STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

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

Disciplinary Counsel's Sanctions Memorandum

Disciplinary Counsel respectfully requests that the Hearing Panel accept the parties' stipulation and jointly proposed conclusions of law and impose a Public Reprimand. *See* A.O. 9, Rule 8.A(4). In support thereof, Disciplinary Counsel sets forth the following Memorandum.

I. Summary of Facts

As set forth in the Stipulation, Respondent Jason Tiballi has practiced law since 1996. Stipulation ¶ 1. In 2016 he joined the law firm of Wick & Maddox and in 2018 he became the attorney primarily responsible for the firm's Essex office's seven client trust accounts. Stipulation ¶¶ 2, 4, 5. A compliance exam of these accounts showed three primary areas of noncompliance with the Rules of Professional Conduct that govern attorneys' management of client trust accounts. Stipulation ¶¶ 7-10; Stipulation Joint Exh. A. Respondent has been entirely cooperative and accepting of his responsibility for the violations. He has worked diligently to bring the accounts into compliance since the problems were identified, even in spite of the additional hurdles brought about by a global pandemic. He has no prior disciplinary history. Stipulation ¶¶ 11-16.

II. Violations

Rules 1.15 and 1.15A require that lawyers exercise great care in handling client funds. These rules dictate that lawyers must comply with several specific record keeping and notice requirements and that failure to do so is a violation of the rules. In particular, Rule 1.15(a)(1)

specifies that client funds shall be "identified" and "appropriately safeguarded" and "complete records" of client funds held in connection with representation "shall be kept by the lawyer." Rule 1.15A(a) sets forth further specifics for how the records must be kept:

> 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.

Under Rule 1.15(f)(2), "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."

Here, the facts adopted in the Stipulation and Joint Exhibit show that Respondent's trust accounting practices were not in compliance with multiple specific requirements. The descriptive context in the parties' joint exhibit supports that the lack of compliance involved substantial sums of money, and the records showed problems with the accounts going back "many years," some of which likely originated before 2016. Joint Exh. A at 2. At the same time, the lack of compliance was not due to dishonest conduct, misappropriation, or failure to understand the rules. Rather, the problems identified arose as part of a lack of appropriate organizational systems, insufficient staffing, and attorney attrition over a period of years.

III. Sanction: Public Reprimand is the appropriate sanction.

The purpose of sanctions imposed under the Rules of Professional Conduct is "to protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar." *In re Berk*, 157 Vt. 524, 532 (1991). *See also In Re PRB Docket No. 2016-042*, 154 A.3d 949, 955 (Vt. 2016) ("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.") (quotations omitted).

In determining a sanction for misconduct, the panel looks to the ABA Standards for Imposing Lawyer Sanctions and prior case law. *In re Andres*, 2004 VT 71, ¶ 14. Under the ABA Standards, the panel considers (1) the duty violated; (2) the lawyer's mental state; and (3) the extent of the injury caused by the violation. Based upon these considerations, the ABA Standards indicate a "presumptive sanction," which then may be modified by aggravating or mitigating factors. *See* ABA Standards, Theoretical Framework at xviii; § 3.0 at 125 (2019).

Here, Public Reprimand is an appropriate resolution under the ABA Standards for Imposing Lawyer Sanctions.

A. ABA Standards

1. Duty violated

Under the ABA Sanctions, the panel must first identify whether the duty breached was owed to a client, the public, the legal system, or the profession. ABA Standards § 3.0 at 130. Rules 1.15 and 1.15A involve Respondent's duty to his clients to appropriately safeguard their property by employing clear and organized systems for handling funds. Respondent's conduct failed to meet this duty. There is no evidence that the failure led to any loss of client funds.

2. Mental state

Next, the panel evaluates whether, at the time of misconduct, the lawyer acted intentionally, knowingly, or negligently. Intentional or knowing conduct is sanctioned more severely than negligent conduct. ABA Standards § 3.0 at 133. In the context of sanctions, "knowledge" is "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." ABA Standards at xxi. "Negligence" is "the failure of a lawyer to heed 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*. Here, there is no clear and convincing evidence that Respondent's acts and omissions were anything other than negligent disorganization. There is no evidence that he acted dishonestly or intentionally or knowingly attempted to circumvent rules.

3. Extent of injury

The extent of injury is defined by "the type of duty violated and the extent of actual or potential harm." ABA Standards § 3.0 at 138. There is no evidence of actual injury in this case. The violations were discovered as a result of a routine compliance exam. Nevertheless, Respondent's lack of any organized trust accounting system endangered the security of client funds because it was difficult if not impossible to figure out how much his firm was holding and for which clients. Thus, the violations caused a degree of potential harm.

4. Presumptive sanction

In sum, Respondent violated duties to the client, acted negligently in doing so, and while there was no actual injury, there was a degree of potential harm. Section 4.1 of the ABA

Standards addresses sanctions for attorneys who mishandle client funds. "Reprimand is the presumptive sanction 'when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.'" *In re PRB Docket 2012-155,* 2015 VT 57 ¶ 14 (quoting ABA Standard § 4.13). Here, Respondent's negligent acts and omissions and disorganization in his trust accounting practices support that the presumptive sanction is a Public Reprimand.

