

115 PRB

[Filed 21-Aug-2008]

STATE OF VERMONT

PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2007.244

Decision No. 115

The parties filed a Stipulation of Facts and Joint Recommendations as to Conclusion of Law and Sanctions. The Hearing Panel accepts the stipulated facts and the recommendations and orders that Respondent be admonished by Disciplinary Counsel for failure to comply with the trust accounting rules in violation of Rule 1.15(a) and 1.15A of the Vermont Rules of Professional Conduct. In addition, Respondent is placed on probation for a period of six months in accordance with the terms set forth below.

Facts

For the past several years the Professional Responsibility Program has randomly selected attorneys to respond to a survey about their trust account practices. Respondent received the survey in 2007, and as a result of his responses to questions on the survey, Disciplinary Counsel selected Respondent to be audited by an accounting firm retained by the Professional Responsibility Program. After receipt of the audit, Disciplinary Counsel met with Respondent to review his trust account practices.

Respondent maintained two trust accounts, one with TD Banknorth and the other with the Chittenden Bank. The account with TD Banknorth is the account at issue in this case.

For the three years preceding the audit, Respondent used his checkbook to track the TD Banknorth account. Next to each check is a tab. Respondent would note the amount of the check and the new balance. He did not regularly reconcile the account to his bank statements. The audit revealed that the actual balance in the account exceeded that reflected in Respondent's record keeping by approximately \$8000. According to the report of the auditor, the "...detail in the trust account checkbooks appears to be complete and detailed enough to allow for a reconstructive accounting" of the funds in the TD Banknorth account. The auditor also found that there were arithmetic errors and evidence that some of the excess funds "may belong to [Respondent] for miscellaneous real estate closing expenses that were paid by his practice account and not reimbursed by the trust accounts."

Had Respondent regularly reconciled his trust account he would have noticed the arithmetic errors and the excess funds. Respondent did not maintain a separate accounting record for each client for whom funds were deposited in the account, and there was thus no way of determining how much money Respondent had received in connection with the representation of each individual client.

Since the audit Respondent has gone through his files and records in an attempt to reconstruct each client's transaction history. He has also met with Disciplinary Counsel on a regular basis both to provide updates on the account reconstruction as well as to allow Disciplinary Counsel to review his trust accounting system.

As of the date of this Stipulation, Respondent has identified approximately \$7600 of the previously unidentified funds. The bulk of these funds were miscellaneous fees such as recording fees, wire fees, and FedEx fees associated with real estate closings paid from Respondent's operating account and not reimbursed from the trust account.

The auditor, a Certified Public Accountant, informed Disciplinary Counsel that while Respondent was an extremely "sloppy bookkeeper," he found nothing to suggest that Respondent had misappropriated client funds or acted with any sort of evil intent. There was no evidence that any client or third party was injured as a result of Respondent's poor bookkeeping, and Disciplinary Counsel has never received any complaints alleging that Respondent mishandled or misappropriated funds.

Respondent works alone and does not have a bookkeeper. His practice consists for the most part of real estate work as well as the occasional family law case.

Respondent has no prior discipline and has cooperated with the audit as well as with Disciplinary Counsel's investigation.

The trust account that Respondent opened at the Chittenden Bank is tracked with a system that, as of the date of the stipulation, complies with the Vermont Rules of Professional Conduct.

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. Funds shall be kept in accordance with rules 1.15A, B and C. . . . Complete records of such accounts 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.

Respondent's trust accounting system failed to meet these standards. For nearly three years he failed to reconcile the account. As a result, the balance in the account exceeded that in his minimal records. As a result of his failure to reimburse himself for expenses paid from his operating account, there were funds belonging to Respondent in the account and thus Respondent failed to keep his client funds separate from his own funds in violation of Rule 1.15(a).

Rule 1.15A(a)(2) requires that a lawyer's trust accounting system include "a separate accounting page or columns for each client for whom property is held, which shall show all receipts and disbursements and carry a running balance."

Respondent's records were inadequate and he violated this Rule as well. He had no separate accounting for each client and no way of tracking each client's funds.

Sanctions

This case is distinguishable from *In re Harwood*, PRB Decision No. 83 (December 2005), and *In re Farrar*, Supreme Court Entry order, March 12, 2008. In *Harwood*, the attorney used client funds over a period of years to pay his own expenses, and in *Farrar* the attorney used his trust account as a personal savings account for a period of years. In both *Farrar* and *Harwood* the attorney improperly used his trust account for personal purposes—something that is not here attendant. Neither of those underlying factual circumstances is present in the matter under consideration. Therefore the sanctions imposed in those cases are inapplicable to this case. The Respondent in this case is guilty of sloppy bookkeeping and a failure to reconcile his trust account on a periodic basis. He did not use his trust account for his own personal purposes nor did he improperly withdraw client funds to pay his own personal expenses. His clients funds were never improperly used or in jeopardy. Moreover, there is no evidence that any client or third-party was injured as a result of the attorney's substandard bookkeeping.

Therefore, we find merit in Disciplinary Counsel's recommendation for an Admonition by Disciplinary Counsel and placing the Respondent on disciplinary probation for six months in accordance with the following terms and conditions and we hereby approve of the same.

Order

Respondent shall be admonished by Disciplinary Counsel for violation of Rules 1.15(a) and 1.15A(a)(2) of the Vermont Rules of Professional Conduct. Respondent shall be placed on probation under the following conditions.

Respondent shall continue to work to reconstruct his TD Banknorth trust account so as to identify the funds that constitute the excess between the balance reflected in his records and the actual amount of funds reflected in the balance on the bank statement.

Respondent shall provide Disciplinary Counsel and/or an accounting firm retained by Disciplinary Counsel with regular and prompt access to his trust account records.

Respondent shall provide Disciplinary Counsel with monthly reports of the work that he has done to reconstruct his TD Banknorth trust account.

Within six months Respondent shall have identified the particular client with whom the excess funds in his TD Banknorth trust account are associated.

Respondent shall not engage in any conduct that results in a hearing panel of the Professional Responsibility Board issuing an order in which probable cause is found to support a decision by Disciplinary Counsel to file formal disciplinary charges against Respondent, regardless of whether those charges allege a violation of the trust accounting rules.

Disciplinary Counsel shall select a Certified Public Accountant to serve as Respondent's probation monitor. Disciplinary Counsel shall provide Respondent with written notification of the identity of the monitor. Respondent shall bear any expense associated with the probation monitor's supervision of his probation.

Probation shall commence upon the effective date of this Order and may be terminated in six months in accordance with the provisions of A.O.9 Rule 8 (A)(60(b)).

Dated August 21, 2008

Hearing Panel No. 1

/s/

FILED August 20, 2008

Lawrence Miller, Esq.

/s/

Susan Ritter, Esq.

/s/

Diane Drake