STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In Re: Jason R. Tiballi, Esq.
PRB File No. 2020-084

Decision No. 235

Disciplinary Counsel and Respondent initiated these proceedings by filing a proposed stipulation of facts along with jointly proposed conclusions of law. Following the Hearing Panel's rejection of the proposed stipulation, the parties submitted an amended proposed stipulation for the Panel's consideration. Respondent also requested an opportunity to address the Hearing Panel, and a remote hearing by videoconferencing was held for that purpose on January 29, 2021. Disciplinary Counsel and Respondent attended the remote hearing.

Pursuant to Administrative Order 9, Rule 11(D)(5)(a), the Panel hereby accepts the amended proposed stipulation of facts and, based on the amended stipulation and additional evidence presented at hearing, issues the following findings of fact, conclusions of law and order:

FINDINGS OF FACT

Respondent was licensed to practice law in the state of Maine in 1996 and in the state of Vermont in 1997. Respondent joined a Vermont law firm in August of 2016. Respondent's practice has consisted of handling real estate transactions and estate planning.

After the departure of one of the firm's attorneys in May of 2018 and the retirement of one of the firm's partners in October of 2018, Respondent became responsible for maintaining seven separate IOLTA bank accounts for the firm's office in which he conducted his practice.[1]

[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

Between October of 2018 and June of 2020 Respondent maintained a total of seven IOLTA accounts at six different banking institutions. Respondent's office employed two paralegals through December 21, 2019, both of whom managed client trust account transactions; beginning January 1, 2020, only one paralegal was assigned to trust account management. Respondent's office employed a part-time bookkeeper during the time Respondent was responsible for management of the client trust accounts.

On March 31, 2020, a certified public accountant performed a compliance examination of the IOLTA accounts maintained at Respondent's office for the period April 1, 2019 through March 31, 2020 ("the audited period"). Respondent was present for and participated in the examination.

The compliance examination documented the following deficiencies associated with the various IOLTA accounts that were present during the audited period:

- On one occasion, an IOLTA account had a negative balance of $58,569 because a wire transfer was initiated by Respondent from the wrong account in error, which resulted in some checks not being honored initially and money held in trust for a different client being temporarily used, without permission, to carry out the business of the client whose account had the negative balance.
- On another occasion, a check in the amount of $711.10 written from the same IOLTA account for a homeowner's insurance premium, though mailed out to the appropriate party to whom the money was owed, was stolen and fraudulently altered to read $3,711.10 and then cashed or deposited by the perpetrator of the fraud. A discrepancy of

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.*

$3,000.00 was timely noted on the law firm's monthly reconciliation for that account; however, Respondent did not promptly look into that discrepancy. As a result, the IOLTA account was temporarily overdrawn. Respondent eventually reported the fraud to law enforcement authorities, but not until five months after the fraud had occurred.

- In January of 2020, the balance in a second IOLTA account was rendered insufficient because of a failure to account for a wire transfer fee, resulting in other clients' funds being used to temporarily cover the fee.
- In connection with a third IOLTA account there was no regular reconciliation of the account book balance to the statement balance. There was manual recording of disbursements and deposits in the account book.
- For five out of seven IOLTA accounts, multiple reconciliation reports contained multiple older outstanding items, indicating unaddressed errors in the account recordkeeping.
- Out of fifteen reconciliation reports examined during the compliance exam, eight showed a negative book balance, indicating unaddressed errors in the account recordkeeping dating back several years.
- For several IOLTA accounts, there was no reconciliation of monthly bank statement balances to individual client balances. Respondent did, however, track individual client activity online.
- Reconciliation reports for two IOLTA accounts had multiple transaction entries that lacked sufficient transaction descriptions.

* * *

Respondent relied on a combination of electronic records, internet banking access, physical statements and accounting software to generally monitor accounts and transactions. All

seven IOLTA accounts are approximately ten years or older and some of the problems identified by the compliance exam existed when Respondent took over management of the accounts in 2018.

