VERMONT SUPREME COURT
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APR 03 2015

ENTRY ORDER

2015 VT 57

SUPREME COURT DOCKET NO. 2014-082

SEPTEMBER TERM, 2014

In re PRB Docket No. 2012-155	}	Original Jurisdiction
	}	
	}	
	}	Professional Responsibility Board
	}	
	}	
	}	DOCKET NO. PRB 2012-155

In the above-entitled cause, the Clerk will enter:

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Thomas S. Durkin, Superior Judge,
Specially Assigned

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VERMONT SUPREME COURT
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2015 VT 57

No. 2014-082

In re PRB Docket No. 2012-155

Supreme Court

Original Jurisdiction

Professional Responsibility Board

September Term, 2014

Jean Brewster Giddings, Chair

Beth DeBernardi, Disciplinary Counsel, Burlington, for Petitioner-Appellant.

P. Scott McGee, Norwich, for Respondent-Appellee.

PRESENT: Reiber, C.J., Dooley, Skoglund and Robinson, JJ., and Durkin, Supr. J., Specially Assigned

¶ 1. **PER CURIAM.** Office of Disciplinary Counsel appeals the determination of the Hearing Panel of the Professional Responsibility Board that attorney should receive a private admonition sanction for violating Vermont Rule of Professional Conduct 1.15 by commingling personal and client funds in his client trust account. We affirm.

¶ 2. The parties stipulated to the following facts. Attorney was admitted to the Vermont bar in 1983. He worked as a solo practitioner and independent contractor until 1986, at which time he signed on as an associate with another law firm. In 1997, he again established his own private practice. At that time, he opened an Interest on Lawyer Trust Account (IOLTA), which he presently still maintains. Attorney uses this client trust account for real estate transactions and in connection with his estate and disability work. Attorney employs secretaries, social workers, paralegals, and associates, and he contracts with an independent bookkeeping service.

¶ 3. In 2011, attorney randomly was selected to complete an IOLTA account survey. While responding to the survey, he realized that he had been violating the rules by using his IOLTA account to escrow funds that were not directly client related. Attorney retained an independent certified public accountant (CPA) who reviewed all his IOLTA account transactions going back to 1997 to identify any other irregularities. The CPA's review was "comprehensive and exhaustive" and included review of "all deposits and withdrawals and all transactions." He concluded that all of the client funds were accounted for. After review, attorney self-reported all violations to Disciplinary Counsel. In addition to retaining a CPA, attorney retained the assistance of legal counsel. He also purchased bank records and probate court records to confirm information that had been lost in a flood.

¶ 4. Attorney reported three categories of IOLTA violations. First, attorney commingled personal and client funds by creating subaccounts within his IOLTA trust account in which he deposited personal funds. Attorney deposited these funds in escrow to be used later to pay liabilities owed to third parties, but the funds were labeled as attorney's personal funds while in the account. The funds were deposited separately into easily identifiable IOLTA subaccounts, and attorney maintained a separate ledger to ensure that he would not confuse the client and personal funds. Attorney discontinued these accounts once he realized their use was improper.

¶ 5. With respect to commingling personal and client funds, the parties stipulated that attorney's mental state was one of negligence; he did not knowingly or intentionally violate the rules. He mistakenly believed that creating separate escrow accounts was permitted, if not required, under the rules, as long as the accounts were segregated and labeled for specific purposes. His conduct resulted in no actual injury to his clients.

¶ 6. Second, bookkeeping errors resulted in funds being overdrawn from several of the IOLTA subaccounts. Attorney attributed these errors to his or his bookkeeper's failure to enter the correct inclusive date when issuing a check to close out an account. This resulted in higher balances than actually existed. As soon as each error was discovered, the bookkeeper deposited funds sufficient to bring the accounts in good standing. No overdraft notices were ever issued.

¶ 7. With respect to the overdrawn subaccounts, the parties stipulated that attorney's mental state was one of negligence. The errors were due to poor bookkeeping and inadequate oversight practices. His conduct resulted in no actual injury but had the potential to cause injury because some client funds were used to cover the negative balances.

¶ 8. Third, residual funds remained in several client subaccounts when matters were closed by other associates or when associates left the firm. Most of these funds were fees payable to attorney or funds earmarked for bank charges that never were debited from the subaccount. Some of these funds were payable to clients or third parties. Attorney since has closed the dormant accounts by making the necessary payments. Attorney has, with the assistance of his CPA, established additional checks and reconciliation protocols to avoid future errors.

¶ 9. With respect to surpluses in subaccounts, the parties stipulated that attorney's mental state was one of negligence. Again, these were errors due to poor bookkeeping and inadequate oversight practices. A small number of clients suffered minor injury due to the delay in receiving these funds.

¶ 10. Attorney appeared before the hearing panel. After considering the parties' stipulations and arguments, the panel ordered that attorney be privately admonished for violating Rule 1.15(a)(1) by commingling personal and client funds; Rule 1.15(b) by depositing his own money in excess of that required for bank fees; and Rule 1.15(f)(2) by using money held in trust for one client to carry out business for another client without that client's permission. The hearing panel considered attorney's mental state of negligence in concluding that public reprimand was the presumptive sanction, but reduced the sanction to private admonition based on several mitigating factors, including attorney's good standing, good faith effort to cure violations, full disclosure and cooperative attitude, and remorse. Disciplinary Counsel filed this appeal.

¶ 11. We uphold the hearing panel's findings of fact and mixed conclusions of law and fact if they are "clearly and reasonably supported by the evidence" and not clearly erroneous. In re Neisner, 2010 VT 102, ¶ 12, 189 Vt. 145, 16 A.3d 587 (quotation omitted). Although we grant deference to the panel's recommendations on sanctions, we ultimately determine the appropriate disciplinary measure. Id.

