

New Hampshire Supreme Court
Professional Conduct Committee

a committee of the attorney discipline system

David M. Rothstein, Chair
Benette Pizzimenti, Vice Chair
Toni M. Gray,* Vice Chair
Susan R. Chollet*
Thomas P. Connair
Alan J. Cronheim
Richard H. Darling*

4 Chenell Drive, Suite 102
Concord, New Hampshire 03301
603-224-5828 ♦ Fax 228-9511

Elaine Holden*
Heather E. Krans
Richard D. Sager
Martha Van Oot
Mary Elizabeth Tenn
* non attorney member
Holly B. Fazzino, Administrator

Bennett, Paul J. advs. Attorney Discipline Office # 11-061

**RECOMMENDATION FOR A TWO YEAR SUSPENSION
WITH THE SECOND YEAR STAYED FOR ONE YEAR**

On August 20, 2013, the Professional Conduct Committee (the “Committee”) heard Oral Argument and deliberated the above captioned matter. Members present included: David M. Rothstein, Chair, Benette Pizzimenti, Vice Chair, Toni M. Gray, Vice Chair, Susan R. Chollet, Alan J. Cronheim, Richard H. Darling, Elaine Holden, Richard D. Sager and Mary Elizabeth Tenn. Thomas P. Connair and Martha Van Oot were absent. Heather E. Krans was recused.

Elizabeth M. Murphy, Assistant Disciplinary Counsel, presented on behalf of the Attorney Discipline Office. Justin C. Shepherd, Esquire, presented on behalf of the Respondent, Paul J. Bennett, Esquire, who addressed the Committee. James L. Kruse, Deputy General Counsel was also present.

In addition to the oral arguments, the Committee reviewed the record, including the Notice of Charges, Answer, Hearing Panel Report, Exhibit Volumes I and II, Stipulation as to Facts and Rules Violations, Attorney Discipline Office’s (the “ADO”) Memorandum on Sanction, Report of the Hearing Panel, and Respondent’s Appeal Memorandum. The Committee determined that the record supports a recommendation of a suspension consistent with the Hearing Panel Report.

I. STIPULATION AS TO FINDINGS OF FACT

The Committee voted to accept the Stipulation as to the Facts dated June 4, 2013, consistent with the Hearing Panel Report, by clear and convincing evidence, as follows:

1. Respondent, Paul J. Bennett, Esq., is a New Hampshire lawyer who was admitted to the New Hampshire Bar in 1988. At all times relevant to this proceeding, Mr. Bennett has practiced as Paul J. Bennett & Associates, P.C., with an office at 130 Middle Street, Manchester, New Hampshire.

2. Mr. Bennett was admitted to the Massachusetts Bar in 1992. He is currently on active status in Massachusetts.
3. The Attorney Discipline Office's investigation was initiated upon receipt of information from Deborah Ross, Mr. Bennett's former employee, regarding her efforts to cash payroll checks drawn on an IOLTA Trust Account maintained by Mr. Bennett's law firm. Ms. Ross also advised that other operating expenses were being paid out of the referenced account.
4. Mr. Bennett filed voluntary responses to Ms. Ross's allegations. In August 2011, Mr. Bennett also assented to an audit of his records and accounts by ADO staff auditor, Craig Calaman, CPA.
5. Mr. Calaman's audit covered the period January 1, 2008, through June 30, 2012. His Audit Report was issued on October 12, 2012, following which the ADO issued a Notice of Charges on January 17, 2013.
6. In anticipation of trial of this disciplinary matter before a Hearing Panel, the ADO filed the ADO's Exhibits 1-10, including the Audit Report. Mr. Bennett stipulates to such exhibits and they are incorporated herein by reference.
7. During the period of time relevant to this proceeding, Mr. Bennett's law firm maintained the following, separate accounts, at TD Bank:
 - a. Operating account;
 - b. General client trust account, [identified on checks as "New Hampshire Bar Foundation Trust Account" and on Mr. Bennett's New Hampshire Supreme Court Annual Trust Accounting Compliance Certificates as "IOLTA Trust Account" or "NH Bar Foundation Client Trust" or "Clients Trust Account."]; and
 - c. Merchant trust account [identified on checks as "IOLTA Trust Account" and on Mr. Bennett's New Hampshire Supreme Court Annual Trust Accounting Compliance Certificates as "IOLTA Trust Account" or "IOLTA Trust M/C Visa Account"]. Mr. Bennett represents that he originally intended to open this account as an IOLTA account. He learned during the course of the ADO audit that the account had not actually been set up as an interest-bearing IOLTA account.
8. The merchant trust account was opened by Mr. Bennett prior to the audit period to serve as an IOLTA credit card "holding" account into which client payments of invoiced fees and/or retainers paid by credit card were to be deposited and then transferred promptly to

the firm operating account as payment for invoiced services and expenses incurred, or to the general client trust account as retainers.

