STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File Nos. 2010.104

Decision No. 147

The parties have filed a Stipulation of Facts and Joint Recommended Conclusions of Law and Sanctions. Respondent has waived certain procedural rights including the right to an evidentiary hearing. The panel accepts the stipulated facts and recommendations and orders that Respondent be admonished by Disciplinary Counsel for failure to insure that funds deposited in his trust account were collected funds which resulted in overdrafts and comingling of funds in violation of Rule 1.15(f)(1) and Rule 1.15(f)(2) of the Vermont Rules of Professional Conduct.

Facts

Respondent was admitted to practice in Vermont in 1980.

In September of 2009, a former colleague contacted Respondent and asked if he would be interested in advancing the former colleague a bridge loan. Respondent declined, but indicated that he might know of someone who was interested. Respondent contacted a friend who was interested, and he put him in touch with his former colleague. The two reached a deal and the friend advanced a bridge loan of $230,000. The loan was due in thirty days with a payment of $256,000 due to Respondent's friend.

The three agreed that on the repayment date, the former colleague would wire $256,000 to Respondent's trust account which Respondent would then disburse as directed by his friend.

On October 16, 2009, Respondent was notified that the loan was to be paid off and that the funds would be wired to his trust account from a bank in California. That day Respondent spoke with a representative of the California bank and provided him with his trust account number and wiring instructions. A short time later the representative called back and told Respondent that the funds had been wired to his trust account.

After being told that the funds had been wired, Respondent drafted a series of disbursement checks as directed by his friend, payable to his friend, a bank that had issued the friend a line of credit, credit card companies to whom the friend owed money and a college savings plan benefiting his friend's children.

Since October 16, 2009, was a Friday, and Respondent's bank had closed for the day by the time Respondent had spoken with the California bank, Respondent post-dated the checks for October 20, 2009, the following Tuesday, and gave them to his friend. Respondent intended to confirm the wire when he returned to work on Monday, October 19, 2009.

When respondent returned to work on the following Monday he did not confirm that the friend's funds had been wired to his account, and in fact they had not been wired. Over the next several days as the checks were presented, Respondent's bank honored the checks, but notified Respondent and Disciplinary Counsel that the trust account was overdrawn. Respondent immediately contacted his friend and told him what had happened and tried to stop payment on the checks that he had issued. He was able to stop payment on some of the checks, but some had already been honored causing overdrafts to Respondent's trust account.

Respondent also immediately notified the California bank which claimed to have

made a "keying error." The bank wired the funds to Respondent's trust account and upon confirming receipt of the wire, Respondent issued new checks to replace those which he had been able to stop.

The checks that Respondent issued to his friend totaled approximately $256,000. At that time the balance in Respondent's trust account was $11,100 all of which belonged to clients other than Respondent's friend. Those clients never consented to their funds being used to carry out the business of Respondent's friend. These funds were replenished as soon as Respondent realized what had happened.

As a result of the overdraft, Disciplinary Counsel audited Respondent's trust accounting system. The audit was conducted by a Certified Public Accountant who provided Disciplinary Counsel with a report of his examination in March of 2011. The audit confirmed the transaction detailed above and noted instances when respondent did not reconcile the sum of his individual client balances to his trust account balance. Prior to issuing his report, the accountant informed Disciplinary Counsel that there was no evidence of fraud in Respondent's trust account.

Disciplinary Counsel met with Respondent in June of 2011 and again in November of 2011. Respondent has made recommended changes to his trust accounting system to bring it into compliance with the Rules of Professional Conduct.

Conclusions of Law

Rule 1.15(f) of the Vermont Rules of Professional Conduct provides as follows:

> Except as provided in paragraph (g):
>
> (1) a lawyer shall not disburse funds held for a client or a 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 his trust account.

(2) 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.

Respondent violated Rule 1.15(f)(1) by disbursing funds according to his friend's direction without first confirming that the funds had reached his trust account. He violated Rule 1.15(f)(2) by using funds belonging to other clients to carry out his friend's business without the permission of the other clients following full disclosure of the circumstances.

Sanction

We accept the recommendation for admonition by Disciplinary Counsel. It is consistent with previous hearing panel decisions, and continues the current trend of Vermont's approach to trust account violations. It is clear that any deviation from the trust account management procedures required by the Rules of Professional Conduct may result in discipline.

Earlier this year, this panel considered a trust account commingling case under the predecessor rule to Rule 1.15(f)(2). *In re PRB Decision No. 138* (March 2011). In that case the attorney had deposited in his operating account a check for an amount that included his fees as well as funds to pay an obligation of the client. A check in payment of the client's obligation was returned for insufficient funds due to the return of another client's check also deposited in his operating account. In that case, we looked at *In re Farrar*, 2008 VT 31 (2008), the Vermont Supreme Court's latest case on trust account violations and concluded that "[t]he 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." *Id* at p. 4. This case reinforces our opinion that commingling should be treated as a strict liability offense.

We believe that the same is true of the violation of Rule 1.15(f)(1). Unlike the attorney in *In re Decision No. 138*, who put client funds in the wrong account, the attorney in the present case correctly placed the funds in his trust account. He checked with the forwarding bank and learned that the funds had been wired to his account. He must have had some understanding that he needed to confirm that the funds had actually arrived, since the checks that he disbursed on Friday were dated for Tuesday giving him time to check with his bank on Monday and either let the transaction proceed if the money was there, or stop payment before Tuesday if there was a problem.

The rule is precise and strict in its wording. "[A] lawyer shall not disburse funds held for a client or a 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 his trust account." V.R.P.C. Rule 1.15(f)(1).

The lawyer must take positive steps to determine that he has "collected funds" in his trust account. This means more than receipt of an assurance that the forwarding bank did its job. The lawyer must "reasonably believe" that the funds have been credited to his account. In order to meet this standard, the attorney must check with his own bank to determine the status of the funds in his account. The failure to do so violates this rule.

Accordingly, we accept the recommended sanction of admonition by Disciplinary Counsel. It is consistent with this panel's decision in PRB Decision No. 138. It also conforms to other decisions in which attorneys were admonished for failure to insure that

adequate funds were available in their trust accounts before disbursing funds in connection with a real estate closing. *In re PRB Decision No. 129* (April 2010), *In re PRB Decision No. 105* (February 2008) and *In re PRB Decision No 62* (January 2004).

Order

Respondent shall be ADMONISHED by Disciplinary Counsel for violation of Rule 1.15(f)(1) and Rule 1.15(f)(2) of the Vermont Rules of Professional Conduct.

Dated: 1/6/12

Hearing Panel No. 8

John T. Leddy, Esq., Chair

Joseph Obuchowski, Esq.

Jeanne Collins