STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

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

Decision No. 236

Disciplinary Counsel and Respondent, Lance C. Shader, Esq., initiated this proceeding by filing a stipulation of facts dated November 12, 2020 for the Hearing Panel's review, along with jointly proposed conclusions of law. Under Administrative Order 9, Disciplinary Counsel can initiate a disciplinary proceeding by filing either a petition of misconduct or 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).

On January 8, 2021, the Panel issued a ruling rejecting the proposed stipulation. Subsequently, on February 18, 2021, the parties submitted an amended stipulation of facts and amended conclusions of law for the Panel's consideration. In their jointly proposed conclusions of law, the parties maintain that Respondent's conduct in connection with his handling of numerous real estate transactions violated various client trust accounting provisions in the Rules of Professional Conduct, as well as the requirement in Rule 1.3 that an attorney "act with reasonable diligence and promptness in representing a client."

Pursuant to Administrative Order 9, Rule 11(D)(5)(a), the Panel hereby accepts the amended proposed stipulation of facts and will issue a public reprimand for Respondent's misconduct, along with requiring an eighteen-month period of probation. The Panel issues the following findings of fact, conclusions of law and order:

FINDINGS OF FACT

Respondent, Lance Shader, is a licensed Vermont lawyer who maintains a solo real estate practice in West Dover, Vermont. He was admitted to practice in Vermont in 1983.

As a solo practitioner, Respondent bears the responsibility to maintain his law firm's "IOLTA" client trust accounts.[1] As part of his real estate practice, between 2009 and October 2019 Respondent was a title insurance agent for a title insurance company. In his capacity as a title insurance agent Respondent brokered the purchase of title insurance by clients of his in connection with real estate transactions in which he represented the clients. As a title insurance agent a lawyer prepares and issues the title insurance policies to his or her clients who have purchased such insurance.

For each title insurance policy issued, a client pays a premium (the cost of the insurance). A percentage of the premium is paid over by the title insurance agent/lawyer to the title insurance company and a percentage of the premium is retained by the title insurance agent/lawyer.

In 2019, the title insurance company for which Respondent served as an agent notified Respondent that its records indicated numerous instances where Respondent had not issued final title insurance policies or remitted to the title insurance company its portion of the premiums collected by Respondent. Respondent has stipulated that in connection with approximately 30

[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 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*.

transactions he failed to issue final title insurance policies to his clients and failed to remit the title insurance company's portion of the paid premiums, which were being held in his trust account. The checks for premiums due to the title insurance company in each matter had been prepared by Respondent on the date of closing for each real estate transaction but had not been sent to the title insurance company.

After an initial delay in his response, Respondent worked with the title insurance company to address the backlog of unissued final title insurance policies and remitted to the title insurance company the payments that were due for the company's portion of the premiums. The backlog was cleared by July 2020.

The problems associated with Respondent's failure to promptly issue the title insurance policies and to remit the payments owed to the title insurance company were due to the lack of proper trust accounting practices that dated back approximately ten (10) years. As of the point in time when Respondent was contacted by the title insurance company, he had been generally aware of the lack of proper trust accounting practices but had not taken steps to remedy them.

In September 2020, a certified public accounting firm performed a compliance examination of the Respondent's trust accounting system for the period June 1, 2019 through June 30, 2020 ("the audited period"). The compliance examination documented the following deficiencies associated with Respondent's IOLTA account during the audited period:

- The compliance examination revealed multiple instances of no documentation to back up banking activity. For example, a $315 deposit to the trust account in December 2019 had no corresponding record to tie the deposit to a particular client. Similarly, five separate transfers in March 2020 from the trust account to the law firm's operations account lacked documentation regarding the law firm's charges for which the transfers were made. Transfers to the operations account in May 2020 suffered from the same problem. Respondent was later able to show that these transfers were for fees that had been earned but not promptly transferred from the trust account to the operations account.