¶ 12. The sole issue on appeal is whether private admonition is the appropriate sanction for attorney's misconduct. Disciplinary Counsel contends that suspension is the presumptive sanction and that the mitigating factors should reduce the sanction from suspension to public reprimand. Disciplinary Counsel emphasizes the serious nature of the violations, the potential harm to clients, and the fact that attorney should have known his actions were violating the rules. We disagree and conclude that the hearing panel was correct in ordering private admonition.

¶ 13. We have adopted the American Bar Association (ABA) Standards for Imposing Lawyer Discipline, In re Andres, 2004 VT 71, ¶ 14, 177 Vt. 511, 857 A.2d 803 (mem.), which sets forth four factors to consider when determining an appropriate sanction in a disciplinary proceeding: (1) the duty violated; (2) the lawyer's mental state; (3) actual or potential injury caused by the misconduct; and (4) aggravating or mitigating factors. ABA Ctr. for Prof'l Responsibility, Standards for Imposing Lawyer Sanctions § 3.0 (1986) (amended 1992) [hereinafter ABA Standards].

¶ 14. Four possible sanctions are appropriate for attorneys who mishandle client funds. Id. § 4.1. Suspension is the presumptive sanction "when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client." Id. § 4.12. Reprimand is the presumptive sanction "when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client." Id. § 4.13. The presumptive sanctions, however, may be increased or reduced based on a weighing of aggravating and mitigating factors. Id. §§ 9.2-9.3. In the context of sanctions, "knowledge" is defined as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." Id. at xxi. "Negligence" is defined as "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.

¶ 15. The primary dispute here centers around the starting point for discipline: suspension or public reprimand. As noted above, § 4.12 requires knowledge on the part of the attorney, while § 4.13 requires only negligence, but the distinction is blurred because § 4.12 applies when an attorney either "knows or should know" his conduct violates the rules. The hearing panel applied § 4.13 based on the parties' stipulation that attorney's mental state merely was negligent. Despite this stipulation, Disciplinary Counsel argues that the language "should know" as used in § 4.12 applies here because all attorneys should know the rules, particularly those governing client trust accounts.

¶ 16. Disciplinary Counsel relies on our decision in In re Farrar, 2008 VT 31, 183 Vt. 592, 949 A.2d 438 (mem.), to support its argument. The facts of Farrar are strikingly similar to those of the present case: in responding to a random survey, the attorney discovered he had been commingling funds in violation of Rule 1.15, which he fully disclosed. The hearing panel ordered private admonition, but on review we concluded that public reprimand was the appropriate sanction. 2008 VT 31, ¶¶ 1-2. We agreed with the panel that the presumptive sanction was suspension, given the seriousness of the offense and the fact that the attorney "should have known that his handling of his trust account" violated the rules. Id. ¶ 11. We disagreed, however, with the Panel's decision to reduce the sanction from suspension to private admonition based on mitigating factors that included the attorney's cooperation with the proceeding, remorse, and lack of dishonest intent. Id. ¶ 9-10, 12. We emphasized that "[t]he prohibition against lawyers commingling private monies with client funds is a fundamental precept" and "mistake about the applicability of an ethical rule cannot excuse or even mitigate misconduct when the lawyer has violated a rule fundamental to governance of the legal profession." Id. ¶ 10 (quotation omitted).

¶ 17. At oral argument, Disciplinary Counsel discussed the difference between negligence and knowledge in handling client property. According to Disciplinary Counsel, a negligent action can be characterized as bookkeeping or other technical errors; the attorney understood the Rules but nonetheless made a careless mistake. An action where the attorney should have known he was violating the rules, according to Disciplinary Counsel, would involve a situation where the attorney either did not know the rules or did not understand that his conduct violated the rules.

¶ 18. This echoes our analysis in In re Fink, 2011 VT 42, 189 Vt. 470, 22 A.3d 461, where we discussed the line between negligent and knowing states of mind. Id. ¶ 38. We stated that "the distinguishing factor between negligent and knowing conduct is whether a lawyer had a conscious awareness of the conduct underlying the violation or whether he failed to heed a substantial risk that a violation would result from his conduct." Id. We acknowledged that a fine line exists between negligent and knowing acts, yet the difference between public reprimand and private admonition is great. Id. We concluded that because this line is so difficult to discern and the distinction is highly fact-based, we should accord great weight to the hearing panel's determination on the attorney's state of mind. Id.

¶ 19. Here, Disciplinary Counsel argues that, despite the parties' stipulations, attorney's state of mind is a question of law. Attorney's state of mind is indeed a question of fact, as we noted in Fink. The parties stipulated that attorney was fully cognizant of the rules but nonetheless believed his conduct was appropriate. But whether such a misunderstanding of the rules is knowing rather than negligent is a question of law. Thus, the question is whether suspension is the presumptive sanction when the attorney should have known his conduct violated the rules. As stated above, supra, ¶ 11, we review these mixed questions of fact and law for clear error.

¶ 20. The hearing panel concluded that, based on the language in the definition section of the ABA Standards, which does not include the term "should know," the presumptive sanction for attorneys who do not have conscious knowledge is public reprimand. The panel stated that it "expect[s] that all lawyers should know the rules, but [it does] not impose serious discipline such as suspension for that fact alone," and concluded that it does not "believe that suspension is an appropriate starting point for discipline given that the parties have agreed that we are dealing here with negligent behavior."

¶ 21. We agree with the hearing panel, particularly given this fine line between mental states and the seriousness of imposing suspension or public reprimand over private admonition. Although we treat violations of trust account rules seriously, the ABA Standards provide no indication that client trust account violations are subject to a different analysis. And we decline to conclude that any time an attorney should have known his conduct violated the rules, because he is charged with comprehensive knowledge of the content of those rules, that he presumptively will be suspended. In Fink, we differentiated between mental states in defending against violations and mental states as applied to sanctions. 2011 VT 42, ¶ 41. We stated that "knowing conduct does not encompass both knew or should have known" because "[i]f the definition extended to constructive knowledge then no misconduct would be negligent." Id. (quotation omitted). We explained that "while a lawyer's good faith, but unreasonable, belief that his actions are not misconduct is not a defense to a violation, such an error can be a factor in imposing discipline." Id. We agree that under the Fink analysis the presumptive sanction in this case is a public reprimand.

