

**STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM**

In re: PRB Docket No. 2018-145

Decision No. 222

Disciplinary Counsel and Respondent initiated these proceedings by filing a proposed stipulation of facts along with jointly proposed conclusions of law. The parties also requested a hearing to present additional factual material to the Panel. In response, the Hearing Panel proceeded to schedule a hearing. In addition, the Panel requested that the parties submit to the Panel for its consideration a June 21, 2018 letter from Respondent that was referenced in the proposed stipulation of facts. In response to this request, Disciplinary Counsel filed a motion to enter the letter into the record with certain redactions. When a motion to redact a document has been filed, the Panel must review an unredacted copy of the document to evaluate whether redaction is appropriate. *See In re Sealed Documents*, 172 Vt. 152, 162, 772 A.2d 518, 527 (2001) (“[I]n rendering a decision, the court must examine each document individually, and make fact-specific findings with regard to why the presumption of access has been overcome.”).

Based on its review of an unredacted copy of the June 21, 2018 letter, the Panel concludes that the proposed redactions are justified. Administrative Order 9, Rule 12(A) provides that “[p]rior to the filing of formal disciplinary proceedings, all proceedings and communications in connection with a complaint shall be confidential within the program, unless confidentiality is waived by both the complainant and the respondent attorney, or is otherwise dispensed with for good cause by order of the Board Chair.” The proposed redactions consist of communication by Respondent to Disciplinary Counsel concerning a matter that is separate and distinct from the subject matter of this disciplinary proceeding. Because the communication occurred prior to the initiation of this proceeding and no

charges have been filed related to the subject matter of the redacted communication, the redacted material is confidential under Rule 12(A). Accordingly, the Panel hereby GRANTS Disciplinary Counsel's motion to file the letter as redacted. The unredacted copy of the letter will remain under seal in the file.

The final merits hearing was held on November 8, 2018. Disciplinary Counsel presented no evidence at the hearing. Respondent testified before the Panel at the hearing.

With the factual record now complete, the matter is now ready for a decision on the merits of the issues presented. Based on the stipulated facts that have been accepted by the Panel and the additional evidence in the record, the Panel issues the following findings of fact, conclusions of law and order:

FINDINGS OF FACT

1. Respondent was admitted to practice in Vermont in 2009 and has been actively practicing law since 1998, when he was first licensed in the State of New Hampshire.
2. In 2013, Respondent opened his solo practice in Vermont. Respondent's practice is of a general civil nature with an emphasis on landlord and tenant law, family law and residential real estate.
3. Respondent understands his obligations under the Rules of Professional Conduct relative to managing client trust account, including his IOLTA account.¹
4. As a solo practitioner, Respondent is responsible for maintaining his IOLTA accounts.
5. Respondent maintains two accounts: one with the Vermont State Employees' Credit

¹ Rules 1.15, 1.15A, and 1.15B of the Vermont Rules of Professional Conduct address trust accounts. An IOLTA account is a pooled interest-bearing trust account for client or third-party funds that are not expected to earn any significant amount of interest because they are "of a small amount or are held for a period of short duration." V.R.Pr.C. 1.15B, Reporter's Notes – 2009 Amendment, at 808. The interest that accrues in an IOLTA account is periodically paid over to the Vermont Bar Foundation "to support legal services for the poor or for public education on the legal system." *Id.*

Union (VSECU), which is the account in active use and the subject of this proceeding, and one with Passumpsic Savings Bank, which is dormant.

6. Respondent uses the VSECU account as his primary IOLTA account. The account is used to hold client retainers and prepaid costs, hold real estate purchase funds, and for making related disbursements.

7. By letter dated June 21, 2018, Respondent notified Bar Counsel that he had become aware of errors involving his IOLTA account record keeping. The letter included a detailed description of circumstances surrounding the errors. Respondent accepted full responsibility for the deficiencies and expressed remorse for the conduct.

8. On July 10, 2018, Certified Public Accountant Randy Sargent of JMM & Associates performed a compliance examination of Respondent's IOLTA account for the period May 21, 2017 through June 20, 2018. Mr. Sargent's report was received by Disciplinary Counsel on July 31, 2018.