- The compliance examination revealed that Respondent was not performing reconciliation of the trust account as required.[2] Moreover, account reconciliation spreadsheet reports generated for April and June 2020, respectively, showed a negative balance for several clients.
- The June 2020 reconciliation report in Quicken showed a bank statement balance of approximately $95,000 but a checkbook balance of only $54,000. The discrepancy was found to have resulted from a large number of small-amount

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[2] 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 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 pertinent Professional Responsibility Program guidance document 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.

Managing Client Trust Accounts – Rules, Regulations, and Tips (revised 1/6/2010 & 10/14/2014) at 10 (emphasis added); *see also id*. (providing for further reconciliation to a “list of clients” and associated balances for each).

older transactions that had either not cleared or had been improperly entered dating back to 2007. The uncleared items spanned a variety of matters; they included many uncleared checks to the Dover Town Clerk's Office, bank wire fees that may have been recorded incorrectly, and many uncleared checks to clients in amount of $100 or less.

The accountant who performed the compliance examination attributed the problems with Respondent's trust accounting system to lack of diligence and disorganization. The compliance examination found no evidence of misappropriation, loss of client funds, or of any intentional acts taken to circumvent Respondent's financial obligations.

Following the compliance examination, Respondent has undertaken the following steps to address the underlying problems and to put in place remedial measures that prioritize the trust accounting problems he has experienced:

- Respondent retained a staff accountant from his law firm's CPA firm to work on the trust account each week, including the requisite three-way reconciliation. The accountant creates a weekly list of items that need attention and gives it to Respondent, who addresses each issue himself within the following week. A bi-weekly review of earned fees will also be conducted so that such fees are withdrawn from the trust account in a timely fashion after they are earned and will not result in co-mingling of earned attorney's fees with client funds.
- In the past, account reconciliation has been problematic because the version of Quicken set up in Respondent's office has been unreliable. The reports sometimes produced incorrect balances, resulting in excessive earned fees being taken out of retainers. With the help of a professional, the latest version of

Quicken has been installed on Respondent's computer system and all of the trust account information transferred. The firm's CPA, and possibly a Quicken consultant if necessary will shortly address the best customizing of the program to produce accurate results in connection with the monthly three-way reconciliation procedure.

- Sunday evenings of every week are now set aside by Respondent to review balances being held for each client and to quickly address any negative balances that are indicated. Combined with monthly reconciliation, this will ensure that the balance held for every client is accurate and properly accounted for. Each week receipts and disbursements will be reviewed both for accuracy and to verify that they are assigned to the correct client. Older balances have already started to be remitted to the clients on a file-by-file basis, and escrows that have been held for prolonged periods of time are in the process of being resolved with the attorneys who represented other parties in those transactions.

Disciplinary Counsel is unaware of any complaint or any evidence that Respondent misused any client funds. In addition, there is no evidence that any client funds were ever lost as a result of the accounting errors.

Respondent has no prior disciplinary record. Respondent was 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.

Respondent struggled with depression and anxiety throughout 2019 and 2020. Beginning in November 2019 Respondent sought treatment from his physician for depression and anxiety.

Since engaging in treatment, Respondent's symptoms have improved. Respondent's primary care physician believes that Respondent's symptoms may have contributed to Respondent having difficulty keeping up with work-related responsibilities.

CONCLUSIONS OF LAW

Rule 1.15(a)(1) and Rule 1.15A

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:
>
> (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;
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> ***
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> (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).

In several instances Respondent failed to generate the requisite documentation for trust account transactions. In addition, Respondent was required to conduct three-way reconciliation on a monthly basis and to investigate and correct any discrepancies "immediately" under the pertinent rules. *See Managing Client Trust Accounts – Rules, Regulations, and Tips*, at 10 (revised 1/6/2010 & 10/14/2014) ("Differences between the bank statement balance and the checkbook balance *should be investigated immediately and corrected* either in your records or by the bank.") (emphasis added). Respondent allowed differences identified through reconciliation of the account to persist for extended periods of time. In sum, Respondent violated Rules 1.1.5(a)(1) and 1.15A.