By September of 2019, Respondent was aware that there were problems with the IOLTA accounts and, with assistance from the law firm's bookkeeper and paralegal, began a process of attempting to clear the IOLTA accounts of stale checks, accounting errors and escrow deposits. Respondent left the law firm on June 1, 2020 but has continued to work with his old firm to remedy the issues identified by the compliance exam. In July 2020, Respondent's old firm hired a real estate bookkeeper, and Respondent has been working with that person to help resolve the issues identified by the compliance examination.

The seven IOLTA accounts have not been used since the compliance examination report was issued so that Respondent and the bookkeeper can correct the accountings. As of December 2020, six of the seven IOLTA accounts had all uncleared checks and deposits re-issued or correctly accounted for so that the remaining balance is the original balance amount in each account of less than $100, which was initially deposited for the purpose of ordering checks.

There is no evidence that Respondent intentionally took or misused any client funds and Disciplinary Counsel is unaware of any complaint that Respondent misused any client funds. There is no evidence that any client funds were ever lost as a result of the accounting errors.[2]

Respondent has no prior disciplinary record. Respondent was forthright and cooperative during the course of the compliance examination and Disciplinary Counsel's investigation. In addition, he has taken full responsibility for the deficiencies identified in the compliance examination report and has expressed remorse for his noncompliance. Although it appears that

[2] Respondent testified that insurance ultimately covered the loss associated with the fraudulent alteration of the trust account check.

the lack of a full-time bookkeeper at the old firm may have contributed to the failure to achieve prompt correction of the various trust accounting errors identified in the compliance examination, Respondent has acknowledged that he was not sufficiently diligent and bears responsibility for the noncompliance.

Respondent is currently practicing law at another Vermont law firm, where he handles real estate transactions and attends real estate closings. The new firm has a busy real estate practice. Another member of the new firm is responsible for oversight of the firm's trust accounting system. Respondent's new firm has a full-time bookkeeper and a staff member assigned to trust accounting. Respondent has no involvement in the oversight of the bookkeeper and staff member at his new firm.

CONCLUSIONS OF LAW

Rule 1.15(a)(1) provides, in pertinent part, 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 and B." V.R.Pr.C. 1.15(a)(1).

Rule 1.15A of the Vermont Rules of Professional Conduct 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:

> ***
>
> (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.

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

The trust accounting 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).

The guidance provides as follows:

> 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.

Id. at 10 (emphasis added); *see also id*. (providing for further reconciliation to a "list of clients" and associated balances for each).

Respondent's system of accounting for the IOLTA accounts at his old firm failed to meet the requirement of subdivision (4) of Rule 1.15(A)(a). Respondent failed to promptly undertake and complete the reconciliation process on a monthly basis, as required by the rule. In connection with several IOLTA accounts, regular reconciliation was not undertaken. In addition, when reconciliation was undertaken, Respondent was aware through that process of multiple discrepancies in the records of the various IOLTA accounts and, yet, allowed them to persist for extended periods of time. Some of those discrepancies involved significant sums of money and negative balances. One of them involved involved a check that had been stolen by a third party

and fraudulently presented for payment. Moreover, Respondent did not report the fraud to law enforcement until five months had elapsed from the misappropriation.

Rule 1.15(f)(2) 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." V.R.Pr.C. 1.15(f)(2). In several instances during the period audited IOLTA accounts had negative balances and other clients' funds were used to cover overdrafts. Some of these negative balances resulted from miscellaneous bank fees that were relatively modest. However, one instance – in which Respondent made a wire transfer from the wrong account – involved a very significant sum of money ($58,569). Respondent's use of other clients' funds to cover overdrafts in the IOLTA accounts violated 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.").

Disciplinary Counsel conceded that there was no evidence suggesting that Respondent acted with an improper purpose or with knowledge of a need to act to prevent loss of client funds.[3] Accordingly, the Panel concludes that Respondent's mental state should be considered to be that of negligence.