9. Respondent was present for and participated in the exam, and he agrees that the findings set forth in the Sargent report are generally accurate.

10. The Sargent report identifies five areas of noncompliance pertaining to Respondent's account activity and record keeping: (1) failing to reconcile the trust accounts in a timely manner; (2) withdrawing funds from a trust account to pay for legal fees that had either not yet been earned or had not yet been deposited into the account; (3) failing to document a few deposits into the accounts and to itemize the individual payments included in some lump sum transfers for earned legal fees; (4) depositing a significant amount of personal funds into a trust account in an attempt to reconcile the bank balance to individual client balances; and (5) failing to maintain a single set of records to document all trust account activity.

11. In addition to the findings set out in the Sargent report, Respondent provides the

following additional factual context and information:

a. Failure to timely reconcile Respondent's client trust accounts to the bank statements and to the ledger balance and list of funds held for each client caused Respondent to fail to detect several accounting errors he had made. For example, on one or more occasions he withdrew funds for payment of fees that had not yet been earned for that specific client matter. On another occasion, he withdrew funds for earned fees but from other clients' funds, because no deposit for the earned fee had ever been made by that particular client and that fee should have instead been invoiced directly to the client.

b. Instead of using a single set of records to document trust account activity, Respondent used multiple systems, including a manual checkbook, manual log of deposits, individual client ledgers, and a timekeeping system that did not identify individual amounts on a per client, per matter basis for earned fees.

c. In attempt to resolve apparent errors and reconcile the bank statement to the individual client balances, Respondent deposited his own personal funds and then failed to accurately record or document this activity.

12. There is no evidence that Respondent intentionally took or misused client funds.

13. There is no evidence that any client funds were ever lost.

14. No complaint regarding any misuse of client funds was ever referred to Disciplinary Counsel.

15. Since Respondent received the exam report, he has taken the following steps to bring his bookkeeping into compliance: Respondent now uses a single record to account for all deposits and disbursements from his IOLTA account, which includes information identifying the specific client, the specific matter and the purpose of the deposit/disbursement. Respondent has also begun photocopying documentation of deposits into his IOLTA account along with the related deposit slip, so as to avoid

lump sum deposits that do not readily identify the client source/matter for such deposits. Respondent now reconciles his IOLTA account on a monthly basis at a minimum. Respondent continues to record deposits and disbursements into the individual client ledger and reconciles the ledger to the Excel spreadsheet and to the IOLTA account monthly bank statement.

16. Respondent has no prior disciplinary record.

17. Respondent lacked any dishonest or selfish motive.

18. When Respondent was preparing to disburse funds from his IOLTA account and became aware that the account did not have sufficient funds to cover a disbursement he immediately deposited his own funds into the account to ensure that a disbursement could be made and would not result in an overdraft.

19. Respondent self-reported his violations and cooperated fully in the subsequent investigation undertaken by Disciplinary Counsel.

20. At the evidentiary hearing, Respondent once again accepted full responsibility for his violations and expressed remorse for his misconduct. The Panel finds his testimony to be compelling.

CONCLUSIONS OF LAW

Rule 1.15(a)(1) of the Vermont Rules of Professional Conduct provides as follows:

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 and B. 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.

V.R.Pr.C. 1.15(a)(1).

Rule 1.15A provides, in pertinent part, as follows:

(a) Every lawyer or law firm holding funds of clients or third persons . . . shall hold such funds in one or more accounts in a financial institution or, in

appropriate circumstances, a pooled interest-bearing trust account pursuant to Rule 1.15B. An account in which funds are held that are in the lawyer's possession as a result of a representation in a lawyer-client relationship or a fiduciary relationship shall be clearly identified as a "trust" account or shall be identified as a fiduciary account, such as an estate, trust, or escrow account, to distinguish such funds from the lawyer's own funds. *** The lawyer or law firm shall maintain an accounting system for all such accounts that shall include, at a minimum, the following features:

- (1) a system showing all receipts and disbursements from the account or accounts with appropriate entries identifying the source of the receipts and the nature of the disbursements;
- (2) a record for each client or person for whom property is held, which shall show all receipts and disbursements and carry a running account balance;
- (3) records documenting timely notice to each client or person of all receipts and disbursements from the account or accounts; and
- (4) records documenting timely reconciliation of all accounts maintained as required by this rule and a single source for identification of all accounts maintained as required in this rule. "Timely reconciliation" means, at a minimum, monthly reconciliation of such accounts.²

V.R.Pr.C. 1.15A(a).