Rule 1.15(f)(2)

Rule 1.15(f)(2) provides 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). The Panel found it difficult to identify Disciplinary Counsel's theory of a violation. It appears that the proffered theory is that a violation resulted from the lack of proper trust accounting records and inadequate reconciliation procedures.[3] The Panel concludes, on the record presented, that Disciplinary Counsel has not met her burden of demonstrating by "clear

[3] Disciplinary Counsel submitted to the Panel a one-line proposed conclusion of law stating that Respondent violated Rule 1.15(f)(2). The conclusion of law cited to three paragraphs of the second amended stipulation of facts, without providing any legal analysis of how those facts establish a violation. The only explanation for a violation that the Panel could find in the briefing appears as one sentence in a separate memorandum that was submitted for the purpose of addressing the issue of sanctions – not the issue of violations. In discussing whether injury resulted from Respondent's conduct, Disciplinary Counsel asserted that "Respondent's lack of [an] 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." Sanctions Mem., 12/4/20, at 5 (emphasis added).

and convincing evidence," A.O. 9, Rule 16(C), that a violation of Rule 1.15(f)(2) was committed.

Disciplinary Counsel has failed to explain why a failure to keep complete and accurate records and to perform proper reconciliation – which undoubtedly violated Rule 1.15(a)(1) and Rule 1.15A – should, without more evidence, rise to the level of use or endangerment of client funds in violation of Rule 1.15(f)(2). The elements of these offense are not identical.

To the extent that Disciplinary Counsel was seeking to rely on the accountant's conclusion that Rule 1.15(f)(2) was violated,[4] the Panel finds the accountant's analysis to be similarly unpersuasive. The accountant attributed a violation of Rule 1.15(f)(2) to the fact that the reconciliation process had indicated some negative balances associated with individual clients; however, the accountant attributed those negative balances to Respondent "not record[ing] individual transactions correctly to provide for an accurate reconciliation between the checking account balance, the bank balance, and the total of individual client balances." First Amended Stipulation of Facts, 11/12/20, Ex. A – Independent Accountant's Report, 9/18/20, Finding # 2. The report does not establish any misuse of client funds – on the contrary, Disciplinary Counsel stipulated that she is not aware of any misuse of client funds – or any concrete factual statement that would suggest that any client funds were endangered. More was needed to establish a violation of this provision. This is not to blame the accountant. The accountant is not a lawyer and his or her primary function in a compliance examination is to identify accounting problems for the Professional Responsibility Program, not to make findings of fact for a Panel or to render conclusions of law.

[4] The accountant's report was attached to the original proposed stipulation of facts submitted in this proceeding.

Rule 1.15(d)

Rule 1.15(d) provides that "[e]xcept as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive . . . ." Respondent collected title insurance premiums from his real estate clients who purchased such insurance and deposited those premiums in his trust account. A portion of each premium was owed to the title insurance company upon receipt. In thirty instances Respondent failed to promptly pay over the company's share of the premium when it was due. Respondent was obligated to pay out the funds due the title insurance company promptly and, by failing to do so, he violated section 1.15(d).[5]