9. When there were insufficient funds in the operating account, when that account was encumbered by the IRS, or after the operating account was closed by the bank, the merchant trust account was used by Mr. Bennett and his staff to pay for the daily and weekly operating expenses of the law firm business, including payroll. The first two such disbursements in early August 2010 were made by check drawn on the merchant trust account, signed by Mr. Bennett's bookkeeper without Mr. Bennett's knowledge while Mr. Bennett was away on vacation. Thereafter, (August 20, 2010, to January 7, 2012) such disbursements for operating expenses and payroll were made with Mr. Bennett's knowledge by checks drawn on the merchant trust account. These checks were signed by Mr. Bennett or by the bookkeeper who Mr. Bennett authorized to sign his (Mr. Bennett's) name as maker of the check.
10. In June and July 2011, the merchant trust account had insufficient funds to cover payment of payroll checks issued to Ms. Ross. Mr. Bennett recalls advising Ms. Ross of the circumstances and recalls that she agreed to delay presenting her checks for payment.
11. Mr. Bennett filed New Hampshire Supreme Court Annual Trust Accounting Compliance Certificates (Trust Accounting Compliance Certificates) covering reporting periods from June 2007 to May 2012. Mr. Bennett signed each of these submissions.
12. In the Trust Accounting Compliance Certificates covering reporting periods June 2007 to May 2011, Mr. Bennett identified the general client trust account and merchant trust account as trust accounts holding client funds and subject to Supreme Court Rule 50.
13. On all of his Trust Accounting Compliance Certificates, Mr. Bennett represented that the client trust accounts were maintained in compliance with Supreme Court Rule 50 and Rule of Professional Conduct 1.15.
14. On his Trust Accounting Compliance Certificates covering the reporting periods June 2007 to May 2009, Mr. Bennett represented that his office had performed monthly reconciliations of the client trust accounts. He also represented that for the same reporting periods, he had not been "out of trust."
15. On his Trust Accounting Compliance Certificate covering the reporting period June 2009 to May 2010, Mr. Bennett did not answer the question whether he had been "out of trust" during that reporting period. As to monthly reconciliations of client trust accounts, Mr. Bennett represented that it was "office policy" to conduct such reconciliations, that he had fired a "substandard office bookkeeper," and that he had hired a new one to "reconcile all accounts."

16. Mr. Bennett acknowledges that, as of August 30, 2010, when he filed the referenced Trust Accounting Compliance Certificate for the reporting period June 2009 to May 2010, he knew that his client trust accounts were not being maintained in compliance with Rule 50 and Rule of Professional Conduct 1.15. Notwithstanding his disclosure regarding the necessary change in staff to reconcile the accounts (and his apparent intention to correct certain bookkeeping and accounting problems of which he had become aware), Mr. Bennett executed the Trust Accounting Compliance Certificate with the standard language certifying that his accounts had been maintained in compliance with the rules during the reporting period.
17. Mr. Bennett did not timely file a Trust Accounting Compliance Certificate for the reporting period June 2010 to May 2011. It was due in August 2011, at around the time he agreed to the ADO audit. Mr. Bennett made the filing as later directed by the Supreme Court in its order of January 23, 2012. *See In the Matter of Paul J. Bennett, Esq.* (Case No. ADM-2011-0119). In that filing, Mr. Bennett acknowledged what was made apparent during the audit, *i.e.*, that neither he nor his staff had performed monthly reconciliations and that he was "out of trust."
18. In his Trust Accounting Compliance Certificate for the reporting period June 2011 to May 2012, Mr. Bennett's list of client trust accounts included the original merchant trust account and a new merchant trust account at TD Bank in April 2012. Mr. Bennett neglected to include the general client trust account which was still in place and in use for the June 2011 to May 2012 reporting period. Mr. Bennett did not answer the questions whether he had been out of trust and whether he had performed monthly reconciliations of the client trust accounts, except to refer to work in progress in conjunction with Mr. Calaman's audit.
19. When he filed his Trust Accounting Compliance Certificates for the reporting periods June 2010 to May 2012, Mr. Bennett knew that the ADO audit had revealed that his client trust accounts were not being maintained in compliance with the rules. Notwithstanding such knowledge and his admissions of ongoing problems with his bookkeeping and accounting, Mr. Bennett executed the Trust Accounting Compliance Certificates for the reporting periods covering June 2010 to May 2012, with the standard language certifying that his client trust accounts had been maintained in compliance with the rules during the applicable reporting periods.
20. As reflected in the Audit Report, there is no evidence that either Mr. Bennett or his non-lawyer assistants performed monthly reconciliations of the client trust accounts during any of the reporting periods from June 2007 to May 2012. Mr. Bennett acknowledges knowing that no such reconciliations were done during the period 2009 to 2012.
21. As reflected in the Audit Report, neither the merchant trust account nor the general client trust account was maintained in compliance with Rule 50 and Rule of Professional Conduct 1.15 during any of the referenced reporting periods.