Rule 1.15(b) states that "a lawyer may deposit the lawyer's own funds in an account in which client funds are held for the sole purpose of paying service charges or fees on that account, but only in an amount necessary for that purpose." V.R.Pr.C. 1.15(b).

Rule 1.15(c) provides for deposit into a trust account of a client's advance payments for legal fees and expenses and states that "[s]uch funds are to be withdrawn by the lawyer only as fees are earned or expenses incurred."

² The reconciliation procedure is set forth in a guidance document issued by the Professional Responsibility Program. *See Managing Client Trust Accounts – Rules, Regulations, and Tips* (revised 1/6/2010 & 10/14/2014) at 10 ("Once a month you will receive your bank statement. The account balance on the bank statement *must* be reconciled to the account balance shown in your check register. *** Differences between the bank statement balance and the checkbook balance *should be investigated immediately and corrected* either in your records or by the bank") (emphasis added); *see also id.* (providing for further reconciliation to a "list of clients" and associated balances for each).

Rule 1.15(f)(2) further states that “a lawyer shall not use, endanger, or encumber money held in trust for a client or third person for purposes of carrying out the business of another client or person without the permission of the owner given after full disclosure of the circumstances.”

During the period of time audited – May 21, 2017 through June 20, 2018 – Respondent failed to comply with the requirements of the trust account rules applicable to his IOLTA accounts. He relied on incomplete and inaccurate records of deposits and disbursements. He failed to put in place a comprehensive and coordinated accounting system for his IOLTA accounts that would allow him to document, by individual client and client matter, all receipts and disbursements. In addition, he failed to undertake timely reconciliation of his IOLTA accounts. This conduct violated Rules 1.15(a)(1) and Rules 1.15(A)(1), (2), and (4).

These violations, in turn, resulted in further noncompliance with the provisions of Rules 1.15(b), (c), and (f)(2). Because of the incomplete and inaccurate records maintained by Respondent and failure to perform the requisite reconciliations, Respondent ended up depositing his own personal funds into his IOLTA account to ensure that disbursements from that account were adequately covered. The deposits were not made for the purpose of paying service charges or fees on the trust account and therefore violated Rule 1.15(b). In addition, Respondent failed to accurately record some of those deposits, which resulted in further accounting confusion. Although well-intentioned, Respondent’s deposit of this own personal funds violated Rule 1.15(b).

Moreover, because his accounting system was only able to track legal fees he had earned by individual client – and not by individual case or matter – Respondent inadvertently

paid himself legal fees that he had not yet earned in connection with clients for whom he was handling multiple cases or matters. In some instances, clients had not yet made payments for fees, resulting in the inadvertent withdrawal of a different client's funds. This conduct violated Rule 1.15(c) and Rule 1.15(f)(2).

SANCTIONS DETERMINATION

The Vermont Rules of Professional Conduct “are ‘intended to protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar.’” *In re PRB Docket No. 2006-167*, 2007 VT 50, ¶ 9, 181 Vt. 625, 925 A.2d 1026 (quoting *In re Berk*, 157 Vt. 524, 532, 602 A.2d 946, 950 (1991)). The purpose of sanctions is not “to punish attorneys, but rather to protect the public from harm and to maintain confidence in our legal institutions by deterring future misconduct.” *In re Obregon*, 2016 VT 32, ¶ 19, 201 Vt. 463, 145 A.3d 226 (quoting *In re Hunter*, 167 Vt. 219, 226, 704 A.2d 1154, 1158 (1997)).

