STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File Nos. 2012.092

ORDER TO VACATE

Decision No. 150

Procedural Posture

On February 2, 2012, this Hearing Panel issued a decision admonishing Respondent for violation of Rules 1.15(f)1 and 1.15(f)2 of the Vermont Rules of Professional Conduct. The decision was based upon a stipulation of facts dated December 6, 2011, and executed by Respondent and Disciplinary Counsel.

The Supreme Court ordered review of the decision on its own motion pursuant to Administrative Order 9 Rule 11 (E). The Court directed the parties to address the "standard of liability governing Rule 1.15 of the Vermont Rules of Professional Conduct." Each party filed a brief. Upon receiving the Respondent's brief, Disciplinary Counsel realized that the joint Stipulation of Facts filed with the hearing panel, and upon which the hearing panel based its decision, was not accurate. The parties joined to request the Court to vacate the hearing panel decision. The Court, by Entry Order dated May 31, 2012, remanded the matter to this Hearing Panel to address the parties' motion.

On June 15, 2012, the parties filed with the hearing panel a joint Request to Reject Stipulation of Facts which we now consider.

Order

A.O. 9 Rule 11(D)(5)(a) gives hearing panels the authority to either accept or reject a stipulation of facts. Based upon the parties request, we hereby reject the stipulation filed December 6, 2011; we also VACATE the order of this Hearing Panel dated February 2, 2012.

Dated: September 20, 2012

Hearing Panel No. 10

Danielle D. Fogarty, Esq., Chair

Joseph O'Dea, Esq.

Robert Bergman, D.V.M.

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File Nos. 2012.09

Decision No. 150

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. This resulted in an overdraft to Respondent's trust account 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

This violation arises in the context of a real estate closing handled by Respondent on behalf of the purchasers, herein identified as the C family. Respondent's clients funded a portion of the purchase with a check delivered to Respondent on September 27, 2011, drawn on the Mr. C's Fidelity account in the amount of $94,886.03. Respondent deposited the check in his trust account on the same day.

The real estate transaction closed on September 29, 2011, and at the closing Respondent issued trust account checks in reliance upon the deposit of Mr. C's check. One of the checks that Respondent issued was payable to the seller in the amount of $93,708.67. Unbeknownst to Respondent, his bank had not honored the check received

from Mr. C and the check was returned by Mr. C's bank to Respondent's bank on September 30, 2011. Thus, when the seller presented the check drawn on Respondent's trust account, it was presented against insufficient funds. At that time, Respondent's trust account held approximately $82,000 belonging to clients other than the C family.

Respondent's bank honored the check presented by the seller, causing Respondent's trust account to be overdrawn by almost $11,000. This resulted in funds belonging to clients other than the C family being used to carry out the C family's business. Those other clients had not authorized Respondent to so use their funds.

Upon learning of the overdraft, Respondent took immediate action to protect client funds. He also investigated the overdraft and discovered that his bank had not honored the check he had received from the C family. In fact, Mr. C's check should have been honored by his bank and, eventually, the funds were credited to Respondent's trust account.

Respondent did not intentionally cause the overdraft to his trust account. Respondent is licensed to practice law in Vermont. He was admitted to the Vermont Bar in 1970.

Conclusions of Law

Recent Hearing Panel decisions have considered the extent of an attorney's obligation to insure that he or she is in possession of collected funds prior to making trust account disbursements. In this case we also consider the application of the exceptions to the "collected funds" rule.

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 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.
>
> (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.

The exceptions are covered in Rule 1.15(g) which provides:

> In the following circumstances, a lawyer may disburse trust account funds deposited for or on behalf of a client or third person in reliance on that deposit even though the deposit does not constitute collected funds if the lawyer reasonably believes that the instrument or instruments deposited will clear and will constitute collected funds in the lawyer's trust account within a reasonable period of time:
>
> > (1) When the deposit is either a certified check, cashier's check, money order, official check, treasurer's check, or other such check issued by, or drawn on, a federally insured bank, savings bank, savings and loan association, or credit union, or of any holding company or wholly owned subsidiary of any of the foregoing; or
> >
> > (2) When the deposit is a check drawn on the IOLTA account of an attorney licensed to practice law in the State of Vermont or on the IORTA account of a real estate broker licensed under 26 V.S.A. Chapter 41; or
> >
> > (3) When the deposit is a check issued by the United States of America or any agency thereof, or by the State of Vermont or any agency or political subdivision thereof; or
> >
> > (4) When the deposit is a personal check or checks in an aggregate amount that does not exceed $1,000 per transaction; or
> >
> > (5) When the deposit is a check or draft issued by an insurance company, title insurance company, or title insurance agency, licensed to do business in Vermont.