22. As reflected in the Audit Report, at various times during the referenced reporting periods, Mr. Bennett was "out of trust."
23. The Audit Report reflects that during the audit period, neither Mr. Bennett nor his non-lawyer assistants maintained a trust accounting system for the client trust accounts identified in the referenced Trust Accounting Compliance Certificates that included:
 - a. A complete and accurate ledger showing all receipts and disbursements from the trust accounts with entries identifying the source of receipts and nature of disbursements; or
 - b. A separate accounting page or column for each client accurately identifying for whom funds were held, showing all receipts and disbursements and a running balance.
24. During the audit period, neither Mr. Bennett nor his non-lawyer assistants performed monthly reconciliations regarding client funds held in client trust accounts.
25. During the audit period, Mr. Bennett and/or his non-lawyer assistants frequently failed to promptly transfer credit card payments of retainers from the merchant trust account into the general client trust account.
26. During the audit period, Mr. Bennett and/or his non-lawyer assistants frequently received credit card or cash retainers which were deposited into the merchant trust account or the general client trust account, but were not transferred to the operating account as the fees were earned and invoiced.
27. Positive client balances in the client trust accounts, as reflected in the Audit Report, often represented monies belonging to Mr. Bennett's law firm as earned fees that had not been transferred to the operating account.
28. To the extent earned fees were left in the merchant trust account or the general client trust account, as reflected in the Audit Report, funds belonging to clients and funds belonging to Mr. Bennett's law firm were commingled.
29. The Audit Report reveals that during the audit period, Mr. Bennett and/or his non-lawyer assistants made disbursements from the merchant trust account or the general client trust account before the corresponding fees were earned and invoiced or transferred to the operating account.
30. The Audit Report reveals that during the period August 6, 2010, to January 7, 2012, Mr. Bennett and/or his non-lawyer assistants continued to use the original merchant trust

account for deposit of client credit card payments and made disbursements from that account to cover operating expenses in the total approximate amount of \$27,000.

31. Mr. Bennett's use of the original merchant trust account to pay for operating expenses became more frequent in the Spring of 2011, after his operating account was subject to an IRS levy and then closed by the bank.
32. As reflected in the Audit Report, Mr. Bennett's account records show that, during the audit period, many transactions involving client funds were not fully or accurately documented and clerical errors resulted in disbursements to or on behalf of clients in excess of money on hand.
33. As reflected in the Audit Report, Mr. Bennett's client trust accounts were "out of trust" in the approximate amount of \$5300, as of June 20, 2012.
34. Mr. Bennett made up the entire client trust account shortfall with personal funds paid on December 3, 2012.

II. STIPULATION AS TO RULINGS OF LAW

The Committee voted to accept the Stipulation that Mr. Bennett violated Rule of Professional Conduct 1.15: Safeguarding Property; Rule 5.3: Responsibilities Regarding Non-lawyer Assistants; Rule 8.4(a): General Rule; and Supreme Court Rule 50: Trust Accounts, by clear and convincing evidence, as recommended by the Hearing Panel.

Rule of Professional Conduct 1.15: Safeguarding Property and Supreme Court Rule 50: Trust Accounts

35. Pursuant to Rule of Professional Conduct 1.15, Mr. Bennett owed his clients, the public, and the Bar various duties, including the following:
 - a. To hold client property separately from his own property or his law firm's property and to deposit client funds into one or more clearly designated trust accounts in accordance with Supreme Court Rules;
 - b. To maintain financial records with respect to such client trust accounts as specified in the Supreme Court Rules;
 - c. To deposit in such client trust accounts legal fees and expenses paid by the clients in advance, to be withdrawn by Mr. Bennett only as fees are earned or expenses are incurred; and
 - d. To promptly return to his clients any funds which his clients are entitled to receive.