¶ 22. In reaching this conclusion, we also note that the potential injury to the client is less severe than in Farrar. Although any mishandling of client property is serious, we consider that attorney took pains not to commingle funds by creating separate subaccounts for distinct purposes and keeping careful, detailed records of each account to ensure no client funds were confused with his personal funds. In Farrar, on the other hand, the attorney's bookkeeper transferred money back and forth between the business and client trust accounts, directly commingling the funds. 2008 VT 31, ¶ 3. The potential that client funds would be used for nonclient related purposes was far greater there than here. Based on attorney's mental state, the lack of actual injury, and the low potential for injury, we conclude that public reprimand is the presumptive sanction.

¶ 23. With public reprimand the starting point, we consider whether the mitigating factors reduce the appropriate sanction from public reprimand down to private admonition. As Disciplinary Counsel recognized, attorney took additional affirmative steps in hiring a CPA at his own expense, ordering bank and court records, and diligently tracking every irregularity going back to the opening of his IOLTA account in 1997. His personal investigation far exceeded that of Disciplinary Counsel, resulting in details of violations and irregularities that Disciplinary Counsel would not have uncovered. He disclosed far more information than was required, including several bookkeeping errors and other irregularities that already had been remedied. Attorney's extensive efforts go beyond what was required of him and weigh heavily in our consideration of mitigating factors.

¶ 24. We also add to the scale several other mitigating factors stipulated to by the parties: absence of a prior disciplinary record, lack of selfish or dishonest motive, presence of personal problems, positive character and reputation, presence of physical disability, and remorse. The only aggravating factor is attorney's thirty years of experience. The weight of the mitigating factors over the aggravating factors is far greater than in Farrar, 2008 VT 31, ¶ 12, and merits a reduction in sanction.

¶ 25. We therefore conclude that public reprimand is the presumptive sanction and that mitigating factors reduce the appropriate sanction to private admonition.

Affirmed.

¶ 26. **ROBINSON, J., concurring.** While the commingling of an attorney's personal funds with clients' funds is almost always impermissible under our ethical rules, see V.R.Pr.C. 1.15, the commingling at issue here was as benign as commingling can be. Although attorney placed personal funds in subaccounts within his client trust account, those accounts were separately labeled as attorney's personal funds, the funds were deposited separately into these accounts, and attorney maintained a separate ledger to ensure that he would not confuse client and personal funds. Attorney made an honest mistake in believing that keeping separate personal "escrow" accounts within his account was permitted. Upon learning that his understanding was mistaken, attorney arranged for a wide-ranging, extensive audit, and he self-reported more than Disciplinary Counsel would have sought to uncover. For all of these reasons, the end point of the hearing panel's, and now the majority's, analysis is reasonable and appropriate, and for reasons set forth below, I concur in the result.

¶ 27. I write separately because I believe the path to that result chosen by the hearing panel and endorsed by the majority confuses the applicable law and sets a dangerous precedent for future cases involving improper handling of client property.[1] In determining the presumptive sanction, before considering aggravating and mitigating factors, the majority rightly focuses on the distinction between § 4.12 and § 4.13 of the American Bar Association (ABA) Standards for Imposing Lawyer Discipline. ABA Ctr. for Prof'l Responsibility, Standards for Imposing Lawyer Sanctions (1986) (amended 1992) [hereinafter ABA Standards]. The former describes the presumptive sanction "when a lawyer knows or should know that [he or she] is dealing improperly with client property and causes injury or potential injury to a client." Id. § 4.12. The latter describes the presumptive sanction "when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client." Id. § 4.13. The majority asserts that the line between these standards is blurred because the former section applies when an attorney either knows or "should know" that his or her conduct violates the rules. Ante, ¶ 15. I believe these sections are clear and distinct, and that the majority, not the ABA, has created confusion with respect to the application of these standards. The reasoning embraced by the majority is, essentially, that if a lawyer knowingly takes actions that constitute commingling of personal and client funds, but does not actually know that his or her actions violate the rules, then the lesser presumptive sanction for negligent conduct may apply. I gather the theory is that "should know" is a concept that sounds in negligence.

¶ 28. The problems with this approach are manifold. First, it completely reads the phrase "or should know" out of § 4.12. The majority's suggestion that the presumptive sanction of suspension only applies when a lawyer actually knows that he or she is dealing improperly with client property is at odds with the plain language of the standards. The commentary to the ABA Standards makes this point even clearer. The annotation to § 4.12 states that suspension should be reserved "for lawyers who engage in misconduct that does not amount to knowing

[1] I agree completely with the majority's analysis with respect to the bookkeeping errors and overdrawn subaccounts. I depart from the majority's analysis only with respect to the commingling of client and personal funds.

misappropriation or conversion" and that "[t]he most common cases . . . involve lawyers who commingle client funds with their own or fail to remit client funds promptly." By contrast, the commentary to § 4.13 of the ABA Standards explains that "reprimand is appropriate for lawyers who simply fail to follow their established procedures. Reprimand is also appropriate when a lawyer is negligent in training or supervising his or her office staff concerning proper procedures in handling client funds." This description applies squarely to the bookkeeping errors and overdrawn subaccounts for which attorney in this case was sanctioned, both of which resulted from a negligent failure to follow established procedures. But it does not describe the class of violations involving an attorney knowingly following practices that, although attorney did not realize it, amount to improper commingling under the rules.

