

STATE OF VERMONT  
PROFESSIONAL RESPONSIBILITY BOARD

In Re: Lance C. Shader, Esq.  
PRB File No. 2020-101

**RULING ON PARTIES' PROPOSED STIPULATION OF FACTS**

Disciplinary Counsel and Respondent, Lance C. Shader, Esq., have requested that the Hearing Panel accept a stipulation of facts dated November 12, 2020 and jointly proposed conclusions of law to resolve this matter. Disciplinary Counsel also filed a legal memorandum on or about December 4, 2020 regarding an appropriate sanction. In their jointly proposed conclusions of law, the parties maintain that Respondent's conduct violated certain client trust accounting provisions of the Rules of Professional Conduct.

Under Administrative Order 9, Disciplinary Counsel can initiate a disciplinary proceeding by filing a petition of misconduct or by filing a stipulation of facts. *See* A.O. 9, Rule 11(D)(1). Rule 11(D)(5) provides further that:

[w]here proceedings have been initiated by stipulated facts, the hearing panel shall review the stipulation and either: (i) reject the stipulation, in which case the parties may amend and resubmit it, or disciplinary counsel may reinstitute proceedings by filing a petition of misconduct in accordance with this rule; or (ii) accept the stipulation and adopt it as its own findings of fact, although the panel may take further evidence on the issue of sanctions.

A.O. 9, Rule 11(D)(5)(a).

The panel has decided to reject the proposed stipulation because it does not provide the panel with a proper statement of stipulated facts on the basis of which to make findings of fact. To begin with, the stipulation does not provide sufficient factual information for the panel to evaluate Respondent's conduct and make adequate findings of fact.

In an attempt to establish the core facts in this proceeding, the stipulation refers *generally* to an attached report written by an accountant who conducted a client trust account “compliance exam” of Respondent’s records. *See* Stipulation, ¶ 11 (stating that “[t]he results of the exam are documented in the [attached] report”); ¶ 12 (stating that “[a]s documented in the report, Respondent did not have organized and proper trust accounting systems”); ¶ 13 (stating generally that the report “identifie[d] three major areas of noncompliance, including failure to properly document receipts and disbursements from his trust account, failure to timely reconcile the account, and instances of negative balances); ¶ 14 (stating that Respondent “agrees that the findings set forth in the report are generally accurate”). The statements in paragraphs 12 and 13 are conclusory and there is no factual foundation for those statements within the four corners of the stipulation that would enable the panel to describe in reasonable detail the conduct in question. The factual details surrounding the purported failures, including when the failures first occurred and how long they persisted, are absent from the stipulation.

In essence, the parties are asking the panel to derive statements of fact from a document attached to the stipulation. The panel declines to do so for several reasons.

To begin with, Rule 11(D)(5)(ii) does not call for the panel to derive facts from a separate document. Rather, it calls for the parties to present an express statement of stipulated facts which, if accepted, will be adopted “as [the panel’s] own findings of fact.” Specific facts must be presented within the four corners of the stipulation. The rule does not contemplate the submission of a separate document from which a panel extracts facts.

The procedure that applies when a proceeding is initiated with a stipulation of facts stands in contrast to the process for determining the facts when a proceeding has been initiated with a petition of misconduct. When a petition of misconduct is filed, an evidentiary hearing is

held on the merits of the petition. Evidence is presented during the hearing, which can include documentary evidence, and the panel makes findings based on the evidence. Initiation of a proceeding with a stipulation stands in contrast and requires a unified statement of facts for the panel's review.

Moreover, in the context of the current case, it bears noting that the accountant's report is somewhat conclusory and lacking in factual detail. For example, the statement that "there was a significant number of negative balances either associated with individual clients or as a lump sum . . . ." begs the question of how many balances and what "lump sum" figure are considered "significant." The statement that "there were outstanding balances that were significant both in terms of dollar amount and number of transactions" is similarly vague.

This is not to find any fault with the report; the purpose of a compliance audit prepared by an accountant is to alert the Professional Responsibility Program to problems with the trust accounting system, not to make comprehensive findings of fact for a hearing panel. It is incumbent on Disciplinary Counsel to flesh out and present a developed set of stipulated facts for adjudication – whether by submission of a stipulation or by filing a petition and proceeding to a hearing on the merits. The audit report is too limited in nature to suffice.