36. Pursuant to Supreme Court Rules 50 and 50-A, Mr. Bennett was required to do the following:
- a. Create or maintain a pooled, interest-bearing trust account (IOLTA account) for clients' funds which are nominal in amount or to be held for a short period of time (Sup. Ct. R. 50(1));
 - b. Complete and file an annual Trust Accounting Compliance Certificate listing all interest-bearing trust accounts for clients' funds (Sup. Ct. R. 50(1)E and 50-A(1));
 - c. Maintain records of the handling, maintenance and disposition of all funds of a client, to include (1) a ledger or system showing all receipts and disbursements from the trust account or accounts with appropriate entries identifying the source of the receipts and the nature of the disbursement, and (2) a separate accounting page or columns for each client for whom property is held, which shall show all receipts and disbursements and carry a running account balance (Sup. Ct. R. 50(2)A);
 - d. Deposit all cash property of clients received by Mr. Bennett in one or more clearly designated trust accounts (separate from Mr. Bennett's or his firm's own funds) in financial institutions (Sup. Ct. R. 50(2)B);
 - e. Deposit in client trust accounts only those retainer fees that are refundable if not earned, and as to which Mr. Bennett has so informed the client (Sup. Ct. R. 50(2)C); and
 - f. Reconcile each financial institution client trust account on a monthly basis, as required by Supreme Court Rule 50(2)F.
37. Pursuant to Supreme Court Rule 50-A(2), an attorney who fails to comply with the requirements of Rule 50 regarding the maintenance, availability and preservation of accounts and records, or who fails to file the required annual Trust Accounting Compliance Certificate, shall be deemed in violation of Rule of Professional Conduct 1.15 and Supreme Court Rule 50.
38. Mr. Bennett breached the aforementioned duties by engaging in knowing and reckless conduct in violation of Rule of Professional Conduct 1.15 and Supreme Court Rule 50, as follows:
- a. Mr. Bennett failed to use his client trust accounts to hold client funds separate from his own or his law firm's funds, and otherwise to safeguard client funds, by failing to timely transfer credit card payments deposited in the merchant trust account to the general client trust account or to the operating account; co-

mingling earned fees with client funds in his client trust accounts; and knowingly making disbursements from client trust accounts to pay for firm operating expenses;

- b. Mr. Bennett withdrew funds from client trust accounts to pay for fees not yet earned or invoiced;
 - c. Mr. Bennett failed to maintain records of the handling, maintenance and disposition of client funds, as required under Supreme Court Rule 50(2)A;
 - d. Mr. Bennett failed to fully and accurately document financial transactions affecting client funds;
 - e. Mr. Bennett failed to perform monthly reconciliations of each of his client trust accounts, as required under Supreme Court Rule 50(2)F;
 - f. Mr. Bennett failed to provide complete and accurate information requested in his Trust Accounting Compliance Certificates during various of the aforementioned reporting periods, and recklessly misrepresented that his client trust accounts had been maintained in compliance with applicable rules; and
 - g. Mr. Bennett allowed his client trust accounts to be out of trust during the audit period.
39. Mr. Bennett's conduct in this regard constitutes clear and convincing evidence of a violation of Rule of Professional Conduct 1.15 and Supreme Court Rule 50.

Rule of Professional Conduct 5.3: Responsibilities Regarding Nonlawyer Assistants

40. Facts as set forth above are incorporated by reference.
41. Mr. Bennett owed a duty to his clients, to the public, and to the Bar to make reasonable efforts to have measures in effect at his law firm providing reasonable assurance that non-lawyer assistants employed or retained by Mr. Bennett or his law firm will conduct themselves in a manner compatible with Mr. Bennett's professional obligations.
42. Mr. Bennett breached such duty by engaging in knowing and reckless conduct in violation of Rule of Professional Conduct 5.3, as follows:
- a. He failed to make reasonable efforts to have in place at his law firm record keeping systems designed to ensure proper handling and maintenance of client funds and client trust accounts, as well as accurate reporting to the Court regarding the performance of such tasks in conformity with applicable Supreme Court Rules; and

- b. He failed to employ, train, and/or properly supervise his non-lawyer assistants charged with such record keeping, handling, and maintenance of such accounts, as well as the preparation of Trust Account Compliance Certificates to be filed pursuant to Supreme Court Rule 50.
43. To the extent his non-lawyer assistants contributed to the foregoing misconduct, Mr. Bennett knew or should have known of their poor performance and is wholly responsible for such misconduct.
44. Mr. Bennett's conduct in this regard constitutes clear and convincing evidence of a violation of Rule of Professional Conduct 5.3.

Rule of Professional Conduct 8.4(a): General Rule

45. Because there exists clear and convincing evidence that Mr. Bennett violated the above rules, there is necessarily clear and convincing evidence of a violation of Rule of Professional Conduct 8.4(a).

III. FACTUAL ANALYSIS

Having accepted the above Stipulation as to findings of fact and rulings of law, the Committee concludes that the appropriate sanction is a two year suspension with one year suspended. In making this recommendation, the Committee is mindful of Disciplinary Counsel's request for a suspension, and it has carefully reviewed the Hearing Panel Report as well as Mr. Bennett's Appeal Memorandum arguing that a suspension is unnecessary. The Committee accepts the Hearing Panel's analysis on sanction which is incorporated herein and concludes, as did the Hearing Panel, that certain conditions should be imposed in conjunction with reinstatement.