Applicability of the ABA Standards for Imposing Lawyer Sanctions

Hearing panels are guided by the ABA Standards when determining appropriate sanctions for violation of the Vermont Rules of Professional Conduct:

When sanctioning attorney misconduct, we have adopted the *ABA Standards for Imposing Lawyer Discipline* which requires us to weigh the duty violated, the attorney's mental state, the actual or potential injury caused by the misconduct, and the existence of aggravating or mitigating factors.

In re Andres, 2004 VT 71, ¶ 14, 177 Vt. 511, 857 A.2d 803.

“Depending on the importance of the duty violated, the level of the attorney's culpability, and the extent of the harm caused, the standards provide a presumptive sanction.

*** This presumptive sanction can then be altered depending on the existence of aggravating or mitigating factors.” *In re Fink*, 2011 VT 42, ¶ 35, 189 Vt. 470, 22 A.3d 461.

The Duty Violated

The ABA Standards recognize a number of duties that are owed by a lawyer to his or her client. *See Standards for Imposing Lawyer Sanctions* (ABA 1986, amended 1992) (“*ABA Standards*”), Theoretical Framework, at 5. Other duties are owed to the general public, the legal system, and the legal profession. *Id.* In this case, Respondent owed a duty to his clients to safeguard and preserve their property through adherence to the trust account rules. *See also id.* (providing that the “duty of loyalty” includes a duty to “preserve the property of a client.”)

Mental State

“The lawyer’s mental state may be one of intent, knowledge, or negligence.” *ABA Standards*, § 3.0, Commentary, at 27. For purposes of the sanctions inquiry, “[a lawyer’s] mental state is [one] of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result.” *Id.*, Theoretical Framework, at 6. The mental state of “knowledge” is present “when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct [but] without the conscious objective or purpose to accomplish a particular result.” *Id.* The mental state of “negligence” is present “when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.” *Id.*; *see also id.*, at 19 (definitions of “intent,” “knowledge,” and “negligence”). “[A]pplication of these definitions is fact-dependent” and “[t]he line between negligent acts and acts with knowledge can be fine and difficult to discern” *In re Fink*, 2011 VT 42, ¶ 38.

Absent evidence that a lawyer who has failed to comply with the trust accounting requirements disregarded information indicating a need to act promptly to prevent loss or potential loss of a client’s funds, the lawyer’s mental state in trust accounting cases has generally been considered to be negligent. *See In re PRB No. 2013-145*, 2017 VT 8, ¶ 1, 204 Vt. 612, 621, 165 A.3d 130, 140 (concluding that

“Respondent acted negligently when he failed to set up his Quicken accounting system in accordance with the Rules of Professional Conduct. *** Respondent was negligent when he failed to perform timely reconciliations of the IOLTA account. Respondent was also negligent when he failed to correct entry errors that led to an incorrect running balance”); *In re PRB Docket No. 2014-133*, 2015 VT 63, 199 Vt. 640, 643, 136 A.3d 564, 567 (finding, in part, that “Respondent did not reconcile his trust account to his monthly bank statement” and concluding that “Respondent was negligent in his failure to follow the trust accounting rules.”).

Here, Disciplinary Counsel takes the position that Respondent acted with a negligent state of mind. In light of this position and the limited evidence presented with respect to Respondent’s state of mind, the Panel concludes that Respondent’s mental state should be considered to be that of negligence.

Injury and Potential Injury

The ABA Standards consider “the actual or potential injury caused by the lawyer’s misconduct.” *ABA Standards*, § 3.0(c), at 26. The term “injury” is defined as “harm to a client, the public, the legal system, or the profession which results from a lawyer’s misconduct. The level of injury can range from ‘serious’ injury to ‘little or no’ injury.” *Id.*, Definitions, at 9. The term “potential injury” refers to harm that is “reasonably foreseeable at the time of the lawyer’s misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct.” *Id.* Under the ABA Standards, “[t]he extent of the injury is defined by the type of duty violated and the extent of actual or potential harm.” *Id.* at 6.

Here, there was no evidence of any actual injury to any client. There was no evidence that any client funds were ever lost as a result of the deficiencies in Respondent’s trust accounting procedures.

