138 PRB

[Filed 14-Mar-2011]

STATE OF VERMONT

PROFESSIONAL RESPONSIBILITY BOARD

In Re: PRB File No. 2010.007

Decision No. 138

Respondent is charged with co-mingling Respondent's funds with those of a client by depositing into Respondent's operating account a check received from the client to cover both Respondent's fee and real estate recording fees, in violation of Rule 1.15(A) of the Vermont Rules of Professional Conduct.

Disciplinary Counsel and Respondent have filed a stipulation of facts and recommended conclusions of law. Respondent has waived certain procedural rights including the right to an evidentiary hearing. The Panel accepts the facts and recommendations and orders that Respondent be admonished by Disciplinary Counsel.

Facts

In June of 2009, Respondent conducted a closing for a client (hereinafter "Client B"). Client B paid by check in an amount intended to cover payment for Respondent's services as well as the fee to record Client B's mortgage in the land records. Respondent deposited Client B's check into Respondent's operating account.

Respondent then issued a check to the Town in the amount necessary to pay the fee to record Client B's mortgage. The check was drawn on Respondent's operating account, and the check was returned for insufficient funds. Respondent had previously deposited into Respondent's operating account a check in payment of legal fees from another client (hereinafter "Client A"). In reliance upon that check, Respondent wrote checks on Respondent's operating account to pay some business expenses. Client A's check was no good, and as a result, a series of checks that Respondent issued against Respondent's operating account were returned for insufficient funds, including the check Respondent had issued to the Town to pay the fee to record Client B's mortgage.

In July of 2009, Respondent made good on the money owed to the Town. No client lost money as a result of Respondent's conduct.

In November of 2009, Respondent submitted to an audit of Respondent's trust accounting system by a Certified Public Accountant selected by Disciplinary Counsel. In February of 2010, the accountant recommended a series of changes to Respondent's trust accounting system. Respondent implemented the changes and cooperated with Disciplinary Council's review of the

changes. Since that time, Disciplinary Counsel has received no complaints relating to Respondent's trust accounting system.

At the time of the violation Respondent had been admitted to the Vermont bar for six years. Respondent has been the subject of no prior disciplinary complaints.

Conclusions of Law

The misconduct took place in June of 2009 and as a result is governed by the Vermont Rules of Professional Conduct existing at that time. In June of 2009, Rule 1.15(A) of the Vermont Rules of Professional Conduct required lawyers to "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." This rule prohibits co-mingling.

Respondent violated Rule 1.15(A) when he deposited the funds intended to pay for Client B's recording fees into Respondent's operating account instead of into Respondent's pooled-interest-bearing trust account.

By depositing the funds into Respondent's operating account, Respondent commingled Client B's funds with Respondent's own. Respondent should have deposited Client B's check into Respondent's trust account, and then immediately withdrawn the portion that was Respondent's fee for services and then issued a trust account check to the Town to pay the recording fee.

In June of 2009, Rule 1.15C (A) of the Vermont Rules of Professional Conduct, required lawyers to deposit funds held in trust into "accounts clearly identified as trust or escrow accounts…."

Respondent violated Rule 1.15C(a) by failing to deposit Client B's check into Respondent's trust account.

Sanction

The parties have joined to recommend that this Panel order admonition by Disciplinary Counsel for Respondent's violation. In our decision to accept the recommendation, we have reviewed a number of recent Vermont cases, including the Supreme Court decision in *In re Farrar*, 2008 Vt. 31 (2008), decisions of other hearing panels, as well as efforts by the Court and the Professional Responsibility Program to increase strict compliance with the trust account rules.

In the *Farrar* case the attorney had placed personal funds in his trust account as a means of saving for certain business expenses. Respondent's practice went on for several years. The Hearing Panel imposed a private admonition and the Court ordered review of the case on its own motion.

Quoting a District of Columbia case, the Court stressed the reasons for the rule of the rule against commingling and its importance:

> The rule against commingling has three principal objectives: to preserve the identity of client funds, to eliminate the risk that client funds might be taken by the attorney's creditors, and, most importantly, to prevent lawyers from misusing/misappropriating client funds, whether intentionally or inadvertently.

Farrar ¶ 7, quoting *In re Rivlin*, 856 A.2d. 1086, 1095 (D.C. 2004)(citations omitted)).

The Court went on to observe that "[t]he prohibition against lawyers commingling private monies with client funds is a fundamental precept." *Id.* at ¶ 7.

In an Indiana case the Court held that "[w]ith regard to determining whether a violation of the 'anti-commingling' rule has occurred, it is irrelevant that the misconduct was not part of a scheme to conceal income, was not the product of selfish or dishonest motives, or that client funds were never in fact at risk." *In the Matter of Anonymous*, 698 N.E.2d 808 (Ind. 1998). In essence, according to the Indiana Court, commingling may be considered a strict liability offense. There is little or no room for discussion as to whether or not the offense occurred. The factors cited only go to the matter of sanctions.