¶ 29. Second, this approach departs significantly from our own case law. In In re Farrar, we considered a case in which a lawyer had his bookkeeper regularly transfer $200 from the lawyer's business account to the trust account as a sort of savings plan for the lawyer. 2008 VT 31, ¶¶ 2-3, 183 Vt. 592, 949 A.2d 438 (mem.). The bookkeeper reconciled the trust account on a monthly basis; the lawyer's money was never used to counteract a deficit in the client trust account; the lawyers' clients never suffered actual harm; and the lawyer had no selfish or dishonest motive. Id. The hearing panel recommended a private admonition and placed the lawyer on probation with the condition that he write an article for the Vermont Bar Journal about proper trust-account management. Id. ¶ 4. This Court, reviewing the hearing panel's recommendation on its own motion, rejected the private admonition as inappropriately lenient. In determining the presumptive sanction, this Court wrote:

> [R]espondent's practice of putting his own money in his client trust account violated his duty to his clients to preserve their property. Respondent had full knowledge of his bookkeeper's regular practice of putting nonclient funds into his client trust account, and respondent continued this practice for many years. Respondent should have known that his handling of his trust account was in violation of his professional responsibilities. As explained, respondent's actions did not actually harm his clients, but there

> was the potential for injury. Under these circumstances, . . . the presumptive sanction . . . is suspension.

Id. ¶ 11. Considering the mitigating factors, this Court imposed the sanction of public reprimand, rather than suspension. We specifically rejected the lawyer's argument that the lawyer should not be subject to more than a private admonition because he made an honest mistake and did not cause any injury. We explained:

> While recognizing that respondent did not act selfishly, we will not minimize his infraction merely because he was unaware that his acts violated the rules of professional conduct. "If a failure to understand the most central Rules of Professional Conduct could be an acceptable defense for a charged violation, even in cases of good faith mistake, the public's confidence in the bar, and more importantly, the public's protection against lawyer overreaching would diminish considerably." The prohibition against lawyers commingling private monies with client funds is a fundamental precept. "[M]istake about the applicability of an ethical rule cannot excuse or even mitigate misconduct when the lawyer has violated a rule fundamental to governance of the legal profession."

Id. ¶ 10 (citation omitted) (quoting In re Smith, 817 A.2d 196, 202 (D.C. 2003)).

¶ 30. The majority tries to distinguish Farrar by suggesting that the potential for injury to clients here was less severe than in Farrar. Ante, ¶ 22. But the majority ignores Farrar's express holding that suspension is the presumptive sanction under the ABA Standards for knowing conduct that amounts to commingling, even if the lawyer did not realize that the bookkeeping practice violated the ethical rule. The majority also makes no attempt to reconcile its holding with this Court's recognition in Farrar that a "mistake about the applicability of an ethical rule cannot excuse or even mitigate misconduct." The majority's holding in this case contradicts our decision in Farrar on these points.

¶ 31. Although Farrar squarely addresses the presumptive sanction for commingling personal and client property under the ABA Standards, the majority instead relies on the analysis in In re Fink, which deals only obliquely with the issue before us in this case. 2011 VT 42, 189 Vt. 470, 22 A.3d 461. In Fink, we concluded that the evidence supported the hearing panel's finding that the lawyer knew he was supposed to put a contingent fee in writing and knew he had not done so. Id. ¶ 39. As a result, we agreed that this violation was knowing. Id. But with respect to another violation, the charging of an excessive fee, the lawyer was merely negligent because he had erroneously thought that he would play a bigger role, and would contribute to a greater degree to the client's case. Id. ¶ 40.

¶ 32. The Court's general discussion of the different states of mind described in the ABA Standards does not support the conclusion that a lawyer's mistaken understanding of the ethical rules concerning commingling of property lowers the presumptive sanction for improper commingling to a public reprimand. In fact, in its discussion, the Court noted:

> In the context of sanctions . . . knowing conduct does not encompass both knew or should have known. If the definition extended to constructive knowledge then "no misconduct would be negligent because rather than failing to heed a substantial risk we would always assume the lawyer should have known the substantial risk."

Id. ¶ 41 (quoting In re Stansfield, 187 P.3d 254, 263 (Wash. 2008)). The problem is, as noted above, in the context of sanctions for dealing improperly with client property, the category of violations subject to a presumptive sanction of suspension specifically does include violations where the lawyer knew or should have known that the offending conduct violated the rules.

¶ 33. I fear that the Court's holding in this case will have the unintended consequence of reducing the presumptive sanction to public reprimand in the vast majority of cases involving improper dealings with client property. I have no doubt that the vast majority of lawyers who maintain their trust accounts in a way that violates the rule against commingling do not realize that their practice violate the rules. But I can imagine a wide range of practices that we would agree a lawyer should know violate the rules. If we read the "should know" prong out of the description of the presumptive sanction in § 4.12, then we are essentially setting up ignorance of the applicable ethical rules as a defense (or at least a mitigating factor) in a disciplinary proceeding arising from a violation of those rules. This approach undermines the ability of the

Board of Professional Responsibility and this Court to ensure compliance with the rules, and can only undermine public confidence in our effective regulation of the bar.

¶ 34. If what is driving the majority's decision is the parties' stipulation that attorney's "mental state with respect to the violation of IOLTA requirements was one of negligence," then the majority should limit its decision to that rationale. If the majority interprets this stipulation as a concession that § 4.13 (rather than § 4.12) applies,[2] then it should acknowledge that based on the rest of the record the stipulation does not appear to jibe with the relevant ABA Standards. Rather than describing the applicable law in a way that reads an important prong out of § 4.12, the majority should simply conclude that the parties essentially stipulated to a presumptive sanction that is less severe than that ordinarily required by the ABA Standards for commingling of the sort attorney committed here.

