

120 PRB

[Filed 2/26/2009]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2008.104

Decision No. 120

The parties filed a Stipulation of Facts and Joint Recommendations as to Conclusion of Law and Sanctions. Respondent also waived certain procedural rights including the right to an evidentiary hearing. The Hearing Panel accepts the stipulated facts and the recommended conclusions of law, but declines to accept the recommended sanction of public reprimand. The Panel orders that Respondent be admonished for failure to reconcile his client trust account to his bank statements in violation of Rule 1.15(d)(2) of the Vermont Rules of Professional Conduct.

Facts

Respondent is a sole practitioner with one non-lawyer employee. His practice focuses on real estate transactions and personal injury work. Respondent was admitted to the Vermont Bar

in 1987. Respondent maintains a pooled interest bearing client trust account which has been at TD Banknorth for all times relevant to this case.

In February of 2006, Respondent conducted a closing for clients who were purchasing property in Barre. The clients had been renting the property under a “rent-to-own” plan in which a percentage of the rent they had paid was to be applied as a down payment towards the purchase. In anticipation of the closing, Respondent used a software program to prepare a HUD settlement statement. In doing so, Respondent mistakenly entered his clients’ rent payments in the wrong spot. As a result, the final HUD statement credited the seller with approximately \$7300.00 more than he should have received. No one, not Respondent, seller’s attorney, the realtor nor the parties noticed the mistake. During the closing, Respondent issued several checks drawn on his trust account. One of the checks was payable to the seller, and due to the mistake on the HUD statement, was for an amount that exceeded what the seller should have received by approximately \$7300.00. Nearly two years later, Respondent’s bank notified him that his trust account was overdrawn. On receipt of the notice, Respondent reviewed his trust account records back to the year 2000 and discovered that in several closings he had made the same error that he had made in February of 2006: failing to enter the buyer’s down payment in the proper spot on the HUD settlement statement. Respondent determined that, over time, his errors caused him to disburse from his trust account approximately \$11,000.00 more than should have been disbursed. Respondent immediately took out a loan and deposited the money into his trust account to ensure that his clients’ interests were protected.

In the course of Disciplinary Counsel's investigation into the overdraft, Respondent informed Disciplinary Counsel of the mistakes he had uncovered. As a result, the investigation expanded to include an audit of Respondent's trust accounting system.

The audit was conducted by a Certified Public Accountant selected by Disciplinary Counsel and confirmed the mistakes that Respondent had made in preparing HUD statements at various closings which caused him to disburse from his trust account approximately \$11,000.00 that should not have been disbursed.

Due to the volume of funds in the trust account, the account was not overdrawn until December of 2007. In other words, the volume of Respondent's business allowed him to use client funds to cover the shortfall caused by the mistakes he had made in preparing the various HUD statements. Respondent never had his clients' permission to use their funds for transactions other than their own.

Respondent received and reviewed his monthly bank statements to ensure that each check listed as having been paid was a check that should have been issued. He did not, however, compare or reconcile the balance on the bank statements to the balance reflected in his trust accounting system. Had Respondent reconciled the balances, he would have noticed that the balance on the bank statements was less than the balance reflected in his trust accounting system.

Respondent cooperated with Disciplinary Counsel's investigation, including the audit of his trust accounting system. The audit revealed that the system complies with the record-keeping requirements of the Vermont Rules of Professional Conduct. The audit did not reveal any evidence tending to suggest that Respondent intended to misuse client funds.

By securing a loan and depositing the proceeds into his client trust account, Respondent protected his clients' interests.

In conjunction with the investigation of the overdraft, Respondent opened a new client trust account and stopped using the TD Banknorth account.

Since the audit, Disciplinary Counsel has not received any notices of over drafts to either of Respondent's client trust accounts.

In 1993, Respondent was admonished for conduct that bears no similarity to the conduct at issue in this case.

Conclusion of Law

Rule 1.15(d)(2) of the Vermont Rules of Professional Conduct provides:

A lawyer shall not use, endanger, or encumber money held in trust for a client or third person for purposed of carrying out the business of another client or person without the permission of the owner given after full disclosure of the circumstances.