Turning first to the application of the rule itself. Rule 1.15(f)(1) requires that a lawyer not disburse funds for a client unless they are "collected funds." Hearing Panel

No. 8 recently considered two cases involving the extent of the attorney's obligation to insure that he or she is in possession of collected funds which are defined as "funds that a lawyer reasonably believes have been deposited, finally settled, and credited to his trust account." Rule 1.15(f)(1).

The first case was *In re PRB Decision No. 138* (March 2011). In that case the Hearing Panel looked at the most recent Supreme Court case on trust account violations, *In re Farrar*, 2008 VT 31 (2008), and concluded that the only possible interpretation of that decision was to conclude that this is a strict liability offense, though the court did not explicitly so state.

In the second case, *In re PRB Decision No. 147* (January 2012),[1] the Panel again found a violation where the attorney failed to insure that he was in possession of collected funds. The attorney had confirmed that wired funds had been sent to his account but neglected to confirm with his own bank that the funds had actually been received. The Panel stated: "[t]he 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." *Page 5.*

We concur with the position of the earlier Hearing Panel decisions, in finding this to be a strict liability offense. *In re PRB Decision No. 138* (March 2011), *In re PRB Decision No. 147* (January 2012). Here Respondent deposited the check to his trust

[1] This case is subject to the right of the Court to review on its own motion under Administrative Order No. 9, Rule E.

account, but did not subsequently take any steps to confirm that the check had been honored by his bank, which in fact it had not been. His failure to do so violates Rule 1.15(f)(1).

Even though Mr. C's check had not been honored, Respondent's bank honored his trust account check payable to the seller in the real estate transaction. As a result funds of clients other than the C family were used to cover this check. These other clients had not given permission for their funds to be used for the C family transaction and thus Respondent violated Rule 1.15(f)(2).

We now turn to the exceptions to the Rule to determine if any apply to this situation.

The Reporter's Notes to the 2005 Amendment are helpful in our determination that none of the exceptions apply in this case. According to the Notes:

> The exceptions to these basic principles set forth in Rule 1.15(e)[2] are based on the premise that certain categories of trust account deposits carry a limited and acceptable risk of failure so that disbursements to trust account funds may be made in reliance upon such deposits without disclosure to and permission of clients owning trust account funds subject to possibly being affected. Four of the five categories enumerated in paragraph (e) reflect instruments issued by or drawn on sources of assured financial stability so that the likelihood that the instrument will be dishonored or that the deposit will otherwise fail is so slight that it may be treated as presumptively "collected." The fifth category, personal checks aggregating $1.000 or less, covers the need for last-minute funds to cover minor and unanticipated closing costs and is a de minimus amount that can be readily repaid in the event of failure.

Mr. C's check drawn on his Fidelity account was in essence a personal check with none of the presumptive validity that accompanies the types of instruments enumerated in Rule 1.15(g)(1) such as certified or cashier's checks, or checks from specific payors such

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[2] The Notes refer to the Rules as numbered in 2005. The rules currently numbered as 1.15(f) and (g) were then numbered 1.15(d) and (e).

as Vermont attorneys' IOLTA checks or government checks as covered by Rule1.15(g) (2) and (3).

The only category of personal checks that are exempted from the collected funds rule are those aggregating less than $1000. Here the check was for substantially more and the exception does not apply.

Sanction

The Panel accepts the recommendation of the parties for admonition by Disciplinary Counsel. In determining the sanction to be imposed in this matter, it is appropriate to consider the ABA Center for Professional Responsibility, Standards for Imposing Lawyer Sanctions (1986) (amended 1992) [hereinafter "ABA Standards"] as well as previous Court and Hearing Panel decisions. *In re Strouse*, 2011 VT 77 (2011).

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." This is the case here. Respondent negligently assumed Mr. C's check had been credited to his account when in fact, it had not. His negligence put funds belonging to other clients at risk.

Admonition is also consistent with previous hearing panel decisions in which the attorney negligently dispersed money from his trust account without first ensuring that he was in possession of collected funds.

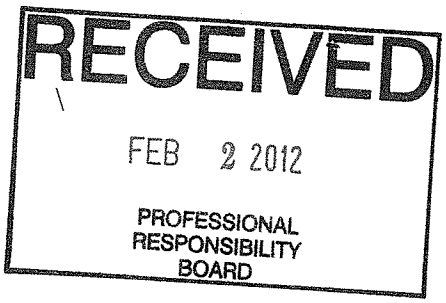
In both of the cases discussed above, *In re PRB Decision No. 138* (March 2011) and *In re PRB Decision No. 147* (January 2012), the sanction was admonition. See also, *In re PRB Decision No. 105* (February 2008) and *In re PRB Decision No. 93* (Sept. 2006).

Order

Based upon the foregoing, we order that Respondent 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 February 2, 2012

Danielle D. Fogarty, Esq., Chair



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