 11. Having concluded that a private admonition is not appropriate, we consider the appropriate sanction for respondent's actions. "In determining the appropriate sanction, we consider the duties violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and any aggravating or mitigating factors." In re Bucknam, 160 Vt. 355, 366, 628 A.2d 932, 938 (1993); see American Bar Association, Standards for Imposing Lawyer Discipline § 3.0 (1986) (amended 1992) (listing factors to be considered in imposing sanctions), available at http://www.abanet.org/cpr/regulation/standards_sanctions.pdf [hereinafter ABA Standards]. As explained, respondent's practice of putting his own money in his client trust account violated his duty to his clients to preserve their property. Respondent had full knowledge of his bookkeeper's regular practice of putting nonclient funds into his client trust account, and respondent continued this practice for many years. Respondent should have known that his handling of his trust account was in violation of his professional responsibilities. As explained, respondent's actions did not actually harm his clients, but there was the potential for injury. Under these circumstances, we agree with the Hearing Panel's determination that the presumptive sanction in this case is suspension. See ABA Standards § 4.12 ("Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes . . . potential injury to a client.").

¶ 12. Next, we consider the aggravating and mitigating circumstances. We concur with the Hearing Panel's conclusion that several factors mitigate against suspending respondent, including respondent's lack of a dishonest motive, respondent's full and free disclosure to disciplinary counsel, and respondent's remorse. See ABA Standards § 9.32 (listing mitigating factors). There are also relevant aggravating factors that the Hearing Panel did not address. As stipulated in the facts, respondent's misconduct was ongoing for several years and respondent is an experienced attorney. See ABA Standards § 9.22 (listing potential aggravating factors including "substantial experience in the practice of law"). On balance, we conclude that the mitigating factors outweigh the aggravating factors, and that a public reprimand is the appropriate sanction in this case.

Robert Farrar is publicly reprimanded for violation of Rule 1.15 of the Vermont Rules of Professional Conduct for regularly depositing nonclient funds in his client trust account.

BY 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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[1] Respondent attempts to distinguish his case from other instances where we have sanctioned attorneys with a public reprimand primarily based on respondent's conclusion that his conduct did not potentially damage any client. The Hearing Panel found that respondent's practice of placing his funds in his client trust account had the potential to harm his clients, and, as discussed, we agree.

[2] In any event, attorneys are independently obligated under the Rules to honestly answer questions from the Office of Disciplinary Counsel and to cooperate with disciplinary proceedings. See V.R.Pr.C. 8.1, 8.4(d) (requiring attorneys to provide information to disciplinary counsel).

STATE OF VERMONT

PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No 2006.189

Decision No. 101

Disciplinary Counsel charged that Respondent violated Rule 1.15(a) of the Vermont Rules of Professional Conduct by regularly depositing non-client funds in his client trust account. The

parties filed a stipulation of facts and a joint recommendation as to conclusions of law. The matter was set for hearing on the issue of sanctions on April 16, 2007, before Hearing Panel No. 2 consisting of Jesse M. Corum IV, Esq., Theodore C. Kramer, Esq. and Christopher G. Chapman. Disciplinary Counsel Michael Kennedy was present as was Respondent and his attorney Stephen S. Blodgett. The Hearing Panel accepts the stipulation and admonishes Respondent for violation of Rule 1.15. Respondent is also placed on probation in accordance with the provisions outlined below.

Facts

In October of 2005, the Professional Responsibility Program sent surveys regarding trust account management to approximately 100 lawyers admitted to practice in Vermont. Respondent received the survey and completed it. One of the questions asked: "Have you deposited any non-client funds in any trust accounts? If so, please explain." Respondent answered yes and explained his answer as follows: "For a while, I would put $200/week in trust and draw it out. That practice was discontinued." Based upon this response a disciplinary investigation was opened, and Respondent was asked to explain his decision to place his own money in the trust account.