[3] In their proposed amended stipulation of facts, the parties included a statement that "Respondent *understands* his obligations under the Rules of Professional Conduct relative to managing client trust accounts (IOLTA)." (emphasis added). Disciplinary Counsel has not explained the relevancy of this proffered statement. As a present tense statement, it cannot be considered as evidence of Respondent's mental state at the time of the violations. Moreover, assuming the statement is intended to inform a possible future evaluation of Respondent's state of mind in the event of any future violations of the trust

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 actual injury to any client. No client funds were ever lost as a result of the deficiencies in Respondent's trust accounting procedures and other violations of the rules. Nevertheless, there was some potential for injury to Respondent's clients. In connection with one IOLTA account there was no regular reconciliation for an extended period of time and reconciliation was sporadic in other accounts. Potential errors in the accounting went unaddressed for lengthy periods of time. In addition, various IOLTA accounts for which Respondent was responsible were overdrawn on several occasions – in at least one instance, by a very significant amount of money – and other clients' funds were used for some period of time to cover disbursements that generated negative balances, thereby exposing funds of other clients to potential loss.

account rules, it stands to reason that following an audit and the filing of disciplinary charges a respondent would be deemed to be well aware of his or her obligations under the Rules relating to trust accounts. Absent an explanation, the statement does not seem to be relevant to the decision in this case.

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 and, 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 in this case. Respondent's IOLTA accounting practices were fundamentally deficient. The violations were numerous and significant in nature. They included an absence of regular reconciliation and lack of diligence in correcting errors, numerous instances of negative balances, a failure to promptly address a third party's fraudulent conduct, and multiple instances of using other clients' funds to cover overdrafts, including one instance where $50,000 was transferred from other clients' funds. Under these circumstances, a private admonition is not justified. *See Farrar*, 2008 VT 31, ¶ 7 (rejecting private admonition for trust account violations and observing that "[p]rivate reproval should be used only 'in cases of minor misconduct, when there is little or no injury to a client . . . .'").

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. Although Respondent's IOLTA accounting procedures did not comply with the

requirements of the rule, Respondent did monitor the accounts regularly and there was no evidence presented that he intended to deal improperly with any trust account funds. The trust accounting problems seemed to be a product of Respondent's disorganization in combination with a lack of adequate bookkeeping assistance at Respondent's old firm during the period of time in question. The circumstances in this case differ from 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, 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. *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 violations were fundamental in nature and extensive.

§ 9.22(i) (substantial experience in the practice of law) – Respondent had practiced law in excess of twenty years at the time of the violations.

(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) – There was no evidence presented that Respondent took or misused client funds or otherwise engaged in any dishonest conduct, or that he sought to advance his own interests.

§ 9.32(e) (full and free disclosure to disciplinary board or cooperative attitude toward proceedings) – Respondent cooperated during the course of the audit and cooperated in the disciplinary process. However, this factor 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 In re Bowen*, 2021 VT 7, ¶ 45 ("[B]ecause attorneys have an independent professional duty to cooperate with disciplinary investigations under Rule 8.1(b), this factor is afforded little weight.).

§ 9.32(l) (remorse) – The parties have stipulated that Respondent has taken full responsibility for the deficiencies in his management of the IOLTA accounts and has expressed remorse. Respondent's verbal statement to the Panel also acknowledged his remorse for the misconduct.[4]

[4] The parties propose that the Panel apply the mitigating factor under § 9.32(d) – "timely good faith effort to make restitution or to rectify consequences of misconduct"– based on the fact that Respondent worked with staff while at his old firm and, even after leaving the firm, has continued working with staff at his old firm to address the IOLTA discrepancies. However, taking steps to comply with the trust accounting rules or to bring a non-compliant accounting system back into compliance is not restitution; nor does it rectify the *consequences* of misconduct. It is what is required to *be* in compliance. Moreover, the fact that Respondent continued to work on reconciliation of discrepancies even after leaving the law firm does not change this conclusion; rather, this conduct on his part is properly viewed as going to the issue of whether he has accepted responsibility and is remorseful – a question considered under a separate criterion, § 9.32(l).

