

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2014.124

Decision No. 173

The parties have filed a Stipulation of Facts, Proposed Conclusions of Law and a Recommendation for Sanctions. The Respondent has waived certain procedural rights including the right to an evidentiary hearing. The panel accepts the stipulated facts and recommendations and orders that Respondent be admonished by Disciplinary Counsel for violation of Rule 1.15(f) of the Vermont Rules of Professional Conduct for disbursing funds in connection with a real estate closing without first confirming that the funds had been deposited into his account.

Facts

Respondent was admitted to practice in Vermont in 1987 and a portion of his practice includes handling real estate transactions.

In the fall of 2013 Respondent's office handled a real estate refinancing for a client. As part of that transaction, the client was paying off his first mortgage and his home equity loan. The transaction was to be funded by several sources including a new first mortgage and a new home equity loan both from the same lender, which was also the bank where Respondent maintained his trust account.

At the time of the closing, the lender transferred the loan proceeds for the new first mortgage to Respondent's trust account but neglected to transfer the loan proceeds for the new home equity loan to the trust account. Respondent's office confirmed that the first mortgage loan proceeds had been transferred but failed to notice that the home

equity loan proceeds had not been.

Respondent's office conducted the closing as scheduled and issued trust account checks to disburse the funds for the transaction. Several weeks later, Respondent was notified by his bank that his trust account was overdrawn. The financial institution covered the check, but charged Respondent's trust account a \$19.00 insufficient funds charge.

Respondent immediately deposited funds in the account sufficient to cover the shortfall and the bank charge. He then took steps to determine the cause of the overdraft, and learned that some of the funds for the refinancing had not been transferred to his trust account. The bank transferred the funds to his account, and he removed the deposit he had made to cover the shortfall except for the amount of the overdraft fee.

Respondent's usual practice for real estate closings is to verify that all funds have been received before making disbursements. In this instance, his office failed to notice that one of the funding sources had not been received because there were two loans from the same lender. Respondent accepts full responsibility for this oversight.

No clients lost money as a result of the overdraft.

There are a number of mitigating factors present. Respondent has no prior disciplinary record; he has cooperated with the disciplinary proceedings; he had no dishonest or selfish motive, and he has expressed remorse.

Conclusions of Law

Rule 1.15(f) of the Rules of Professional Conduct provides that . . .

- (1) a lawyer shall not disburse funds held for a client or third person unless the funds are "collected funds." For purposes of this rule, "collected funds" means funds that a lawyer reasonably believes have been deposited, finally settled, and credited to the lawyer's trust account.

- (2) A lawyer shall not use, endanger, or encumber money held in trust for 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.

Respondent violated Rule 1.15(f)(1) when he disbursed funds from his trust account without first confirming that the wire transfer had indeed reached his account. He violated Rule 1.15(f)(2) when he disbursed funds without confirming that they had been received which resulted in funds of other clients being used to cover the checks for the real estate closing without the permission of those clients.

Several hearing panels have addressed the issue of what constitutes a *reasonable belief* that funds needed for a closing have actually reached the attorney's trust account. It is clear that solely checking with, or receiving notification from, the sending institution does not meet the standard of Rule 1.15(f)(1). The attorney has an obligation to confirm that the funds have actually reached the trust account on which he or she plans to write the checks.

In *In re PRB Decision No. 93* (Aug. 9, 2006), the funds were not wired due to failure on the part of the bank. The panel wrote “[a]t a minimum this rule requires that an attorney check with his or her bank to determine whether an anticipated wire of funds had actually occurred.”

In a later case, *In re PRB Decision No 147* (Jan.6, 2012), the attorney received confirmation from the sending bank that a wire transfer had been sent. Due to bank error the funds were not sent. The attorney failed to check with his own bank and funds were disbursed resulting in checks written on funds of other clients without their permission in violation of the rule.

Respondent's failure to check with the bank to determine whether all of the needed funds had been transferred to his account violated Rule 1.15(f).

Sanction

The parties have joined to recommend that Respondent be admonished by Disciplinary Counsel and we agree. It is consistent with both the ABA Standards for Imposing Lawyer Sanctions and prior Vermont cases.

Section 4.14 of the ABA Standards 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 was negligent in failing to confirm that all of the needed funds had been transferred to his account. There was no actual injury to clients and very little potential for injury.

Admonition is also consistent with prior Vermont cases. Both of the cases cited above, *In re PRB Decision No. 93* (Aug. 9, 2006), and *In re PRB Decision No 147* (Jan.6, 2012), involved wire transfers from other banks. Both attorneys received notice from the sending bank that funds had been transferred, but both failed to confirm with their own banks that the funds had been received. The fact that the transfer in this instance was within the same bank is not relevant. As in the present case, funds of other clients were used to cover the checks written at the closing, and each of the sending banks quickly corrected the error by sending the funds. Both of these cases resulted in admonition by Disciplinary Counsel. The fact that the transfer in the present case was within the same bank is not relevant. since Respondent failed to confirm that the new home equity loan was transferred to his own trust account.

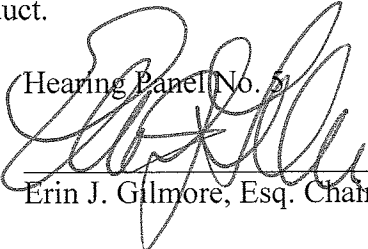
There is one other similar case, *In re PRB Decision No. 62*, (Jan. 21, 2004) which also involved a real estate closing. The attorney confirmed that the funds had been wired, but since he did not check with his own bank he was unaware that the funds had been intercepted by the Office of Foreign Asset Control. Checks were written at the closing which resulted in funds of other clients being used for that transaction.

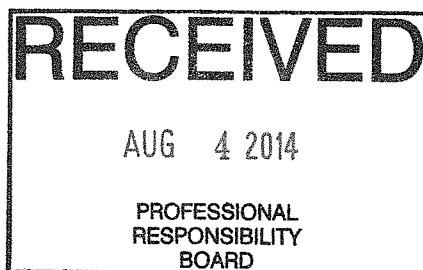
We also must consider whether the facts in this case are consistent with the constraints of Administrative Order 9, Rule 8(A)(5) which provides that admonition is appropriate only “in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and where there is little likelihood of repetition by the lawyer. While we hesitate to characterize any violation of the trust account rules as “minor misconduct,” the facts of this case fall within the admonition criteria of ABA Standards § 4.14. We also do not believe that there was any real potential for harm to any client here, nor do we believe that there is any likelihood of repetition by the attorney, and for these reasons we conclude that the misconduct falls within A.O. 9 Rule 8(A)(5).


Order

Respondent shall be admonished by Disciplinary Counsel for violation of Rule 1.15(f) of the Vermont Rules of Professional Conduct.

Dated: August 4, 2014

Hearing Panel No. 5

Erin J. Gilmore, Esq. Chair





Michele Patton, Esq.



Christopher Bray