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[5] Disciplinary Counsel and Respondent did not propose a conclusion of law to the effect that Respondent's conduct violated Rule 1.15(d). Nevertheless, the Panel concludes that it has the authority – and the obligation – to determine that a violation of that rule was committed by Respondent. When a proceeding has been initiated by the filing of a petition of misconduct, a panel must first provide notice and an opportunity to be heard to the parties if it is going to consider a potential violation that was not pled by Disciplinary Counsel. *See In re Robinson*, 2019 VT 8, ¶¶ 50-52 209 Vt. 557, 209 A.3d 570 (finding error where a panel found, after conclusion of the merits hearing, a violation not pled in the petition and the respondent had not been provided with an opportunity to present supplemental evidence); *see also* A.O., Rule 11(D)(1)(b) (providing for disciplinary proceeding to be initiated by filing of petition "which is sufficiently clear to inform respondent of the alleged misconduct *and the rules alleged to have been violated*") (emphasis added). By contrast, when a proceeding is initiated by a proposed stipulation of facts, the facts to be considered by a panel are established in advance by the parties. A panel can either accept the stipulation and then proceed to a decision or reject the stipulation, in which case the parties can submit an amended stipulation or disciplinary counsel can file a petition of misconduct. See id., Rule 11(D)(5)(a). While the stipulation procedure allows the parties to submit proposed conclusions of law, the panel is not bound by them. *See id*., Rule 11(D)(1)(a) (parties submitting stipulated facts may file "any proposed conclusions of law and recommended sanction which disciplinary counsel and respondent, either separately or jointly, *would like the hearing panel to consider*.") (emphasis added). A.O. 9 allows a respondent to opt for submission of a set of stipulated facts in lieu of facing a petition of misconduct; but once a choice has been made to submit stipulated facts neither the respondent nor disciplinary counsel can limit the violations that flow from those facts. Beyond the text of Rule 11(D)(1), this conclusion is supported by common sense. Any violation supported by stipulated facts should logically be identified in a panel decision. A panel decision that disregards an apparent violation would be subject to criticism and the decision's persuasive value, when considered by hearing panels attempting to mete out comparable sanctions in future cases, could be questioned. Finally, the Panel notes that even if were to disregard the violation of V.R.Pr.C. 1.15(d), it would reach the same conclusion with respect to an appropriate sanction in this case based on the other violations of the rules found by the Panel.

Rule 1.3

Rule 1.3 provides as follows: "A lawyer shall act with reasonable diligence and promptness in representing a client." The Comments to the rule include the following:

> [2] A lawyer's work load must be controlled so that each matter can be handled competently.
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> [3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions. *** Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. ***

V.R.Pr.C. 1.3, Comments [2] & [3].

Respondent concedes, as he must, that he violated Rule 1.3 by failing to issue title insurance policies promptly to his clients in connection with approximately thirty real estate transactions. The clients paid for those policies and they should have received them promptly upon the closing of the transactions. Respondent's failure to issue the policies demonstrated a lack of reasonable diligence and promptness in representing his clients.

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*. The ABA Standards "assume that the most important ethical duties are those obligations which a lawyer owes to his client." *In re Bowen*, 2021 VT 7, ¶ 30, __ Vt. __, __ A.3d __ (quotations omitted).

In this case, with respect to the trust accounting violations, Respondent owed a duty to his clients to safeguard and preserve their property through adherence to the trust account rules. *See ABA Standards*, Theoretical Framework, at 5 (providing that the "duty of loyalty" includes a duty to "preserve the property of a client."). Similarly, to the extent that Respondent was holding in his trust account monies that were owed to the title insurance company, he owed a duty to the general public to handle those monies appropriately. *See id*. ("Members of the public are entitled to be able to trust lawyers to protect their property . . . .").

With respect to the issuance of the title insurance policies that were purchased by Respondent's clients, Respondent owed his clients a duty of diligence. *See id*.

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 stipulated that there was no evidence suggesting that Respondent acted with an improper purpose or with intent to circumvent Respondent's financial obligations. And, based on the compliance examination, it appears that the trust accounting system problems were attributable to lack of diligence and disorganization.

Similarly, there is no indication that Respondent intentionally failed to pay over the premiums due the title insurance company or to issue the policies themselves. On the contrary, the checks to the company were written at the time of closing, suggesting that Respondent had intended to send out the checks and issue the policies but neglected to do so. No other plausible reason for the failure has been presented. Accordingly, the Panel concludes that Respondent's mental state should be considered to be that of negligence.

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 there was no indication that any client was harmed by the failure to promptly issue the title insurance policies.