The Committee briefly summarizes the facts that provide the background for the sanction analysis. It relies on the Stipulation of Facts for the summary, as well as certain exhibits including the ADO's Exhibits 1-10 incorporated in Paragraph 6 of the Stipulation and made part of the Stipulation by reference. The exhibits are voluminous and cover ten different areas related to the prosecution of this matter. These exhibit categories are described as follows: Complaint; Response to Complaint; Rule 50 Certificates; ADO Audit (104 pages); Bank Records; Internal Revenue Service (including tax liens for unpaid payroll taxes); New Hampshire Employment Security (tax delinquency notices); New Hampshire Judicial Council; New Hampshire Department of Labor; Petition for Interim Suspension, and Bank Statements dated August – November 2012.

The Respondent Paul J. Bennett ("Mr. Bennett") has been a practicing attorney in New Hampshire for twenty-five (25) years. During the time relevant to these proceedings, Mr. Bennett has maintained a law practice known as Paul J. Bennett & Associates, at 130 Middle Street,

Manchester, New Hampshire. Mr. Bennett has been a member of the Massachusetts Bar since 1992. A substantial portion of his practice involved criminal defense work, and he routinely entered into Agreements with the Judicial Council as a contract attorney to represent indigents in circumstances where the Public Defender Program is unavailable.

On or about July 9, 2011, Deborah Ross (“Ms. Ross”), a paralegal who was not involved in the financial aspects of the Bennett law firm, was laid off from her job. Mr. Bennett failed to pay her wages in a timely manner, and she contacted the ADO about the situation. She provided information to the ADO that raised concerns about Mr. Bennett’s use of funds in his firm’s IOLTA Trust Account for operating expenses, including payroll checks issued to Ms. Ross. The checks date back to the weeks of June 25, 2011 to July 9, 2011.

On August 4, 2011, Mr. Bennett assented to an audit of his financial records. The audit, which covered the period January 1, 2008 through June 30, 2012, revealed a number of instances in which Mr. Bennett had commingled client and law firm funds, utilized his IOLTA accounts for the payment of operating expenses, been “out of trust” and chronically failed to reconcile his various accounts to endure actual compliance with his professional obligations.

During this same period, Mr. Bennett submitted several Trust Accounting Compliance Certificates pursuant to Supreme Court Rule 50, all of which represented that he was in compliance with Rule 50 as well as Rule of Professional Conduct 1.15. In at least one instance, Mr. Bennett failed to timely file a Trust Accounting Compliance Certificate, and in another instance Mr. Bennett filed a certificate, but he failed to answer whether his accounts had been “out of trust” during the relevant time period.

In his Trust Accounting Compliance Certificate, dated August 30, 2010, covering the period 2009-2010, Mr. Bennett made no representation as to whether he was out of trust. In addressing the question about whether he had been “out of trust” during the reporting period, he responded that he “Just laid off previous bookkeeper. Work was very substandard & disorganized. Have hired new bookkeeper to reconcile all accounts.” In an accompanying letter dated August 30, 2010, he states that “unfortunately I had no choice but to terminate my Bookkeeper. This situation has resulted in the late filing of the documents and payments enclosed. . . .” See ADO Exhibit (“Exh.”) 3, pp. 41-42 and Stipulation of Facts, ¶¶15-16.

In terms of his knowledge of the situation, Mr. Bennett went through various phases in which (1) he believed, but did not independently verify, his bookkeeper’s confirmation of compliance, (2) learned that his bookkeeper was incompetent, (3) replaced his bookkeeper with another whom he believed to be competent, and (4) learned that his successor bookkeeper also lacked competence. Mr. Bennett never independently reported to the Supreme Court that the Trust Accounting Compliance Certificates he had filed were inaccurate, nor did he voluntarily seek assistance in bringing his accounts back into trust and into compliance after learning that his financial books were in disarray when he fired his bookkeeper in 2010.

At the same time Mr. Bennett assented to an Audit, Ms. Ross filed a wage claim with the

Department of Labor. *See*, ADO Exh. 8, p. 312. Her wage claim stated in pertinent part:

I was laid off from Attorney Bennett's firm due to financial issues. As of 7/11/11 I was had [sic] the following payroll checks issued to me #337, #339 and #343 for w/e 6/25, 7/2 and 7/9/11 from Bank of NH IOLTA Trust Acct #xxxxxxx @40 hours per week @ \$20 per hour = \$800 gross = \$673.80 net x 3 weeks = \$\$2,021.40. On 7/29 Atty Bennett stopped payment on these checks and texted me that he would reissue them. As of this date, I have not received the above checks.