Finally, Respondent's statement in the stipulation that "he agrees that the findings set forth in the [accountant's] report are *generally* accurate," Stipulation, ¶ 14 (emphasis added), would not in any event provide a sufficient basis for the panel to conclude that factual statements in the report are, in fact, stipulated. For at least two reasons, such a qualification in a stipulation is problematic. First, under A.O. 9 an adjudication of disciplinary charges based on a stipulation of facts is nevertheless reviewable by the Supreme Court. *See* A.O. 9, Rule 11(E) ("If no appeal or petition for review is filed with the Court, the Court may order review on its own motion . . .

.”). A respondent who stipulated to “general accuracy” of findings could, in the event of Supreme Court review, argue to the Court that the findings of fact by the panel were not *entirely accurate* and attempt to alter or embellish those findings. A panel decision should not facilitate such arguments. Moreover, apart from the possibility that efforts could be made to supplement the factual findings in the event of review, the implication of stating that facts are only “generally accurate” – that a set of stipulated facts is not appropriately worded or does not encompass *all* relevant facts – would necessarily raise the question of why *all* relevant facts have not been presented, thereby calling into question the integrity of the resulting decision. Such ambiguity is fundamentally inconsistent with the purpose of achieving the effective adjudication of disciplinary charges under A.O. 9.

In sum, while the panel appreciates the parties’ willingness to explore the possibility of submitting a stipulation in this case, the stipulation is deficient and therefore will be rejected. The parties may wish to renew their efforts and submit a more detailed amended stipulation for the panel’s review. Alternatively, if the parties are unable to reach agreement, Disciplinary Counsel can initiate a disciplinary proceeding by filing a petition of misconduct.

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As the parties consider whether to submit an amended proposed stipulation of facts, the Panel wishes to draw the parties’ attention to another issue that has raised significant questions for the Panel. The parties’ proposed stipulation includes a statement that Respondent “failed to issue approximately 30 final [title insurance] policies to his clients . . . .” Stipulation, ¶ 6. While there is relatively little factual development surrounding this statement, it clearly suggests that Respondent may have committed multiple violations of his ethical duty to his clients – for example, under Rule 1.1 (relating to competence) and Rule 1.3 (relating to diligence). However,

Disciplinary Counsel has not proposed such a conclusion; nor has she provided any explanation to the Panel for why she has not pursued such charges.

If the Panel had not rejected the stipulation on the grounds stated above it would have ordered, at a minimum, further briefing by the parties to address this ambiguity. The Panel notes that parties submitting a stipulation of facts need not be in agreement on the nature and extent of the violations that arise from stipulated facts. *See* A.O. 9, Rule 11(D)(1) (providing that the parties may submit a proposed stipulation of facts “along with any proposed conclusions and recommended sanction which disciplinary counsel and respondent, *either separately or jointly*, would like the hearing panel to consider.”) (emphasis added). The Panel was left to wonder why Disciplinary Counsel did not separately propose that one or more violations be determined on the basis of the statement in paragraph 6.

The Panel also notes that that when factual issues are presented to a Panel – whether by presentation of a proposed stipulation of facts or through allegations in a petition of misconduct – which may implicate an ethical rule not alleged by Disciplinary Counsel, the Panel can raise such an issue and provide the parties with notice and an opportunity to address the issue. And, in the context of a proposed stipulation, a panel may also reject a stipulation if it concludes that more factual development is required to evaluate the nature and extent of conduct that has been presented to the panel.

The Panel emphasizes that it is not presently reaching any conclusion with respect to the statement in paragraph 6 of the proposed stipulation or as it may appear in any future amended proposed stipulation of fact. The Panel simply wishes to advise the parties of its concerns as the parties as consider how best to proceed in the future.

ORDER

The parties' Stipulation of Facts is rejected. Under Rule 11(D)(5)(a)(i), the parties may reinstitute this proceeding by resubmitting an amended stipulation for the panel's consideration or, alternatively, Disciplinary Counsel may file a petition of misconduct.

Dated: January 8, 2021

**Hearing Panel No. 4**



By: \_\_\_\_\_  
Mary K. Parent, Esq., Chair



By: \_\_\_\_\_  
Cara L. Cookson, Esq.



By: \_\_\_\_\_  
Thad Richardson, Public Member