¶ 35. Although I disagree with the majority about the presumptive sanction in this case, I concur in the majority's judgment because even though suspension is the presumptive sanction in this case, the abundance of mitigating factors warrants a rare two-level sanction reduction to a private admonition. In Farrar, we disapproved of such a substantial reduction from the presumptive sanction of suspension on facts similar to those before us in this case. As I argued above, the distinctions between this case and Farrar noted by the majority—such as the substantially greater risk to client funds resulting from the lawyer's practices in Farrar relative to the risk in this case—have no bearing on which presumptive sanction applies to bookkeeping practices that improperly commingle personal and client funds. However, the distinctions are relevant to explain my departure from Farrar with respect to the extent of mitigation from the presumptive sanction in this case. See ABA Standards § 9.32 (listing thirteen "[f]actors which may be considered in mitigation"). Most important, in this case, there was very little actual risk

[2] Although this sentence in isolation appears to represent such a concession, in the context of the stipulation as a whole, it is unclear whether the stipulation represents a concession that ABA Standard applicable to negligent violations applies rather than simply an acknowledgment that attorney made an honest mistake.

to client funds. Id. § 3.0(c) ("In imposing a sanction . . . a court should consider . . . the potential or actual injury caused by the lawyer's misconduct . . . ."). Moreover, upon realizing that his handling of client funds had violated the rules, attorney's aggressive and proactive self-scrutiny and disclosure in this case were exemplary. Id. § 9.32 (noting that "timely good faith effort to make restitution or to rectify consequences of misconduct" is mitigating factor). Our sanction structure ought to create an incentive for members of the Bar to emulate his self-examination. Given these considerations, a two-level reduction—from the presumptive sanction of suspension to private admonition—is warranted.

¶ 36. For these reasons, although I do not join the majority's analysis, I concur in the result, and agree that private admonition is the appropriate sanction in this case.

¶ 37. I am authorized to state that Judge Durkin joins in this concurrence.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Thomas S. Durkin, Superior Judge,
Specially Assigned

AMENDED
STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2012.155 Decision No. 168

The parties filed a Stipulation of Facts Relevant to Violation, a Stipulation of Facts Relevant to Sanction and a Joint Recommendation as to Conclusions of Law. Respondent was represented by P. Scott, McGee. Beth DeBernardi appeared as Disciplinary Counsel. The parties were not in agreement as to the appropriate sanction in this matter. Respondent's counsel moved for a Protective Order and Confidential Hearing Panel Review of Documents. The motion was granted and the panel scheduled a status conference for counsel to appear and ordered that if it believed based on the stipulations and arguments that admonition was appropriate, the file would remain confidential. If the panel did not agree that admonition was appropriate, the matter would be set for hearing as a public file.

After considering the stipulations filed by the parties and the arguments, the panel orders that Respondent be privately admonished for comingling his funds with those of his clients in violation of Rule 1.15(a)(1) of the Vermont Rules of Professional Conduct, for depositing his own money in his trust account in an amount in excess of that required for bank fees in violation of Rule 1.15(b), and for using money held in trust for one client for purposes of carrying out the business of another client without that client's permission, in violation of Rule 1.15(f)(2).

Facts

The panel accepted the parties' Stipulation of Facts Relevant to Violations summarized as follows: Respondent was admitted to the Vermont bar in 1983. Since January of 1997 he has had his own firm. He has always used an independent bookkeeper rather than an employee to oversee and reconcile his law firm's bank accounts. He maintained his trust account using Quicken, a generic computer bookkeeping program. Respondent's bookkeeper regularly reconciled his trust account.

It was Respondent's practice to establish separate, identifiable, escrow sub-accounts within his IOLTA account for personal funds owed to or intended to benefit third parties in the same manner that he established sub-accounts for individual clients. These accounts were established in the good-faith belief that this was an acceptable use of his IOLTA account.

Three of the sub-accounts which Respondent created were used to hold marital property owned by Respondent and his wife.

1. In 2005, 12 deposits were made totaling $38,321.77 into his IOLTA account to cover work for renovation of his home, and funds were used to pay contractors.
2. In 2011, Respondent and his wife received an insurance reimbursement for damage to their home in the amount of $6,465.13. Respondent created a sub-account for payment of the repairs. All but $222.22 was paid out to contractors. The balance was later discovered and paid to Respondent.
3. In 2011, Respondent and his wife received an insurance payment after an automobile accident in the amount of $1,392.19. After payment of the repairs from this sub-account a balance of $63.00 was paid to Respondent.

The remainder of the sub-accounts which Respondent created were with his own personal funds.

1. For the period 2007 through 2011, Respondent made periodic payments into a sub-account in his IOLTA account which he used for his retirement plan

contributions and his quarterly tax obligations. The total amount flowing through this sub-account was $55,268.03,

2. In 2009 Respondent created a sub-account into which he deposited a total of $950.00 which was sequestered to repay an earlier loan from his father-in-law.
3. In 2004 Respondent placed $500.00 in a separate IOLTA sub-account to cover a departure gift for his secretary who was leaving in 2005 and were paid out for that purpose.
4. Respondent created another sub-account to hold funds he borrowed for his children's college education. The amount deposited to and withdrawn from this account during the period 2005-2006 was $13,665.70.
5. In 2004, Respondent deposited insurance proceeds for a stolen camera in the amount of $537.00. He used part of the money for a replacement camera and withdrew the balance.
6. In 1999 Respondent deposited $1,250.00 in his IOLTA account intended for an international vacation rental in order to facilitate wiring the funds to the landlord.

With respect to each of the sub-accounts created for personal funds, Respondent kept detailed records of the amounts paid in and amounts paid out. No client funds were used at any time.

Respondent maintained separate sub-accounts for each of his clients, but as a result of errors in the use of the bookkeeping system which caused the system to show greater individual account balances than were on deposit, there were 22 instances in which Respondent withdrew more from the client's account than the client had on deposit, which resulted in funds of other clients being used to cover the deficit in the individual accounts. No overdraft notices were generated by the bank due to the presence of funds of other clients. The total amount of these overdrafts was $17,657.33. The largest single amount was $3,000.00, the smallest, $224.00. As soon as each error was discovered, funds were deposited to establish a zero balance.