Nevertheless, there was potential for injury to Respondent's clients. Failing to undertake regular reconciliation and, when reconciliation is undertaken, failing to promptly address discrepancies that are presented in the three-way process creates a general risk to client funds that must be considered in the context of determining an appropriate sanction. Here, Respondent did not always conduct reconciliation and, in addition, failed to follow up and resolve problems that arose when reconciliation was undertaken. Respondent failed to promptly address some significant differences between various statements and failed to promptly investigate indications of negative balances that arose in the reconciliation process. Potential problems went unaddressed for lengthy periods of time. The fact that no client funds were misused or lost does not obviate the potential for injury that was presented. In addition, it has been observed that "lawyer misconduct in handling and protecting client trust accounts [ ] injure[s] both the public at large and the profession by increasing public suspicion and distrust of lawyers." *In re Farrar*, 2008 VT 31, ¶ 8, 183 Vt. 592, 949 A.2d 438 (quoting *In re Anderson,* 171 Vt. at 635, 769 A.2d at 1285).

Likewise, there was potential injury to both Respondent's clients and to the title insurance company as a result of Respondent's failure to issue the title insurance policies promptly and to promptly transmit payments due the company. Respondent's clients necessarily depended on him to provide them with the policies and to do so promptly. Over the course of time, a client might have forgotten that he or she purchased title insurance or encountered difficulty obtaining a copy of the policy that was purchased. This dependence was heightened by the fact that Respondent is a solo practitioner. If Respondent had become incapacitated or died before issuing the policies, even clients who recalled purchasing some form of title insurance through him would have been placed at risk of not being able to track down the policy or, at the very least, of being inconvenienced in identifying and obtaining copies of their policies that accurately reflected the purchased coverage.

The title insurance company was also exposed to potential injury as a result of Respondent's failure to promptly pay over the portion of the premiums due. While those funds remained in the trust account they were potentially subject to attempts by creditors of the Respondent or of his clients to attach funds in the trust account. *See Farrar*, 2008 VT 31, ¶¶ 7-8 (finding potential injury from mismanaging trust account because client funds could potentially be attached by the attorney's or other client's creditors). Respondent was obligated to mitigate that risk – by making prompt payment to the insurance company – and he failed to do so.[6]

Presumptive Standard under the ABA Standards

With respect to the trust accounting violations, 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

[6] Disciplinary Counsel argues that Respondent's failure to transmit the portion of the premiums owed to the title insurance company resulted in actual injury to the company in the form of "loss of time and administrative inconvenience." Sanctions Mem., 12/4/20, at 5. However, Disciplinary Counsel has not presented clear and convincing evidence that would justify a conclusion of actual injury to the company. The stipulation of facts does not address whether the company experienced any financial loss from the delay in payment or the magnitude of any such loss. In addition, the stipulation presented no facts related to "administrative inconvenience" beyond the fact that the company identified Respondent's failure to pay the amounts owed the company and notified Respondent. On the limited factual record presented in this case, the Panel declines to find actual injury to the company.

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 nine months).

The Panel concludes that Standard 4.12 which calls for suspension 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, the trust accounting problems were a product of Respondent's disorganization and lack of diligence. He did not act with an improper purpose. 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.

With respect to the repeated failure to issue the title insurance policies to Respondent's clients, the Panel concludes that Standard 4.42(b) provides the best guidance. It calls for imposition of a suspension when "a lawyer engages in a pattern of neglect and causes injury or potential injury to a client." Here, although Respondent's conduct was the product of neglect – and not intentional – there were thirty instances of failing to issue title insurance policies promptly to clients. The number and duration of the Rule 1.3 violations – involving a large number of clients and an extended period of time when Respondent was failing to serve his clients' interests – suggest the appropriateness of a significant sanction. Respondent's misconduct demonstrated a pattern of neglect and, therefore, the suspension standard should apply.