Nevertheless, to the extent that accounting errors were made and that reconciliations were not timely undertaken, there was some potential for injury to Respondent's clients.

Presumptive Standard under the ABA Standards

ABA Standard 4.13 applies in this case. It 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." *ABA Standards* § 4.13. As discussed above, Respondent was negligent. In addition, while there was no actual injury as a result of Respondent's trust account violations, there was some potential for injury. Thus, Standard 4.13 is the proper standard. *See, e.g., PRB No. 2013-145*, 2014 Vt. at 621-622 (applying Standard 4.13 as presumptive standard where respondent failed to reconcile trust account for 9 months).

The Panel concludes that Standard 4.14, which provides for a private admonition if a lawyer is negligent when dealing with client property "and causes little or no actual or potential injury to a client," is not appropriate because of the fact that Respondent inadvertently disbursed to himself as legal fees funds that belonged to a different client and because he commingled his own personal funds with client funds in his trust accounts – albeit for the purpose of ensuring that no harm would come to any client. The risks associated with commingling are serious. *See In re Farrar*, 2008 VT 31, ¶ 7, 183 Vt. 592, 594, 949 A.2d 438, 440 (2008) ("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."). The potential injury to Respondent's clients cannot be considered minimal under these circumstances.

At the same time, the Panel concludes that the presumptive standard for a sanction of suspension – applicable under Standard 4.12 when a lawyer "knows or should know that he is dealing improperly

with client property and causes injury or potential injury to a client” – should not apply here because Respondent’s erroneous disbursements to himself were inadvertent and because the commingling was isolated and resulted from attempts to mitigate any potential harm to a client. The circumstances in this case are in contrast to those in the *Farrar* case, where the Court applied the presumptive standard calling for suspension to a lawyer who had, over the course of five years, regularly used his trust account as both a personal savings account and as a holding account for excess operating funds to ensure that he had sufficient funds to make payroll payments. *Farrar*, 2008 VT 31, ¶ 3.

Aggravating and Mitigating Factors Analysis

Next, the Panel considers any aggravating and mitigating factors and whether they call for increasing or reducing the presumptive sanction of public reprimand. Under the ABA Standards, aggravating standards are “any considerations, or factors that may justify an increase in the degree of discipline to be imposed.” *ABA Standards*, § 9.21, at 50. Mitigating factors are “any considerations or factors that may justify a reduction in the degree of discipline to be imposed.” *Id.* § 9.31, at 50-51.

The following aggravating factors under the ABA Standards are present:

§ 9.22(d) (multiple offenses) – Respondent’s conduct involved multiple violations of the trust account rules. The Panel observes, however, that the bulk of the violations were closely related to one another or the product of interconnected factual circumstances. Accordingly, the Panel will not assign great weight to this factor.

§ 9.22(i) (substantial experience in the practice of law) – Respondent had approximately 20 years of practice at the time of the violations. He is an experienced attorney.

(b) Mitigating Factors

The following mitigating factors under the ABA Standards are present:

§ 9.32(a) (absence of prior disciplinary record) – Respondent has no record of any prior disciplinary action having been taken against him.

§ 9.32(b) (absence of a dishonest or selfish motive) – Respondent did not engage in any dishonest conduct, nor did he seek to advance his own interests.

§ 9.32(d) (timely good faith effort to make restitution or to rectify consequences of misconduct) – Respondent made timely efforts to address the consequences of his accounting deficiencies by depositing personal funds into his trust account to cover otherwise appropriate disbursements. Although his deposit of personal funds amounted to a violation of Rule 1.15(b), Respondent deserves some credit for taking action to ensure that the account was adequately funded.

§ 9.32(e) (full and free disclosure to disciplinary board or cooperative attitude toward proceedings) – Respondent's cooperation during the course of the disciplinary process is not entitled to significant weight because Respondent has a duty under V.R.Pr.C. 8.1(b) to cooperate in connection with any disciplinary investigation. *See, e.g., In re Richmond's Case*, 872 A.2d 1023, 1030 (N.H. 2005) (“[W]e do not ascribe significant weight to this factor because a lawyer has a professional duty to cooperate with the committee's investigation”). However, the Panel considers the self-reporting by Respondent to be a significant mitigating factor.

