STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

In Re: Jean M. Pagliughi
PRB File No. 2021-101

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 15.A(4). In support thereof, Disciplinary Counsel sets forth the following Memorandum.

I. Summary of Facts

As set forth in the Stipulation, Respondent Pagliughi has practiced law since 1988, but only began doing real estate transactions in 2020. Stipulation ¶¶ 1-3. Within a year of opening her real estate trust account in Vermont, she became aware that her trust accounting systems were not sufficiently organized to meet her obligations under the Rules of Professional Conduct, including failures to timely log all transactions and failures to timely reconcile the account. Stipulation ¶¶ 5-12. The failures led to two mistakes in issuing checks for a real estate closing in February 2021 which led to overdraft notices for the account. Stipulation ¶¶ 7-11. Respondent has been entirely cooperative and accepting of her responsibility for the violations. She has no prior disciplinary history. Stipulation ¶¶ 18-19.

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)(1), "a lawyer shall not disburse funds held for a client or third person unless the funds are 'collected funds,' meaning that the lawyer reasonably believes the funds "have been deposited, finally settled, and credited to the lawyer's trust account."

Here, the facts adopted in the Stipulation show that Respondent's trust accounting practices were not in compliance with Rule 1.15A(2) and (4) and Rule 1.15(f)(1). Stipulation ¶¶ 6, 7, 8, 9. The lack of compliance involved substantial sums of money, but the direct impact was limited to one transaction. 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.

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 actual 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 she 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 mistaken disbursements were discovered fairly immediately and promptly resolved. Nevertheless, Respondent's lack of any organized trust accounting system endangered the security of client funds. 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. Stipulation at 5, subsection (i).

As set forth in the Stipulation and Jointly Proposed Conclusions of Law on pages 5-6, the parties agree to the following information relevant to Standard 9.32, mitigating factors:

(1) 9.32(a) Absence of a prior disciplinary record.

(2) 9.32(b) Absence of a dishonest or selfish motive.

(3) 9.32(d) Timely good faith effort to make restitution or rectify the consequences of misconduct.

(4) 9.32(e) Full and free disclosure and cooperative attitude toward proceedings.

(5) 9.32(l) Remorse.

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. The panel, of course, in its discretion, may also wish to take any other additional evidence at a hearing on the issue of sanctions. *See* A.O. 9, Rule 13.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 Shader*, PRB Decision No. 236 (2021) (imposing public reprimand with probation conditions for trust accounting violations and violation of duty of diligence in failing to timely finalize title insurance policies and remit premiums); *In re Tiballi*, PRB Decision No. 235 (2021) (imposing public reprimand for trust accounting violations that were extensive and involved large sums over many years but pre-dated Respondent's management of the accounts); *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).

Here, the stipulated facts share some similarities to the *Shader* and *Tiballi* matters. All three circumstances involved real estate practices, lack of timely reconciliation of the IOLTA

accounts, general disorganization in trust accounting practices, and failures in timely and accurately logging transaction details. On the other hand, in contrast to *Shader* and *Tiballi*, Respondent's trust accounting problems were identified within about a year of opening the account. Thus, the violations were not as longstanding or extensive. But, the panel should not overlook that Respondent's trust accounting problems came to light when she made disbursements based upon uncollected funds, triggering overdraft notices. This means that her existing systems, to the extent they were systems at all, had no structure for her to identify whether a payment had been deposited, cleared and credited to her account. This fact suggests that lack of other problems up to that point in time had perhaps been based on luck.

The panel also imposed a period of probation in *In re Shader*. 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, some 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. Although the parties have waived a hearing in this matter, if the panel wishes to hear directly from Respondent on the issue of further mitigating evidence, undersigned counsel has no objection to scheduling the matter for a brief Webex hearing.

DATED: September 7, 2021

Respectfully submitted,

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