With respect to Respondent's failure to pay the company promptly from the trust account, the only standard that arguably applies is under Standard 7.0. *See In re Robinson*, 2019 VT 8, ¶47 n.7 (finding Standard 7.0 to be appropriate where no other standard was "clearly applicable" and holding that the list of cases cited in the introduction to Standard 7.0 is "nonexclusive"). Standard 7.3 states that "[r]eprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system." Respondent had a duty to the public under the trust accounting rules to promptly pay out funds owed to third parties. This was a duty owed to the public as a professional. Respondent's omission was the product of negligence. As discussed, Respondent had cut the checks in connection with the closings; he simply neglected to send them out. In sum, a reprimand would be the presumptive sanction for this misconduct.

The ABA standards provide that in cases involving multiple charges of misconduct "[t]he ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations." *ABA Standards*, Theoretical Framework, at 7. In accordance with this guidance, the Panel concludes that suspension should be the presumptive sanction for this case.

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(c) (pattern of misconduct) – A pattern of misconduct was present in this case. Aside from the extensive trust accounting violations that took place, Respondent failed in thirty instances to issue title insurance insurance policies to clients and to issue prompt payments to the title insurance company. These violations on the part of the Respondent were repeated on numerous occasions and involved multiple clients.

§ 9.22(d) (multiple offenses) – Respondent's conduct involved violations of multiple provisions of the trust account rules and of Rule 1.3.

§ 9.22(i) (substantial experience in the practice of law) – Respondent had practiced law for approximately thirty 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 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(c) (personal or emotional problems) – There was evidence presented that Respondent has struggled with depression and anxiety. Respondent's physician believes this may have contributed to Respondent having difficulty keeping up with work-related responsibilities.

§ 9.32(d) (good faith effort to rectify the consequences of misconduct) – Once Respondent was notified that he had not transmitted the payments due the title insurance company and had not issued the title insurance policies to his clients he took steps to remedy those issues.[7]

§ 9.32(e) (full and free disclosure to disciplinary board or cooperative attitude toward proceedings) – Respondent was cooperative during the course of the compliance examination and Disciplinary Counsel's investigation. 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 the management of his trust accounts and has expressed remorse for his violations.

(c) Weighing the Aggravating Mitigating Factors

The mitigating factors substantially outnumber and outweigh the aggravating factors and cause the Panel to conclude that the presumptive sanction of suspension should be reduced to a public reprimand. The fact that depression and anxiety likely played a role in the violations,

[7] 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 has undertaken affirmative steps to address the trust accounting problems identified through the compliance examination. 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, his remedial actions with respect to his trust accounting system are 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).

though not an excuse for the misconduct, supports a downward adjustment of the sanction to a public reprimand. Based on this consideration, as well as the fact that Respondent has had no prior disciplinary infractions over the course of a long career and the absence of any dishonest or selfish motive, the Panel is convinced that a reprimand will suffice in this case to protect the public if it is combined with a period of probation, as discussed below. Respondent has served his community for many years and the community will benefit from his continued service.

* * *

Disciplinary Counsel has requested that the Panel, in addition to imposing a sanction, place Respondent on probation for the purpose of requiring follow-up examination of Respondent's trust accounts. Given the extensive nature of the violations and the fact that Respondent is a solo practitioner, the Panel agrees and will order an eighteen-month period of probation consisting of three follow-up compliance examinations, to be conducted at Respondent's expense, in order to monitor Respondent's compliance with his trust account obligations and ensure compliance going forward.

* * *

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 imposing a public reprimand is consistent with past disciplinary determinations.

