STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

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

RULING ON PARTIES' PROPOSED STIPULATION OF FACTS

Disciplinary Counsel and Respondent, Jeanne M. Pagliughi, Esq., have submitted a proposed stipulation of facts dated August 13, 2021 and jointly proposed conclusions of law in an attempt to resolve this matter. In addition, Disciplinary Counsel filed a legal memorandum on or about September 7, 2021 and Respondent filed a separate memorandum on or about September 6, 2021. 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 Hearing Panel has decided to reject the proposed stipulation because certain portions of the stipulation are ambiguous. To begin with, the factual circumstances surrounding a check in the amount of $27,000 that was written by Respondent are ambiguous.

The proposed stipulation states that two checks were written on Respondent's IOLTA account[1] on February 26, 2021 which "resulted in an overdraft of Respondent's account": one check in the amount of $27,000 and a separate check in the amount of $1,500. *See* Paragraphs 8-9. The stipulation further states that "[the] failure to timely enter transactions and reconcile the account led to [these] two errors." *See* Para. 7.

The stipulation does not reveal any causal connection between the $27,000 check and the failure to follow trust accounting requirements; rather, based on a statement in the stipulation, the check appears to have resulted from Respondent erroneously attributing to the seller (her client) the buyer's obligation to pay *to the seller* the sum of $27,000. The $27,000 check is described in the stipulation as "not a payment due from Respondent's seller-client at all, but rather a payment that should have been made by the buyer, as documented on the settlement statement [from the real estate closing]." Para. 8.

If there was an accounting error that caused the erroneous payment of the $27,000, it has not been explained. By contrast, the causal connection between Respondent's trust accounting practices and the $1,500 check is supported by the language of the stipulation. The stipulation states that the check was "properly issued on behalf of Respondent's client" but resulted in an overdraft because it was supposed to have been preceded by the receipt of a check in that same amount from the buyer. *See* Para. 9. Though a more detailed explanation would have been helpful to the Panel, the Panel reads this statement to indicate that maintaining accurate and up-

[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.*

to-date records would have shown Respondent that the $1,500 check from the buyer had not yet been received.

It is necessary for the parties to show the Panel, with some detail, how the issuance of the $27,000 check was caused by a "failure to timely enter transactions and reconcile the account" if that, in fact, was the case. And if the issuance of that check was not caused by such failures, that needs to be clarified in the stipulation.

In addition, the factual ambiguity surrounding the $27,000 check raises legal issues that have not been addressed in the proposed conclusions of law or in Disciplinary Counsel's memorandum. The parties submitted two brief conclusions of law. The second proposed conclusion states as follows: "Rule 1.15(f)(1) -- In connection with the real estate closing on February 26, 2021, Respondent dispersed [sic] funds for a client from the IOLTA that were not actually deposited, settled and credited to the account as required by this rule." Para. 21. No further legal briefing has been provided to the Panel.

The language of Rule 1.15(f)(1) suggests that it was intended to prohibit lawyers from making anticipatory disbursements from trust accounts before an underlying deposit for a client has actually "cleared":

> [A] lawyer shall not disburse funds held for a client or third person unless the funds are "collected funds." For purposes of this rule, "collected funds" means funds that a lawyer reasonably believes have been deposited, finally settled, and credited to the lawyer's trust account.

V.R.Pr.C. 1.15(f)(1).

The problem with the $27,000 check, however, goes far beyond disbursing funds that were not yet collected. It appears from the language of the proposed stipulation that Respondent wrote a check from the account that *never should have been written*. In other words, it was an outright mistake.

This raises the question of why Respondent's conduct in connection with the $27,000 check did not violate Rule 1.1. That rule provides that:

> [a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

V.R.Pr.C. 1.1.

Disciplinary Counsel has not provided the panel with any explanation for why the Panel should not find a violation of Rule 1.1 based on the issuance of the $27,000 check. The Panel is aware of the Supreme Court's decision in *In re PRB Docket No. 2006–167*, 2007 VT 50, 181 Vt. 625, 925 A.2d 1026, in which the Court concluded that the respondent's single act of negligence in that case should not be considered a violation of Rule 1.3 based on all the factual circumstances presented in that case.[2] However, the Court cautioned that "[t]his decision should not be read to excuse single negligent acts or omissions by attorneys in all situations." *Id.* ¶ 10.

The Panel also acknowledges the parties' statement that the error by Respondent in issuing the $27,000 check was corrected promptly without any *actual* harm resulting. Nevertheless, the question remains whether the error should be considered a Rule 1.1 violation because of *potential* harm considerations associated with that incident, or because it involved the same IOLTA account that was the subject of recurring violations of the trust accounting requirements. The Panel requests that Disciplinary Counsel file a brief on the issue.[3]

---

[2] Rule 1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."

[3] The Panel notes that when a proposed stipulation of facts is submitted to a hearing panel to initiate a proceeding, the rule allows the parties to submit along with the stipulated facts "any proposed legal conclusions and recommended sanction which disciplinary counsel and respondent, either separately or jointly, would like the hearing panel to consider." A.O. 9, Rule 13(D)(1). While the panel *considers* the parties' *proposed* conclusions of law, the panel reaches its own independent conclusions as to which Rules of Professional Conduct, if any, have been violated based on the facts set forth in a proposed stipulation.