At both the Sanction Hearing before the Hearing Panel and in his Appeal Memorandum, Mr. Bennett claims that although he was "grossly negligent" and "reckless", he has taken steps to manage his law practice in a more efficient and protective manner. Mr. Bennett claims he has been cooperative with the ADO and has taken full responsibility for his actions. *See* Hearing Committee Sanction Hearing Transcript, June 4, 2013 p. 26, lines 14-18. Mr. Bennett places the blame for the financial mismanagement of his firm on the ineptitude of two bookkeepers.

At the Oral Argument before the Committee, Mr. Bennett took full responsibility for the acts and omissions of his staff and claims he has not disputed what was known and what was not known to him. *See* Respondent's Appeal Memorandum p. 4; Sanction Hearing Transcript, p. 25, lines 2-9. His counsel asked that he be given credit for his cooperation and points to the Stipulation of Facts as recognition of his mistakes, including irregularities in his IOLTA account. *See* Hearing Transcript, p. 19, lines 8-23. It is Mr. Bennett's position that he was "cooperative from day one. He didn't hide the ball. . ." *Id.* at p. 35, lines 10-15.

Nonetheless, Mr. Bennett responded to the wage claim in the Department of Labor in a manner inconsistent with his statements of full acceptance of responsibility. In a letter to the Department of Labor dated August 25, 2011, he accused Ms. Ross of making false and inaccurate statements. The letter provides in part as follows:

As a direct result of the claim she filed, this office is being investigated by the Professional Conduct Committee. . . Moreover, she has now caused serious damage to this office as a result of her false complaint. This office is in the process of seeking legal representation against Ms. Ross for her false complaints. ADO Exh. 8, p. 317.

In the same letter, Mr. Bennett acknowledged that there had been an IRS levy to attach money owed to his office by the State of New Hampshire under an indigent defense contract with the Judicial Council. (Levy for 941 taxes, dated 5/18/2011 for 03/31/2010 and 06/30/2010 tax periods and released on 8/10/2011. *See* ADO Exh. 5, p.195; Exh. 7, p. 187.)

In another letter dated September 12, 2011, Mr. Bennett blames Ms. Ross for his office's financial crisis. He characterized her allegations to the ADO as a malicious filing of a false complaint. Mr. Bennett reiterates that his office is "still exploring a separate civil action against Ms. Ross for the tens of thousands of dollars her willful actions have cost this firm." ADO Exh. 8, pp. 327-328.

In his Appeal Memorandum, Mr. Bennett states that the ADO complaint concerns his "poor judgment in his choice of bookkeepers and poor oversight of his bookkeepers and not independently ensuring that the books were being kept pursuant to Rule 50 et. al." Appeal Memorandum, p. 5. These statements are inconsistent with Mr. Bennett's claim that he has accepted responsibility for his actions as well as his stipulation that he acted knowingly or recklessly with regard to his obligations under the above-cited Rules of Professional Conduct and Supreme Court Rule 50.

On May 21, 2012 Mr. Bennett wrote to Acting General Counsel with a supplemental response concerning the allegations pending against him. He concludes the letter by confirming that he has "no objection to the completion of the audit and demonstration that the accounts are in proper order. I would request though, that any complaints that have been lodged against me concerning my utilizing an IOLTA account, as has been stated, be dismissed. . ." ADO Exh. 2, p. 18.

Mr. Bennett continued to practice law and handle client funds without qualified accounting supervision after the complaint was filed in July 2011. The ADO filed a Motion for Interim Suspension with the Supreme Court (Case No. LD-2012-0014, In The Matter of Paul J. Bennett) in November 2012. Mr. Bennett filed an Answer and Objection on December 26, 2012, in which he denied the allegations that he commingled client funds with the firm's funds. On February 1, 2013, the parties entered into an agreement whereby Mr. Bennett agreed to retain the services of Dennis Stone, CPA, to perform a comprehensive review of the financial records, accounting systems, and accounting procedures in his office. According to Mr. Stone, the non-compliance issues continued through the end of October 2012, and it was not until January 2013 that the client trust accounts were effectively in compliance with Rule 50. Mr. Stone reported in March 2013 that Mr. Bennett was using a manual system that provides the appropriate procedures. ADO Exh. 9, p. 472.

IV. ANALYSIS AND SANCTION

The purpose of the Court's disciplinary power is "protecting the public, maintaining public confidence in the bar, preserving the integrity of the legal profession, and preventing similar conduct in the future." *Conner's Case*, 158 N.H. 299, 303 (2009). The Committee judges each attorney discipline case on its own facts and circumstances, taking into account the severity of the misconduct and any mitigating circumstances appearing in the record. "The gravity of unprofessional conduct is not determined solely by the number of rules broken or by the particular rules violated, but is determined largely with reference to the attorney's behavior." *Morgan's Case*, 143 N.H. 475, 477 (1999).