§ 9.32(l) (remorse) – Respondent expressed remorse for his misconduct both in his self-reporting letter and in his testimony before the Panel. The Panel has found his testimony in that regard to be compelling and deserving of considerable weight.

(c) Weighing the Aggravating Mitigating Factors

The mitigating factors substantially outnumber and outweigh the aggravating factors and justify a reduction of the presumptive sanction from a public reprimand to a private admonition. The Panel places great weight on the self-reporting by Respondent, the absence of any prior disciplinary action, and Respondent's expression of remorse at the hearing.

* * *

Having in mind that "[i]n general, meaningful comparisons of attorney sanction cases are difficult as the behavior that leads to sanction varies so widely between cases," *In re Strouse*, 2011 VT 77, ¶ 43, 190 Vt. 170, 34 A.3d 329 (Dooley, J., dissenting), the Panel must nevertheless consider whether a private admonition is consistent with past disciplinary determinations. As discussed above, similar factual circumstances were presented in *PRB No. 2013-145*, 2017 VT 8. In that case, the panel concluded that the predominance of mitigating factors justified a reduction of the presumptive sanction from a public reprimand to a private admonition. In reaching this result, it placed significant weight on the fact that there was no actual injury and that the respondent had retained an accountant to bring his accounting system into compliance. The Panel has made similar findings here. There was no actual injury to any client and Respondent took steps to correct the deficiencies in his trust accounting system and procedures. Moreover, the weight of the mitigating factors in this case justify a reduction to a private admonition.

Other decisions involving trust accounts have also imposed private admonitions for similar conduct. *See, e.g., In re PRB Docket No. 2014-133*, 2015 VT 63 (parties jointly recommended private admonition where violations included failure to reconcile to monthly bank statements and panel noted numerous mitigating factors); *In re PRB Docket No. 2012-155*, 2015 VT 57, 199 Vt. 143, 121 A.3d 675 (affirming panel conclusion that public reprimand the appropriate presumptive sanction for

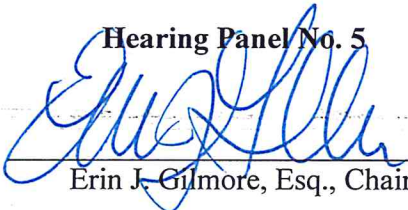
commingling of personal funds and for overdraft of trust accounts and reducing sanction to admonition based on mitigating factors); *In re PRB Docket No. 2013-153*, 2014 VT 35, 196 Vt. 633, 96 A.3d 468 (respondent admonished for failure to reconcile trust accounts and to maintain adequate trust accounting system and for placing unearned fees in law firm operating account; no actual injury from violations and fees were earned eventually). For all these reasons, the Panel concludes that a private admonition is the appropriate sanction.

ORDER

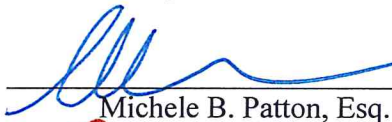
Based on the Panel's findings of fact and conclusions of law, Respondent is hereby admonished for violation of Rules 1.15 and 1.15A of the Vermont Rules of Professional Conduct.³

Dated: **February 5th, 2019**

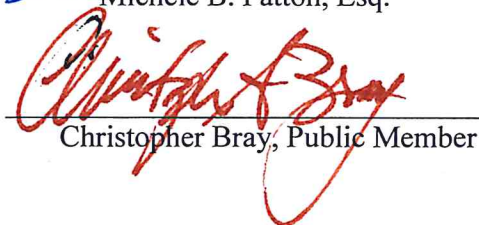
Hearing Panel No. 5



Erin J. Gilmore, Esq., Chair



Michele B. Patton, Esq.



Christopher Bray, Public Member

³ Disciplinary Counsel has indicated that she believes a period of probation is not needed in this case. Based on the factual circumstances presented, the Panel has no reason to conclude otherwise.