Respondent has been a solo practitioner for the past 13 years. He has one employee who is both his secretary and bookkeeper. Though she had no formal training in bookkeeping, she accurately reconciled the account on a regular basis. One of her responsibilities was to write payroll checks. In 2000, in order to assure that money was available for payroll and payroll taxes, she began taking money from Respondent's business account and putting it in the trust account. This began when Respondent found himself behind in remitting his payroll taxes, but

continued after the deficit was caught up. At payroll time the bookkeeper would return the funds to the business account and write payroll checks. This was done on a weekly basis from 2000 until late 2005.

Beginning in September of 2001, the bookkeeper also transferred an additional $200 per week from the business account to the trust account to act as a type of savings account for Respondent for business expenses and his personal draw. This practice was discontinued in April of 2005.

No client money was ever used for any of these expenses. After receipt of the questionnaire, Respondent set up separate accounts and since then only client money has been placed in the trust account. Respondent acknowledges that he should have known better and felt embarrassed and aggrieved to be before the Hearing Panel.

Respondent was admitted to the Vermont Bar in 1972. He was previously publicly reprimanded for violating Rules 1.3 (requires reasonable diligence and promptness in representing a client) and 1.4(a) (requirement to keep client informed about status of matter and requirement to respond to request for information from clients reasonably promptly) of the Vermont Rules of Professional Conduct. Prior to that he had one other disciplinary violation. (This involved an unconfirmed wire transfer in connection with a closing where the monies were held for three days due to USA PATRIOT Act or its predecessors' requirements when they went into effect shortly after September 11, 2001.) Respondent made a full and free disclosure to Disciplinary Counsel and has cooperated with each step of the investigation. His practice of placing non-client funds in his trust account was not motivated by selfishness or bad faith.

Conclusion of Law

Rule 1.15(a) of the Vermont Rules of Professional Conduct 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." The provisions of this Rule are clear and absolute. Respondent has stipulated to a violation and we so find.

Sanction

Determining the appropriate sanction in this matter has proved difficult for the hearing panel. We agree with Disciplinary Counsel that complete separation of client funds from the attorney's own funds is of utmost importance in the management of any law firm, and that violation of this rule should always result in discipline. Disciplinary Counsel argues that, absent mitigating factors, the type of violation of this rule that we see here, one that has been going on for a period of time, should generally result in suspension, and as a general principle we agree. Disciplinary Counsel concedes that in this case the mitigating factors are such that he believes that public reprimand is the appropriate sanction. Respondent argues that the mitigating factors are such that admonition is appropriate.

In determining the appropriate sanction, we look for guidance to the ABA Standards for Imposing Lawyer Discipline and to Vermont case law. We have also considered some of the important aspects of disciplinary sanctions. Sanctions are intended "to protect the public from harm and to maintain confidence in our legal institutions by deterring future misconduct." *In re Hunter*, 167 Vt. 219, 226 (1997). Another purpose of the Professional Responsibility Program, outlined in Administrative Order No. 9, is "to assist attorneys and the public by providing

education, advice, referrals, and other information designed to maintain and enhance the standards of professional responsibility." The goal of educating the profession appears again in Rule 8 of A.O.9 where, in discussing the imposition of an admonition, the Rule provides that: "[a] summary of the conduct for which an admonition was imposed shall be published for the education of the profession. . . ." We believe it is important to point out that it was Respondent who suggested that his situation be used as an educational vehicle for the bar. We have tried to incorporate that purpose both in this opinion and in the terms of the probation ordered.

There is much about this case that can serve to educate the profession. Both the ABA Standards and Vermont case law provide for serious discipline in cases of trust account violations. Section 4.12 of the ABA Standards provides that "[s]uspension 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." Respondent admitted that he should have known that his handling of his trust account was in violation of this rule. He also knew or should have known that there was the potential for injury to his clients had he been sued and his funds attached.