Although the Court has not adopted the *American Bar Association's Standards for Imposing Lawyer Sanctions (2005)* ("*Standards*"), it looks to them for guidance. *Conner's Case*, 158 N.H. at 303. The *Standards* set forth a four part analysis for courts to consider in imposing sanctions: "(a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors." *Id.* (quoting *Douglas' Case*, 156 N.H. 613, 621 (2007)); *Standards* § 3.0.

The first three parts of the analysis create the framework for characterizing the misconduct and determining a baseline sanction. *See Conner's Case*, 158 N.H. at 303 (stating that "[i]n applying these factors, the first step is to categorize the Respondent's misconduct and identify the appropriate sanction"). Once the baseline sanction is determined, the Court then looks to the fourth and final part of the analysis: the existence of any aggravating or mitigating factors and whether they affect the baseline sanction. *See id.* (stating that "[a]fter determining the sanction, [the Court] consider[s] the effect of any aggravating or mitigating factors on the ultimate sanction"). In the case of multiple charges of misconduct, the ABA recommends that the sanction imposed "should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious misconduct." *Id.* (citing *Richmond's Case*, 152 N.H. 155, 160 (2005)).

Here, the misconduct involves: (1) failure to safeguard client's property under *Standards* Section 4; and (2) violations of duties owed to the profession under Section 7.

The *Standards* provide material guidance for determining a baseline sanction. Mr. Bennett's failure to properly maintain the client trust account involved breaches of Mr. Bennett's duty to protect the interests and property of his clients. Section 4.1 of the *Standards* provides, in pertinent part, as follows:

- 4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.
- 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 Reprimand¹ 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

¹ Section 4.13 uses the term "Reprimand." The most analogous sanction in New Hampshire is a Public Censure.

dealing with client property and causes little or no actual or potential injury to a client.

The Committee focuses on Section 4 as the failure to preserve client's property involves the more serious misconduct.

Under the first prong of the analysis, Mr. Bennett violated his duty to his clients as well as to the Court. He failed to properly safeguard client funds, to properly account for and report on the maintenance and handling of client trust accounts, and to train and supervise his non-lawyer staff to ensure proper maintenance and handling of client funds in a manner consistent with Mr. Bennett's professional obligations.

Under the second prong of the analysis, Mr. Bennett admitted to the Hearing Panel that his conduct was grossly negligent and reckless. Hearing Panel Transcript, p. 26, line 14. The Stipulation of Rules Violations states that:

"38. Mr. Bennett breached the aforementioned duties by engaging in knowing and reckless conduct in violation of Rule of Professional Conduct 1.15 and Supreme Court Rule 50 as follows: . . ."

"42. Mr. Bennett breached such duty by engaging in knowing and reckless conduct in violation Rule of Professional Conduct 5.3, as follows: . . ." (Emphasis added).

The Hearing Panel found that Mr. Bennett engaged in reckless conduct. Hearing Panel Report, p. 6. The Committee, in accord with the Hearing Panel and the Stipulation, finds that Mr. Bennett's conduct was, at a minimum, reckless. Under the *Standards*, a reckless or grossly negligent state of mind is the same as that contemplated in §4.12, recommending suspension for a lawyer who "knows or should know that he is dealing improperly with client property...." *Standards*, §4.12 (emphasis added); Commentary, §§4.12 and 4.13 ("lawyers who are grossly negligent in failing to establish proper accounting procedures should be suspended").

Mr. Bennett's breaches were fundamental, showing a lack of understanding of the most basic law office accounting procedures and oversight of his firm's finances. He exhibited gross indifference to the risks associated with delegating responsibility to his bookkeeper even after numerous notices from the IRS regarding tax liens and levies regarding unpaid federal payroll taxes and notices from New Hampshire Employment Security regarding tax delinquencies.

The Committee accepts the Stipulation that Mr. Bennett knew about the financial mismanagement of his firm's finances and the implications of his duties to safeguard his client's funds. See Stipulation, ¶¶16 & 38. He should have known that his financial management of his client's property was improper. Mr. Bennett showed a total disinclination over a substantial period of time to evaluate or even consider the risks associated with his clients' funds. He acknowledged that he knew as early as 2010, when he fired the first incompetent bookkeeper, that his financial records were in need of attention. Hearing Panel Transcript, p. 22, lines 1-14.