There was an improper booking of bank fees which were collected but not assigned to the client's account causing an apparent overdraft of client funds when paid. Respondent covered these overdrafts, actually resulting in his personal funds being added to the IOLTA account.

There were 38 instances where the legal matter was concluded and the file closed, but the balance in the trust account was not distributed. The total amount held was in excess of $13,000.00. In most instances this balance consisted of fees owed to the firm, which were paid when discovered, or to third parties. In some instances the balance represented funds owed to the client.

These amounts have been paid to clients who could be located. For those 5 clients who could not be located, funds totaling $675.53 were sent to the Vermont Treasurer as unclaimed property. This total included $277.10 held in escrow after a real estate closing for a repair. By the time the repair was completed, the client could not be found.

These violations were brought to Respondent's attention when he received an IOLTA account questionnaire from Disciplinary Counsel in December of 2011. This was when he first realized that his accounting practices did not comply with the Rules of Professional Conduct. Respondent reported the matter to Disciplinary Counsel and engaged a Certified Public Accountant to review his trust account records. It was with the help of the CPA that Respondent was able to identify both the overdrafts in the separate client accounts and the retained funds in other accounts.

Respondent has worked with the CPA to create a bookkeeping system that will guard against the type of errors that were discovered. In addition Respondent is no longer depositing his personal or marital funds into his trust account.

The panel accepted the parties' Stipulation of Facts Relevant to Sanction summarized as follows: The Respondent's mental state was one of negligence; he did not knowingly or intentionally violate the Rules.

Respondent's conduct in depositing personal funds into the IOLTA account whether creating separate escrow subcategories or due to inadvertently neglecting to take fees that had been earned or as a result of erroneous treatment of wire fees, caused no actual injury to any client.

There was no actual injury to any client in temporarily overdrawing their separate accounts when funds for one client were used to cover a deficit in funds for another client, although there was the potential for injury.

Respondent's failure to promptly withdraw funds owed to clients caused minor injury in that the clients were denied the use of their funds for varying lengths of time. The funds themselves were small in amount and have all been returned or made available to the clients.

The parties stipulated to eight mitigating factors present:

1. The absence of a prior disciplinary record. In 30 years of practice, respondent has never been the subject of attorney discipline.

2. Lack of a selfish or dishonest motive. Respondent understood the need to

keep his funds separate from those of his clients and believed that segregating the funds within his IOLTA account complied with the Rules and did not take any actions for personal gain.

3. Personal problems contributing to a lack of sufficient oversight. He handled the affairs of his mother from 2007 until her death in 2011, and had two floods at his house and three floods at his office damaging files.

4. Timely and good faith effort to rectify the situation. Respondent engaged a CPA and attorneys to review his entire trust account to bring it into compliance with the Rules and to pay out to clients any amounts due them.

5. Positive character and reputation. His character and reputation were established by five letters from attorneys and members of the community.

6. Physical disabilities. He was diagnosed with cancer in 1988 and again in 2008 and the stress and treatment involved have taken a toll on his personal and professional life.

7. Remorse. Respondent is remorseful and accepts responsibility for his mistakes and those of his staff.

8. Full and free disclosure to Disciplinary Counsel and cooperative attitude toward the proceedings. Respondent has made full and free disclosure to Disciplinary Counsel and has cooperated with the proceedings which were instituted when Respondent reported the violations after receiving the IOLTA questionnaire. The only aggravating factor present is Respondent's 30 years of practice.

Conclusions of Law

The Supreme Court adopted the original version of the Rules of Professional Conduct in September of 1999. A new version of the Rules was adopted in 2009. The misconduct in this case took place both before and after the rule changes.

The parties have stipulated that Respondent violated the following Rules of Professional Conduct:

Rule 1.15(a)(1) of the Rules of Professional Conduct provides as follows: "A lawyer shall 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 portion of the Rules was unchanged in 2009, and therefore applies to Respondent's conduct whether before or after 2009.

When Respondent deposited his own funds in his client trust account he violated this rule against comingling. The fact that he scrupulously maintained separate sub-accounts does not alter the fact that this is a violation of the Rule and we so find.

Rule 1.15(b) provides that "[a] lawyer may deposit the lawyer's own funds in an account in which client funds are held for the sole purpose of paying service charges or fees on that account, but only in an amount necessary for that purpose." This provision was adopted by the Court in 2009. Prior to that date, the Rules did not permit a lawyer to deposit any of his own money into his client trust account, not even to cover bank charges.

Some of the deposits which Respondent made into his trust account were before 2009 and some after. These deposits were for a variety of purposes, such as home and car repairs, saving for taxes and IRA contributions. None was to cover bank charges. We therefore find a violation of this Rule as it existed both before and after 2009.

Rule 1.15(f)(2), added in 2005, provides that a lawyer shall not "use, endanger, or encumber money held in trust for a client or third person for the purposes of carrying out the business of another client or person without the permission of the owner given after full disclosure of the circumstances." There are exceptions to this rule which do not apply in this case. This Rule was added in 2005. It was renumbered but otherwise unchanged in 2009.

The reporter's notes to the 2005 amendment quote VBA Ethics Opinion 2002-4 which states that "a check drawn against uncollected funds in a trust account is in fact drawn against the collected funds of other clients that are held in the account."

On a number of occasions Respondent returned more funds to a client upon the closing of the file than the client had on deposit. Some of these occurred after 2005 when this Rule came into effect. These overpayments to clients did not generate automatic overdraft notices from the financial institution to Disciplinary Counsel because funds of other clients or third persons covered the overpayments. When, at various times, Respondent discovered these overpayments, he promptly deposited his own funds into the account to cover the shortfalls, but there was nevertheless always a period of time during which the funds of other clients or third persons were used or endangered and we find a violation of this Rule.