This case is somewhat unusual because it involves not only a failure to maintain a proper trust accounting system but also a failure to act with reasonable diligence and promptness in the representation of Respondent's clients. There are many cases imposing public reprimands for failing to maintain a proper trust accounting system. *See, e.g.*, *In re Watts*, PRB Decision No. 224 (2019) (imposing public reprimand where violations were extensive and lawyer had substantial experience in the practice of law); *In re Hibbitts*, PRB Decision No. 145 (2011) (imposing public reprimand based even though there was no prior record and no fraud and the respondent cooperated in Disciplinary Counsel's investigation and promptly hired an accountant to put a fully compliant accounting system in place).[8] However, this case involves additional violations of rules beyond the trust accounting rules. Therefore, while cases limited to trust accounting violations are consistent with a public reprimand, they do not provide the best guidance.

In addition, there are numerous cases that impose public reprimands for violations of Rule 1.3. *See, e.g.*, *In re Andres*, 170 Vt. 599, 603, 749 A.2d 618, 622 (2000) (approving a public reprimand based on respondent's neglect that resulted in initial dismissal of client's appeal (later redressed) and in the absence of a prior disciplinary record at the time or selfish motive); *In re Blais*, PRB Decision # 194 (imposing public reprimand for violations of Rule 1.3 based on respondent's failure to respond to initial discovery requests and a subsequent motion to compel discovery and for sanctions, and his failure to comply with the court's discovery orders, resulting in potential injury to client). But those cases generally involve litigation and do not include trust account violations.

[8] In some trust accounting cases a hearing panel has reduced the sanction from public reprimand to a private admonition where 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). However, none of those additional mitigating factors are present in this case.

In re Nawrath, 170 Vt. 577, 749 A.2d 11 (2000), presents the best guidance for this case in light of a strikingly similar set of facts and legal analysis. In that case, a respondent whose practice consisted largely of handling real estate transactions neglected a number of client matters. His violations included failing to promptly issue final title insurance policies and otherwise neglecting components of real estate transactions. In addition, he was found to have mismanaged his client trust account. His violations extended to several clients and several matters. The injury to one client was minimal and promptly remedied; there was only potential injury to the remaining clients. Despite the fact that a pattern of misconduct was found to be present, the Court recognized multiple mitigating factors: no prior record; a cooperative attitude, a good-faith effort to rectify the consequences of the conduct; the absence of a selfish motive; and the fact that stress and depression had impacted respondent's work. Based on these considerations, the Court imposed a public reprimand in combination with a period of probation during which the respondent was required to work with a mentoring attorney. These circumstances closely track the circumstances in the present case.

The Panel concludes that a similar approach is warranted here – a public reprimand plus probation. Because the violations in this case revolve around mismanagement of Respondent's trust account and because extensive remedial measures have already been initiated, the Panel concludes that a mentoring attorney is not required. Rather, the Panel will require a series of compliance examinations to be conducted at Respondent's expense, at six-month intervals, over the course of eighteen months to ensure that Respondent's trust accounts are compliant and will continue to be compliant in the future.

ORDER

Based on the Panel's findings of fact and conclusions of law, Respondent is hereby publicly reprimanded for having violated Rules 1.15(a)(1), 1.15(d), 1.15A, and 1.3 of the Vermont Rules of Professional Conduct. It is further ORDERED that Respondent is hereby placed on probation for a period of eighteen (18) months pending: (a) the completion of three separate compliance examinations of Respondent's trust accounts, to be undertaken at successive six-month intervals by an auditor chosen by Disciplinary Counsel and at Respondent's expense, in order to assess Respondent's compliance with Rules 1.15 and 1.15A. The auditor shall produce a report following each compliance examination and submit the report to both Respondent and Disciplinary Counsel; and (b) Disciplinary Counsel's submission of an affidavit, pursuant to A.O. 9, Rule 8(A)(6)(b), stating that probation is no longer necessary and summarizing the basis for that conclusion. Upon submission of a sufficient affidavit by Disciplinary Counsel, Respondent's probation shall be terminated.

Dated: April 7, 2021 **Hearing Panel No. 4**

By:______________________________
Mary K. Parent, Esq., Chair

By:______________________________
Cara L. Cookson, Esq.

By:______________________________
Thad Richardson, Public Member