A lawyer violates this rule when the lawyer fails to make timely reconciliations of his or her client trust account. *PRB Decision No. 61 (Jan. 2004)*. Respondent violated this rule when he failed to reconcile his bank statements to the balance reflected in his trust accounting system. The Hearing Panel accepts the stipulation of the parties and finds that Respondent violated Rule 1.15(d)(2) of the Vermont Rules of Professional Conduct.

Sanction

The parties have recommended that the Hearing Panel impose a public reprimand in this matter. We do not accept the recommendation and order that Respondent be admonished for this violation.

In reaching this decision we have considered prior Vermont decisions and the ABA Standards for Imposing Lawyer Sanctions.

It is well established that it is appropriate to look to the ABA Standards in determining discipline. Under this system a tentative violation is arrived at by first looking at the duty violated, the lawyers mental state and the existence of actual or potential injury. One then considers the presence of any aggravating or mitigating circumstance to determine if the tentative sanction should be either increased or decreased.

This violation falls under one of two relevant portions of the ABA Standards. Section 4.13 provides that “[r]eprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.”

Section 4.14 provides that “[a]dmonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.”

Respondent violated his duty to his clients to manage his trust account so that one client’s funds were not used for another client without permission. His actions were negligent rather than intentional. The difference between reprimand and admonition under the ABA Standards is the extent of the actual or potential injury. There was no injury in this case. When Respondent discovered his errors, he promptly borrowed money to replenish his trust account. There was,

however, the potential for injury. Had Respondent not been able to cover the shortfall in his trust account there was the possibility that clients could have lost money. We do not know how much this potential loss could have been, but since \$11,000.00 was needed to make the trust account whole, we are assuming that this is the maximum amount of the potential loss.

Due to the existence of the potential loss, reprimand would seem to fit more closely as a tentative sanction. There are, however, mitigating factors to consider. Respondent acted quickly to rectify the consequences of his misconduct by depositing money into his trust account, *ABA Standards §9.32(d)*; he has cooperated fully with Disciplinary Counsel, *ABA Standards §9.32(e)*, and his prior discipline is remote in time and unrelated to the present conduct. *ABA Standards §9.32(m)*. There are no aggravating factors present, and a reasonable argument can be made that the mitigating factors would reduce the tentative sanction to that of admonition.

This position is strengthened when we consider the recent cases in Vermont concerning trust account violations.

The cases tend to fall into two categories: those in which there is intentional mishandling or actual misappropriation for which case serious discipline is imposed, and those in which the lawyer was negligent in his handling of the account, for which admonition is generally imposed.

In the first situation, we have *In re Harwood*, PRB Decision No. 83 (Dec. 2005), (disbarment for intentional commingling and misappropriation of client funds and making false statements to Disciplinary Counsel), *In re Farrar*, PRB Decision No. 101 (May 2007) (public reprimand for, in essence, using the trust account as a personal savings account to accumulate funds for office expenses), and *In re Heald*, PRB Decision No. 66 (May 2004), (public

reprimand, in part due to aggravating factors, for failure to deposit client funds in his trust account).

The admonition cases in general arise in the context of real estate transactions when the attorney is not careful about all of the financial details. These cases include *In re PRB Decision No 93 (Sept. 2006)*, (disbursement checks in a real estate closing dishonored because attorney failed to verify that wired funds had arrived), *In re PRB Decision No. 105 (Feb. 2008)* (in a real estate closing, the attorney failed to collect the deposit from the realtor, thus overdrawing her trust account) and *In re PRB Decision No. 115 (August 2008)*, (attorney failed to reconcile his trust account to bank statements and as a result had \$8000.00 of his own funds in the trust account).

In each of these admonition cases, as in the case before us, the attorney was negligent in his or her handling of monies in a real estate transaction, rectified the problem and no client was harmed. It is somewhat troubling that the failure to reconcile the account in this case went on for such a long period, seven years, but we do not believe that this fact alone is sufficient to warrant public discipline in this case.

Order

For the foregoing reasons we reject the recommended sanction of public reprimand and order that Respondent be admonished for violation of Rule 1.15(d) of the Vermont Rules of Professional Conduct.

Dated: **FEBRUARY 26, 2009**

Hearing Panel No. 4

/s/

Bruce C. Palmer, Esq. Chair

/s/

William Piper, Esq.

/s/

Florence Chamberlin