Sanctions

Both parties made strong and cogent arguments for their suggested sanctions; Disciplinary Counsel for reprimand and Respondent for admonition. The panel acknowledges that this is a close case, and that a strong argument can be made for reprimand under the stipulated facts.

In choosing admonition as the appropriate sanction we have been guided by both the ABA Standards for Imposing Lawyer Sanctions and Vermont case law. We have also considered the purpose of sanctions and the efforts of the Professional Responsibility Program to insure greater compliance with the trust account rules.

The Vermont Supreme Court has consistently applied the ABA Standards in determining the appropriate sanction in attorney disciplinary cases. *In re Andres*, 177 Vt. 511, 857 A2d 803, (2004).

The ABA Standards require us to look at the duty violated, the lawyer's mental state and the actual or potential injury to arrive at a presumptive sanction. We then look to the presence of any aggravating or mitigating circumstances to determine whether that sanction should be increased or decreased. *ABA Standards § 3.0.*

Respondent violated his duty to his clients when he comingled his own money with that of his clients, when he placed his own money in his trust account in excess of that needed for bank charges and when he paid out to clients more funds than they had in their individual accounts, thus violating his duty to other clients whose money was used for this purpose.

The parties have stipulated that the Respondent's mental state was one of negligence.

With respect to injury, there were no monetary losses to any of Respondent's clients. The only injury to any client was the delay in returning surplus funds to a small number of clients, with the attendant lack of opportunity to earn interest on the funds during the period of delay.

There was, however, the potential for injury. In assessing whether any of the following factors have the potential for injury it is helpful to look at the definition in the ABA Standards: "Potential injury is the harm to a client, the public, the legal system or the profession that is *reasonably foreseeable* at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct (emphasis added)." Thus we are required to look at the potential for injury in the particular case rather than in the abstract.

This is in fact what hearing panels have always done in assessing the severity of sanctions. Writing checks on one's trust account for one's personal expenses without the present ability to repay the account can result in disbarment. *In re Harwood*, PRB Decision No. 83 (2004). In *Harwood,* there was a real and serious potential for injury even though eventually he was able to secure funds to make his trust account whole and no client lost money. Had he not been able to secure the needed funds, clients would have lost money. In the present situation, the negligent writing of checks which overdrew a particular client's balance was a violation, but there was not the same potential for injury which is underscored by Respondent's practice of promptly covering the shortfalls when they were discovered.

As Disciplinary Counsel argues, where there is comingling there is the risk that Respondent could have accidently used client funds for his own purposes such as college education or home repairs. In this particular case it appears that this risk was not great since Respondent maintained his funds as he would a client escrow account in easily identifiable subcategories, and kept very accurate records of the personal funds deposited in his trust account.

Disciplinary Counsel makes the argument that with his own funds in the trust account one of his creditors could have attached his trust account to satisfy a personal debt of the client. While we agree that this is a theoretical risk, Disciplinary Counsel could not offer any instances of this having occurred in Vermont. In the event that creditors sought to trustee an attorney's IOLTA account, we are confident that any court reviewing the request would appreciate the need to preserve both the integrity of client funds and client confidentiality.

Respondent also argues that the risk is small in his particular case because he is financially solvent and responsible. We agree with Disciplinary Counsel that not only do we have no evidence of Respondent's financial stability but we do not consider this to be an appropriate or necessary inquiry in a disciplinary case.

The instances where Respondent paid out more to clients than he was holding on their behalf also had the potential for injury. The shortfalls were initially covered by funds of other clients which were at risk until such time as Respondent deposited funds in the account to cover the deficits. That Respondent's and Respondent's staff reviewed the accounts regularly and caught the errors quickly reduced the potential for actual harm, it did not eliminate the potential altogether.

In cases where a lawyer mishandles his or her trust account there is also the potential for harm to the public and the profession. As the Vermont Supreme Court stated in *In re Farrar*, "[l]awyer misconduct in handling and protecting client trust accounts does injure both the public at large and the profession by increasing public suspicion and distrust of lawyers. 208 VT 31 ¶ 7, quoting *In re Anderson*, 171 Vt. 632, 635, 769 A.2D 1282, 1285 (2000).

An attorney's failure to act properly with respect to client property is covered by §4.1 of the ABA Standards. We have not considered the disbarment provision since that is generally reserved for lawyers who knowingly convert client property to their own use.

Under the ABA Standards the controlling issues between suspension, reprimand and admonition are the mental state of the attorney and the presence and extent of injury or potential injury.

> 4.12. Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.
>
> 4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.
>
> 4.14 Admonition 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.

We turn first to Respondent's mental state. The parties have stipulated that Respondent's mental state was one of negligence and that is consistent with the stipulated facts. The Definition section of the ABA Standards defines knowledge as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular task." Negligence is defined as "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." *Chapter III Definitions*.

Disciplinary Counsel argues that suspension is the appropriate sanction not because Respondent *knew* that he was violating the rule, but that he *should have known*.

The term *should know* is not included in the definition section and we are somewhat puzzled by its inclusion in this paragraph. We expect that all lawyers *should know* the rules, but we do not impose serious discipline such as suspension for that fact alone, we look for some conscious understanding on the part of the lawyer that he or she was violating the rule. Given this, we are inclined to treat *should know* as an attempted clarification or additional definition of *knew*. That being the case, we do not believe that suspension is an appropriate starting point for discipline given that the parties have agreed that we are dealing here with negligent behavior.

Thus, we are left with the determination of whether reprimand or admonition is the appropriate presumptive sanction before we look to the aggravating and mitigating factors. The difference between them under the ABA Standards is the extent of the actual or potential injury.