(c) Weighing the Aggravating Mitigating Factors

Although the mitigating factors outnumber the aggravating factors, the Panel concludes that the balance of the factors does not call for any adjustment of the presumptive sanction. The Panel places great weight on the extensive nature of the violations committed and Respondent's substantial experience as a lawyer. While the law firm's IOLTA accounting system was already exhibiting problems when Respondent assumed responsibility for the system, he allowed those problems to languish and was directly responsible for repeated failures to conduct reconciliation and for failing to address and correct accounting errors that arose after he assumed responsibility for the IOLTA accounts in October of 2018 – errors of which he was fully aware. Respondent was responsible for managing the accounting system for a year and one-half before the March 2020 compliance examination, during which time chronic problems went unaddressed. Accordingly, the Panel concludes that there should be no downward adjustment of the presumptive sanction of public reprimand.

* * *

Having in mind that "[i]n general, meaningful comparisons of attorney sanction cases are difficult as the behavior that leads to sanctions 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 public reprimand is consistent with past disciplinary determinations. In *In re Watts*, PRB Decision No. 224 (2019), a hearing panel declined to reduce the sanction for trust accounting violations from a presumptive public reprimand to a private admonition because of the extensive nature of the violations and the attorney's substantial experience in the practice of law. Likewise, in *In re Hibbitts*, PRB Decision No. 145 (2011), a hearing panel which had found

extensive violations declined to reduce the sanction even though the respondent promptly addressed an overdraft, cooperated in Disciplinary Counsel's investigation, and promptly hired an accountant to put a fully compliant accounting system in place – and it reached this conclusion even though there was no evidence of fraud and the respondent had never been disciplined previously.

In cases where a hearing panel has reduced the sanction from public reprimand to a private admonition additional mitigating factors have been present and have substantially outweighed the aggravating factors. *See, e.g.*, *In re Unidentified Attorney*, PRB Decision No. 222 (2019), at 13-14 (mitigating factors substantially outnumbered aggravating factors and significant weight given to respondent's act of self-reporting the trust accounting violations); *In re Unidentified Attorney*, PRB Decision No. 220 (2018), at 18 (mitigating factors, including presentation of evidence concerning respondent's character and reputation, justified reduction). The facts in this case most closely resemble those in the *Watts* and *Hibbits* cases. Accordingly, a public reprimand is appropriate.[5]

[5] Disciplinary Counsel suggested in her memorandum addressing the issue of sanctions that "depending upon Respondent's representations to the panel, a basic probation condition requiring reexamination at Respondent's expense may also be appropriate in this case." Mem. 10/22/20, at 7. The Panel has decided not to order such a probation condition in this case for two reasons. First, Respondent no longer works at the same law firm where the violations occurred and, at his new law firm, he is not responsible for management of the new firm's trust accounting system; the system is managed by one the other members of the firm and Respondent has no involvement in the oversight of the bookkeeper or any other staff member assigned to that work. In addition, Respondent's acceptance of his responsibility, as further evidenced by his statement to the Panel during the sanctions hearing, and his long commitment following the compliance examination to curing the problems with the accounting system at his old firm convince the Panel that there is little likelihood of a recurrence of such misconduct.

ORDER

Based on the Hearing Panel's findings of fact and conclusions of law, Respondent Jason R. Tiballi, Esq., is hereby publicly reprimanded for violations of Rule 1.15 and 1.15A of the Rules of Professional Conduct.

Dated: March 16, 2021

Hearing Panel No. 9

By:_____
Karl C. Anderson, Esq., Chair

By:_____
M. Kate Thomas, Esq.

By:_____
Thomas J. Sabotka, Public Member