

62 PRB

[28-Jan-2004]

STATE OF VERMONT  
PROFESSIONAL RESPONSIBILITY BOARD

In Re: PRB File No. 2004.082

Decision No. 62

On November 20, 2003, the parties filed a stipulation of facts, recommended conclusions of law and recommendations on sanctions. Respondent also waived certain procedural rights including the right to an evidentiary hearing. The panel accepts the facts and recommendations, and orders that Respondent be admonished by Disciplinary Counsel for disbursing funds in connection with a real estate closing without verifying that a wire transfer of the funds had in fact been made in violation of Rule 1.15(a) of the Vermont Rules of Professional Conduct.

## Facts

Respondent is an attorney admitted to practice law in Vermont. In October of 2003, Respondent represented JT in connection with the purchase of real estate in northern Vermont. At the time, JT lived in New Jersey but was a resident of the Commonwealth of Puerto Rico. JT had arranged financing with IndyMac, FSB, and had secured a mortgage through IBF Mortgage Corporation in St. Albans. Respondent had previously conducted many closings with IndyMac and IBF without experiencing difficulties.

The closing took place on October 2, 2003. As of the closing, the wire transfer of JT's funds to Respondent's trust account had not been completed. Unbeknownst to Respondent, the transfer had been intercepted by the Office of Foreign Asset Control (OFAC) which automatically blocks certain transactions, including wire transfers, involving proscribed countries and Specially Designated Nationals. For reasons that remain unclear, the wire transfer was delayed while the transfer was reviewed by OFAC. Respondent disbursed several checks at the closing without confirming that the wire had been posted to this trust account. He merely assumed that the wire transfer had arrived or would soon be forthcoming. JT's money was wired to the Respondent's trust account a few days after the closing, but not before four checks disbursed at the closing in the amount of \$95,906.90 were presented against the trust Respondent's trust account. There were insufficient funds in the trust account to cover the checks, but Respondent's bank honored the checks, resulting in an overdraft of \$20,

577.11. Thus, \$75, 328.79 that belonged to clients other than JT was used to pay checks disbursed at his closing.

Respondent recognizes that he should not have disbursed the checks without verifying that the funds had actually been wired to his trust account. He has resolved that in the future he will not make disbursements in real estate transactions until he is assured that wired funds have arrived in the trust account.

Respondent has no disciplinary record.

#### Conclusion of Law

Rule 1.15 of the Vermont Rules of Professional Conduct requires lawyers to "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 Comment to the rule suggests that this means that a "lawyer should hold the property of others with the care required of a professional fiduciary."

Generally lawyers are prohibited from drawing against funds that have been deposited to their trust accounts but have not had time to clear. We are, however, aware that it is common practice in Vermont real estate closings for attorneys to write checks against instruments that have been deposited to their trust accounts but have yet to clear. Our ruling does

not cover that situation. It is the fact that Respondent failed to even contact his bank to verify that the wire transfer had been posted that is the reason for our finding a violation in this case. An attorney cannot assume that funds have been received merely based upon his or her past experience with the financial institution or assurances that the funds will arrive in a timely manner. The attorney must verify in each instance that the funds have been received. Failure to do so puts funds of other clients at risk which is what happened in this case. Had the wire transfer not eventually been received, more than \$75,000 in funds belonging to other clients would have been permanently jeopardized.

The Panel concludes that Respondent violated Rule 1.15(a) of the Vermont Rules of Professional Conduct by failing to safeguard the funds of clients other than JT. The funds of these clients were at risk when they were used to cover checks which were disbursed at JT's closing and presented for payment before the wire from IndyMac arrived

#### Sanction

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 when there is little likelihood of repetition by the lawyer." A.O.9, Rule 8(A)(5). While an attorney's failure to safeguard client funds is always a serious matter, the Panel believes that taking into consideration all of the factors involved, the conduct falls within

the bounds of this rule. The delay in the wire transfer was the result of post September 11 regulations applying to persons resident outside the United States. Respondent had no reason to believe that there was anything about his client that would trigger review by OFAC, and there is no evidence that Respondent intended to put funds of his other clients at risk. While there was the potential for serious harm to other clients, no harm resulted, and no client funds were lost. We also believe that as a result of this experience Respondent will alter his practice, and that there is little likelihood of his repeating the misconduct.

In addition, this is a case of first impression in Vermont. Since the issue has not been addressed by the Board in any previous matter, we believe that this fact also makes the imposition of admonition by Disciplinary Counsel appropriate. We do, however, wish the bar to understand that this practice violates the Vermont Rules of Professional Conduct and that in the future should an attorney write checks on unverified funds, a more severe sanction may be imposed.

#### Conclusion

For the foregoing reasons the Hearing Panel orders that Respondent be admonished by Disciplinary Counsel for violation of Rule 1.15 of the Vermont Rules of Professional Conduct.

Dated: January 21, 2004

HEARING PANEL NO. 2

FILED: JANUARY 28, 2004

/s/

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Douglas Richards, Esq., Chair

/s/

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Lawrin P. Crispe, Esq.

/s/

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Michael H. Filipiak