The Vermont Court in *Farrar* did not characterize commingling as a strict liability offense, but the language of *Farrar* makes it difficult to discern a fact pattern not resulting in discipline in which the commingling rule was not followed to the letter.

This conclusion is reinforced in looking at a series of trust account cases decided after *Farrar*. All resulted in private admonition, and all involved negligence in handling trust accounts with no actual and little potential for harm to clients.

In re PRB Decision No 93 (2006) arose out of a real estate transaction involving a refinancing. There was a three-day right of rescission, and at the expiration of the three days the attorney made disbursement of the funds without checking with her bank to determine if the

funds had been wired. They had not been due to a bank error. The error was corrected and no injury resulted.

In re PRB Decision No. 105 (2008) is another real estate closing case. The attorney prepared the HUD closing statement and a list of funds needed to be collected from various sources. The realtor's deposit was on the list and checked off, but the attorney failed to get the check from the realtor, and as a result there were insufficient funds of that client to cover the checks written. The error was discovered, funds deposited and no client lost money.

The attorney in *In re PRB Decision No 129* (2010), maintained several trust accounts for real estate closings at the behest of the banks for which he worked. There were two separate complaints here, and in each case the closing funds were deposited in one trust account and the checks for disbursement at the closing were drawn from another trust account. As a result, in both cases the trust accounts were overdrawn and Disciplinary Counsel received the notice of overdraft. No client was harmed and the attorney made changes to Respondent's trust accounting practices.

In determining the sanction to be imposed in a disciplinary case it is also appropriate to look at *ABA Standards for Imposing Lawyer Sanctions*. See *In re Warren*, 167 Vt. 259, 261 (1997).

Section 4.14 of the *ABA Standards* provides that "[a]dmonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client." The parties herein join in recommending that this section apply to the present case. Respondent was negligent in Respondent's handling of Client B's check, and

there was no actual injury and little potential for any. In determining whether a presumptive sanction under the *ABA Standards* is appropriate we also look to aggravating and mitigating factors. Respondent has cooperated with Disciplinary Counsel, including a formal review of Respondent's trust accounting system, *ABA Standards §9.32(e),* and he has no prior discipline, *ABA Standards §9.32(a).* There are no aggravating circumstances. Thus, admonition is appropriate under the *ABA Standards* as well.

In suggesting that admonition is the appropriate sanction in this case the parties also suggest that Respondent's conduct falls within the language of Administrative Order 9 Rule 8(A)(5)(a) which provides that admonition is appropriate only "in cases of minor misconduct, where there is little or no injury to a client, the public, the legal system or the profession, and where there is little likelihood of repetition by the lawyer." We concede that there was little or no injury or potential for injury, and that there is little likelihood of repetition, but we are reluctant to characterize this as "minor misconduct." As our Supreme Court observed in *Farrar:* "We are confident that respondent is not likely to repeat his misconduct, but we cannot characterize respondent's acts as minor." *Farrar* at ¶ 7 (citation omitted). Though we are reluctant to characterize any violation of the commingling rules as "minor misconduct," we recognize that the conduct here was admittedly much less serious than that in *Farrar*, and we can say that in terms of the spectrum of commingling cases, the one before us is minor.

In addition to the Court's decision in the *Farrar* case and the later Hearing Panel cases, both the Court and the Professional Responsibility Program have become increasingly concerned about commingling and have taken proactive steps to uncover poor trust account management

practices before a client is injured and to educate the bar on appropriate trust accounting practices.

In 2004 Disciplinary Counsel began sending Trust Account Questionnaires to randomly selected attorneys. The questionnaires ask details about trust account management and have on occasion uncovered practices which violated the Rules of Professional Conduct. See *e.g. In re PRB Decision No 115* (2008) (private admonition), *In re Harwood*, PRB Decision No. 83 (2005) (disbarment).

In 2006 Disciplinary Counsel began doing random audits of trust accounts. Again, violations were uncovered and attorneys sanctioned. See *e.g. In re Sheredy*, PRB Decision 121 (2009) (public reprimand).

In 2008, the Professional Responsibility Board published a manual, *Managing Client Trust Accounts Rules, Regulations, And Tips,* available at http://www.vermontjudiciary.org/LC/Shared%20Documents/Trust%20Account%20Manual.pdf.

The Supreme Court's decision in the *Farrar* case, the later Hearing Panel decisions and the actions taken by Disciplinary Counsel and the Professional Responsibility Program to monitor trust account management and to educate the bar, leave little doubt about the seriousness of any violation of the commingling rules.

Order

The Panel hereby approves an Admonition by Disciplinary Counsel for violation of Rule 1.15(a) of the Vermont Rules of Professional Conduct.

Dated: **March 14, 2011**

Hearing Panel No. 8

/s/

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John T. Leddy, Esq., Chair

/s/

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Joseph F. Obuchowski, Jr., Esq.

/s/

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Jeanne Collins