The most recent case on violation of Rule 1.15 resulted in disbarment. *In re Harwood*, 2006 VT 15 (Supreme Court Entry Order adopting PRB Decision No. 83). In that case, the attorney was using client funds in his IOLTA account to cover business expenses on a regular basis. No client was harmed because Harwood was able to secure funds to cover the deficit in his trust account. *In re Mitiguy*, 161 Vt. 362 (1994) (PCB Decision No. 59 (1993)) also resulted in disbarment. In that case, the attorney took $30,000 from an estate he was handling. He was convicted on felony charges, and the Supreme Court noted that "[t]heft 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." 161 Vt. at 627.

We believe that the law is clear in the case where the attorney uses client funds as his own that disbarment is the appropriate sanction.

Serious as this violation is, there is a lot in Respondent's behavior that we commend and which we hope the wider bar will consider. Both this case and the *Harwood* case began with receipt of a questionnaire from Disciplinary Counsel asking about trust account practices. Harwood answered the questionnaire in such a way as to mislead Disciplinary Counsel, and it was not until his firm was randomly picked for audit that the violations came to light. In contrast, Respondent here answered truthfully and explained on the questionnaire itself the nature of his misuse of his trust account. Our disciplinary system is premised on "self-regulation that requires the co-operation of all members of the bar if it is going to work fairly and efficiently." *In re Blais*, 166 Vt. 621, 624 (1997) (PCB Decision No. 118 (1997)). Had Respondent not been so candid with his responses he might have slipped through without being selected for audit. Had he been selected after misleading Disciplinary Counsel, he would have faced an additional charge of failure to cooperate with Disciplinary Counsel under Rule 8.4(d). This aspect of truthfulness, candor and cooperation with the disciplinary system also affected the sanction in the case of *In re Hutton*, PCB Decision No. 12 (1991). In *Hutton*, (157 Vt. 649) the attorney used client funds to pay his own expenses, a more serious situation than we see in the instant case. Like Harwood, he repaid the funds and no client was harmed, but unlike Harwood, he self-reported the violation and the sanction was public reprimand with probation. In considering mitigating factors, the Board in *Hutton* stated: "[m]ost importantly Respondent

himself brought this matter to the attention of the Professional Conduct Board and fully cooperated with the Board's review of this matter."

By this opinion we hope to make clear to the bar both the seriousness of commingling one's own funds with client funds, and the importance of truthfulness and cooperation in dealing with Disciplinary Counsel. At the hearing, Respondent volunteered that as a part of any discipline imposed he would be willing to write an article for submission to the Vermont Bar Journal on the management of trust funds in small and solo practices and the necessity for strict adherence to the rules. We accept this offer and incorporate it in the terms of the probation ordered. We also hope that both this opinion and Respondent's article can serve to further educate the bar. We would also point out that, should we to be presented with a case with similar facts in the future, we would be inclined to impose public discipline.

Our decision to impose admonition in this matter is also supported by the fact that Respondent had no dishonest or selfish motive. He had no intent to harm clients and no intent to use their money for his own purposes. We are also confident that this circumstance will not recur.

Order

Respondent is privately admonished for violation of Rule 1.15 of the Vermont Rules of Professional Conduct and is placed on probation on the following terms.

1. Within 45 days of the date this decision becomes final:
    a. Respondent shall write an article of 750-1,000 words on the subject of proper trust account management for small and solo practices;

b. He shall include in the article information about details of trust account management and the potential dangers to clients that arise with commingling of funds; and

c. He shall submit the article to the Vermont Bar Journal with copies to Disciplinary Counsel and to members of the Hearing Panel and to Hearing Panel Counsel.

2. A violation of the terms of this probation may be the basis for interim suspension or further disciplinary charges in accordance with A.O.9 Rule 8(A)(6)(b).

Dated: May 30, 2007

Hearing Panel No. 2

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Jesse M. Corum IV, Esq.

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Theodore C. Kramer, Esq.

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Christopher G. Chapman