Reprimand was imposed in the case of *In re Hibbits*, PRB Decision No. 145 (2011). Here the attorney was a sole practitioner whose trust account was selected for audit after Disciplinary Counsel was notified that a trust account check had been returned for insufficient funds. The audit revealed that the attorney had no formal trust accounting system. She relied on her checkbook and handwritten notes. She did not have ledgers for each client and failed to withdraw fees when earned, preferring to wait until they were needed. Here there was real potential for harm since the attorney had comingled her funds with those of her clients and she had no way of accurately knowing what funds on deposit belonged to clients since there were no detailed records. This combination makes the potential for harm much greater than in the present case where we have comingling, but accurate and detailed records of personal funds on deposit.

In re Sheredy, PRB Decision No. 121 (2009), is a similar case in which reprimand was also imposed.. The attorney comingled his funds with those of his clients, and he consistently failed to reconcile his bank statements with his trust accounting system.

In re Toscano, PRB File No. 126 (2009) is another reprimand case in which there was real potential for harm. In connection with assisting a client with several credit card debt collection cases, the attorney made an oral arrangement with the client that she would pay him and by another oral agreement granted the credit card company the ongoing right to withdraw the payment amount from his trust account without regard to whether or not the client had made the payment. Had the client missed a payment, the withdrawals from his trust account would have continued and funds of other clients put at risk. This is a far greater potential for harm than we have in the present case.

In re Farrar, PRB Decision No 101, 2008 VT 31(2007), is the most recent Supreme Court case on trust account violations. In this case the attorney was putting personal funds into his trust account on a weekly basis as a form of savings account. The hearing panel imposed an admonition and the Supreme Court took the case on its own motion It accepted the panel's findings but imposed a public reprimand. As in the present case, the misconduct came to light as a result of the trust account questionnaire from Disciplinary Counsel. Farrar answered the questions truthfully and, as here, no client funds were lost. Both attorneys cooperated fully with Disciplinary Counsel.

The critical difference between the present case and *Farrar* is the question of the attorney's mental state. Here we have a stipulation that Respondent's mental state was one of negligence. In *Farrar* the panel found that he "knew or should have known" that he was violating the Rule, thus the presumptive sanction was suspension which was reduced to reprimand based on the mitigating factors.

There are a number of mitigating factors in this case which serve to reduce the presumptive sanction to one of admonition. Respondent has no prior discipline, *ABA Standards §9.32(a)*, and he has cooperated fully with the disciplinary proceedings, starting with his letter to Disciplinary Counsel after receipt of the trust account survey which detailed his violations, *ABA Standards §9.32(e)*.

We concur with the Board in *In re Hutton*, PCB Decision No, 12, (1991), which found disclosure of the misconduct to be a key factor in reducing the severity of the sanction. "Most importantly, Respondent himself brought this matter to the attention of the Professional Conduct Board and fully cooperated with the Board's review of this matter."

Respondent has expressed remorse for his actions, *ABA Standards §932(l)*, and has worked hard with a CPA to remedy the problems in his account. In addition he had a number of personal problems during this time, serious health issue, floods and the necessity of caring for an elderly parent, *ABA Standards §9.32(c)*, and has a good reputation in the community, *ABA Standards §9.2(g)*,. The only aggravating factor is his years of practice, *ABA Standards §9.22i)*,

On balance we believe that the mitigating factors far outweigh the aggravating factor and are sufficient to reduce the presumptive sanction from reprimand to admonition.

In our decision to impose admonition in this matter we have also considered the purpose of disciplinary proceedings. It is clear that punishment is not the purpose of lawyer sanctions. "[D]isciplinary sanctions are not intended to punish attorneys, but rather to protect the public from harm and to maintain confidence in our legal institutions by deterring future misconduct." *In re Hunter*, 167 Vt. 219, 704 A.2d 1154, (1997).

We believe that educating lawyers, especially sole practitioners, in the essentials of trust account management is one of the best ways to protect the public from harm and to insure confidence in the disciplinary system. We note that the Hearing Panel in *Farrar* was of the same opinion, and as part of their decision required Farrar to write an article on trust account management for the Vermont Bar Journal. PRB Decision 101 (2007). The Supreme Court eliminated this requirement and increased the sanction to reprimand. We suspect that part of the reason for the increased sanction was to serve to educate the bar to the necessity of good trust account practices. While we agree that this would have been a desirable result, we have concerns about its efficacy when we find attorneys such as Respondent continue to violate the Rules in much the same way.

We note that a number of the recent trust account cases, including the present one, began when attorneys received the trust account questionnaire. As we understand it, Disciplinary Counsel sends a number of questionnaires to randomly selected attorneys and all are reviewed. If Disciplinary Counsel were to send the questionnaire to all attorneys and then to randomly select a number of those for review, we believe that there would be an important educational function built into the system. Had Respondent received this questionnaire five years ago we are confident that his violation of the Rules would have come to the same abrupt halt that it did when he received the questionnaire in 2011.

This practice would serve to put all attorneys on notice of the requirements of the Rules and would not necessarily create any more work for Disciplinary Counsel. We do not mean to suggest that the sole responsibility for educating lawyers should rest with the Disciplinary system, we are only suggesting that this might be another avenue through which to bring the Rules to the attention of the bar.

Disciplinary Counsel has taken similar steps to make the process easier for practitioners through the creation of the manual *Managing Client Trust Accounts*, https://www.vermontjudiciary.org/LC/Shared%20Documents/Trust%20Account%20Manual.pdf. Were Disciplinary Counsel to consider our suggestion that trust account questionnaires be sent to all attorneys, the inclusion of this manual with the questionnaire would enhance its educational function.

The goal of increasing confidence in the disciplinary system can be achieved as well or perhaps better by an education process which prevents misconduct. Violations which are prevented will always better serve the public and better protect the integrity of client funds than discipline of attorneys for violations discovered.

Order

Based upon the foregoing, the Hearing Panel orders that Respondent be admonished for violation of Rules 1.15(a)(1), 1.15(b) and 1.15(f)(2).

Dated: MARCH 21, 2014

Hearing Panel No. 2

Jean Brewster Giddings, Esq., Chair

Joseph F. Cook, Esq.

Gregory Worden

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