5. Aggravating and mitigating factors

The final step in analysis under the ABA Sanctions is to consider aggravating and mitigating factors that justify a departure from the presumptive sanction. ABA Standards §§ 3.0 at 141; 9.1 at 444. A list of factors which may be considered in aggravation and mitigation are set out at ABA Standards §§ 9.22 and 9.32.

As set forth in the Stipulation and Jointly Proposed Conclusions of Law, the parties agree to the following information relevant to Standard 9.22, aggravating factors:

9.22(i) Substantial experience in the practice of law. Jointly proposed conclusions of law ¶ 4(i).

As set forth in the Stipulation and Jointly Proposed Conclusions of Law, the parties agree to the following information relevant to Standard 9.32, mitigating factors:

(1) 9.32(a) Absence of a prior disciplinary record. Stipulation ¶ 14; Jointly proposed conclusions of law ¶ 5(a).

(2) 9.32(b) Absence of a dishonest or selfish motive. *See* Stipulation ¶ 11; Jointly proposed conclusions of law ¶ 5(b).

(3) 9.32(d) Timely good faith effort to make restitution or rectify the consequences of misconduct. Stipulation ¶¶ 10(c), (d), (e), 15; Jointly proposed conclusions of law ¶ 5(d).

(4) 9.32(e) Full and free disclosure and cooperative attitude toward proceedings. Jointly proposed conclusions of law ¶ 5(e).

(5) 9.32(l) Remorse. Jointly proposed conclusions of law ¶ 5(l); Stipulation ¶ 16.

The ABA Standards do not require that each and every mitigating and aggravating factor must be considered in deciding what sanction to impose. The language in Standards 9.1, 9.32, and 9.33 is permissive and advises that factors "may" be considered. Here, Respondent has indicated he wishes to be heard briefly on the issue of mitigation. The panel, of course, in its discretion, may also wish to take any other additional evidence at the hearing on the issue of sanctions. *See* A.O. 9, Rule 11.D(5)(A)(ii) (allowing panel to adopt the Stipulation as its own findings of fact and take further evidence on the issue of sanctions).

B. Prior Cases

When considering the issue of sanctions, panels also generally look to prior cases to compare the sanction and violations in those cases to the case before it, with the objective of achieving proportionality and consistency within the body of attorney discipline law. *See, e.g.*, *In re Neisner*, 2010 VT 102, ¶ 26. A number of cases have addressed violations of trust accounting practices arising from negligent acts or disorganized practices on the part of the lawyer. *See, e.g.*, *In re Watts*, PRB Decision No. 224 at 16 (2019) (imposing public reprimand where scope of trust accounting violations was "extensive"); *In re Unidentified Attorney*, PRB Decision No. 222 at 14 (2019) (concluding that mitigating factors merited reduction from presumptive sanction of reprimand to private admonition); *In re Unidentified Attorney*, PRB Decision No. 220 (2018) (same); *In re PRB Docket No. 2012.155*, 2015 VT 57 (same); *In re PRB Docket No. 2013.153*,

2014 VT 35 (affirming jointly recommended admonition for trust account violations); PRB Decision No. 138 (2011) (collecting cases); *In re Farrar*, 2008 VT 31 (public reprimand for negligently comingling funds).

The most analogous set of facts to the instant case is *In re Elizabeth Hibbitts*, PRB Decision No. 145 (2011). In that case, the respondent was found to have "lacked a formal trust accounting system." She "relied on her checkbook and other handwritten notes," and she "had no ledger or other system that identified receipts and disbursements from her trust account." Decision No. 145 at 2. Like the case here, the violations were not the result of any theft or misappropriation, but a lack of any organized system meeting the requirements of the rules. The panel found that ABA Standard 4.13 applied, and the panel accepted the parties' recommendation for a public reprimand.

The panel also imposed a period of probation in *In re Hibbitts*. Depending upon Respondent's representations to the panel, a basic probation condition requiring reexamination at Respondent's expense by a date certain may also be appropriate in this case.

Although the ABA Standards call for a presumptive sanction of reprimand, as the panel may observe, in the cases cited above, many instances of trust accounting rule violations ultimately result in admonition. The admonitions typically are imposed where a panel credits strong mitigating circumstances, including evidence of remedial measures and changes in practices by the lawyer. It is anticipated that Respondent may present further mitigating evidence at a hearing along these lines, which could cause undersigned counsel to not object to an adjustment to admonition.

This type of disciplinary matter, including agreed-upon facts, violations, and evidence

lends itself to final resolution by way of brief hearing using available remote technology. It is anticipated that the only additional evidence relative to sanctions will be Respondent's desire to directly address the panel, and that neither party would object to the use of video conferencing.

DATED: October 22, 2020

Respectfully submitted,

Sarah Katz
Office of Disciplinary Counsel
Costello Courthouse
32 Cherry Street, Suite 213
Burlington, Vermont 05401
(802) 859-3001