* * *

Another area of ambiguity is related to the parties' statement that an "overdraft" resulted from the two checks. Para. 9. It is not clear whether any of the client's funds were paid out from the IOLTA account in connection with the two checks, even if only for a short period of time; it is also unclear whether any other clients' funds were disbursed or at risk as a result of the two erroneous checks. The stipulation states that "[w]hen the two checks were presented for payment, [the bank] called Respondent and she immediately provided a temporary remedy by covering the overdrafts from her operating funds"; and that the "situation was [quickly resolved by the two attorneys] without any impact on the closing." Para. 10. This statement suggests that while the checks were written and sent out by Respondent, it is possible that no funds were actually withdrawn from the account because of the timing of the phone call to Respondent from the bank. But, on the other hand, the stipulation states that the $1,500 check was "*drawn* on uncollected funds," and that "the two checks resulted in an overdraft." Para. 9 (emphasis added).

Rule 1.15B contemplates the possibility that an IOLTA-approved financial institution may respond in a variety of ways to a check "presented against insufficient funds." V.R.Pr.C. 1.15B(d). It provides for reporting to disciplinary counsel "whenever (1) any properly payable instrument is presented against such a trust account containing insufficient funds, *irrespective of whether or not the instrument is honored*; and (2) whenever any transaction, no matter the type, causes such an account to be overdrawn." *Id*. (emphasis added). The rule further provides as follows:

> [A]ll reports made by the financial institution shall be in the format described below. If an instrument presented against insufficient funds is dishonored, the report shall be made simultaneously with, and within the time provided by law, for notice of dishonor. *If an instrument presented against insufficient funds is honored*, the report shall be made within five banking days of the date of presentation for payment against insufficient

> funds. If any other transaction causes an account to be overdrawn, the report shall be made simultaneously with the forwarding of the financial institution's customary overdraft notice to the depositor.
>
> (1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and shall include a copy of the dishonored instrument, if such a copy is normally provided to depositors;
>
> (2) *In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify* the financial institution, the lawyer or law firm, the account number, the date of presentation for payment and the date paid, as well as *the amount of overdraft created thereby*.[4]
>
> (3) In the case of an overdraft caused by any other transaction, the report shall be a copy of the overdraft notice sent to the depositor by the financial institution.

V.R.Pr.C. 1.15B(e) (emphasis added).

In connection with the "overdraft" in this case, it is important for the Panel to understand whether the checks were honored by the bank and whether any of the client's funds or any other clients' funds (in any amount) were either used or jeopardized – even for a very short period of time – as a result of either of the two erroneous checks. If any other clients' fund were used or at risk, then a question is presented as to whether Respondent also violated Rule 1.15(f)(2). *See* A.O. 9, Rule 1.15(f)(2) ("a lawyer shall not use, endanger, or encumber money held in trust for a client . . . for purposes of carrying out the business of another client or person without the

[4] This language seems to contemplate a scenario where a bank might conceivably pay out the remaining account balance – and then pay any difference – in the course of honoring a check for which there are insufficient funds. Note that the federal Consumer Financial Protection Bureau in explaining the term "overdraft" contemplates banks proceeding to honor checks even when there are insufficient funds: "What is an overdraft? An overdraft occurs when you don't have enough money in your account to cover a transaction, *but the bank pays the transaction anyway*." (Available at https://www.consumerfinance.gov/ask-cfpb/what-is-an-overdraft-en-1035/) (emphasis added). The question is whether in a particular case a bank draws all remaining funds from an account when it does so or utilizes an alternative overdraft protection mechanism.

permission of the owner given after full disclosure of the circumstances."). Disciplinary Counsel should provide a more detailed account as to whether or not the two checks impacted the IOLTA account in any way.

The Panel would like the parties to provide the following additional factual material for the Panel's benefit regarding the "overdraft": (1) when was each of the two checks presented to the bank for payment? [5]; (2) what are the details of the actions that were taken by the bank at the time each of the checks was presented for payment – did the bank honor either of the checks and, if so, how did it do so, or did it simply telephone the Respondent and hold the checks?; (3) were any other clients' funds in the IOLTA account at the time the checks were issued?; (4) were any other client funds (in any amount) actually paid out by the bank from the IOLTA account in connection with either of the two checks and, if so, as a result of which check or checks and in what amount or amounts?; (5) what was the total amount of the Respondents' funds that Respondent deposited into the account to "cover[ ] the overdraft," Para. 10?; and (6) what was the total balance in the IOLTA account at the time the two checks were issued by Respondent? [6]

In the event that the parties file an amended stipulation for the Panel's consideration, the Panel requests that Disciplinary Counsel address the factual and legal issues identified above.

[5] The two checks may not have been presented to the bank for payment at the same time, unless they were written to the same payee and delivered to the same payee around the same time. The stipulation, however, does not identify the payee on the checks or state whether they were presented to the bank separately or together.

[6] The proposed stipulation contains the following three conclusory statements: "There is no evidence that Respondent intentionally took or misused client funds. There is no evidence that any client funds were lost. No complaint regarding any misuse of client funds had been referred to Disciplinary Counsel." Para. 15-17. But these statements, aside from being conclusory, are not responsive to the factual questions raised by the Panel. The Panel is requesting specific factual statements addressing the questions it has raised.

ORDER

The parties' Stipulation of Facts is rejected. As provided in Rule 13(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: November 5, 2021

Hearing Panel No. 4

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

By:_____
Cara L. Cookson, Esq.

By:_____
Thad Richardson, Public Member