The third prong of the analysis requires consideration of actual or potential injury caused by Mr. Bennett's misconduct. We agree with the Hearing Panel's conclusion that "[w]hile the record contains no evidence that any client suffered actual harm, the magnitude of potential harm is significant." Hearing Panel Report, at p. 6. Mr. Bennett was out of trust at various times during the audit period and operated his firm out of the merchant trust account from August 2010 to January 2012. His belated action at the end of 2012 to make up the shortfall calculated as of June 20, 2012, does not mitigate the occurrence of those losses. Aside from potential harm to the reputation of lawyers and the integrity of the profession, Mr. Bennett caused significant potential harm by commingling client funds with his own, thereby subjecting his clients' property to possible claims against Mr. Bennett or his firm. *See* Commentary, *Standards*, sect. 4.12. He also disregarded his responsibility to his employees by failing to timely pay payroll taxes. Ms. Ross claims that her unemployment benefits were delayed as a result of insufficient records with the State. ADO Exh. 8, p. 333. In addition the payment was only made after a Notice of Charges was issued on November 15, 2012. *See* Commentary, *Standards*, Sect. 9.3 (restitution made upon the lawyer's own initiative prior to the initiation of disciplinary proceedings present the best case for mitigation; while those who make it later in the proceedings have a weaker case).

According to Mr. Calaman's Audit Report, the following deficiencies were observed:

1. Records were not maintained in accordance with Supreme Court Rule 50;
2. Funds were removed from trust accounts prior to being earned;
3. Misleading information was provided to clients regarding the handling of retainer funds;
4. Firm funds were commingled with client funds in that earned fees were not removed from trust accounts;
5. Funds were transferred from client trust accounts without identification and seemingly unrelated to client activity;
6. Operating expenses of the firm were taken directly from the trust account; and
7. The firm was out of trust as of June 30, 2012.

Commentary, *Standards*, § 4.12 addresses the suspension sanction as follows:

The most common cases involve lawyers who commingle client funds with their own, or fail to remit client funds promptly. . . Because lawyers who commingle client's funds with their own subject the client's funds to the claims of creditors, commingling is a serious violation for which a period of suspension is appropriate even in cases when the client does not suffer a loss. As explained by the Illinois Supreme Court "It is the risk of loss of the funds while they are in the attorney's possession, not only the actual loss, which the rule is designed to eliminate" *In re Bizar*, 97 Ill. 2d 127, 454 N.E. 2d 271 (1983).

The Supreme Court has emphasized that "[i]n cases involving an attorney's misuse of client funds, we often take severe disciplinary action," and "[a] lawyer's obligation to refrain

from misuse of a client's property must stand among the most insistent of professional norms." *Douglas' Case*, 147 N.H. 538, 544 (2002). Even in instances in which the attorney at issue may not have acted intentionally, the Court has imposed suspension as a sanction for misuse of client funds. See, e.g., *Coddington's Case*, 155 N.H. 66, 71 (2007); *Morgan's Case*, 143 N.H. 475, 477 (1999). In the realm of misuse of client funds, the lack of malicious intent does not relieve an attorney from the sanction of suspension, not to punish the attorney, but "to protect the public, maintain public confidence in the bar, preserve the integrity of the legal profession and prevent similar conduct in the future." *Morgan's Case*, 143 N.H. at 477. So serious is an attorney's duty to safeguard client property that it is enough to merit suspension that the attorney should have known that he or she dealt improperly with client property. *Id.* This guidance, when viewed in the context of the parties' agreement as to the facts, compels the Committee to recommend a sanction of suspension.

Regarding issue of the duration of the suspension, we agree with the Hearing Panel that Mr. Bennett's case falls between two Supreme Court decisions. The first, *Morgan's Case*,² concerned an attorney who maintained a client trust account in which he commingled earned and unearned client deposits, paid various expenditures from the account and failed to maintain proper records and to report discrepancies in his Trust Account Compliance Certificates. The Court observed that the attorney had committed "serious infractions" of the applicable rules that justified the Committee's recommendation of a two year suspension. *Id.* at 477. The Court accepted the two year suspension recommendation, but held the suspension in abeyance based on "mitigating" factors that included acceptance of responsibility for his actions, good faith efforts to take corrective measures to prevent actual harm, lack of dishonesty, voluntary self-reporting upon discovery of the problem, cooperation with the disciplinary process including stipulation to the facts and violations alleged, and the absence of a prior disciplinary record. *Id.* at 377-78.

Coddington's Case concerned an attorney who withdrew client funds from his trust account and without client authorization and commingled earned and unearned legal fees. The attorney did not knowingly or intentionally misuse client funds and his conduct resulted in virtually no injury to any client. *Id.* He did, however, avoid the problem rather than to take prompt corrective measures, and, in particular, ignored the disciplinary process entirely. The attorney also had very little experience and suffered from mental illness. *Id.* at 71-72. The court accepted the Committee's recommendation of a two year suspension and did not hold any part of that suspension in abeyance. *Id.*

Mr. Bennett's case is similar to and distinguishable from these cases. Turning first to *Morgan's Case*, Mr. Bennett, like Morgan, cooperated with the ADO from the audit through the Stipulation, and has no prior disciplinary record of note. The fact that Mr. Bennett cooperated with the investigation, while noted, is not ascribed significant mitigating weight as "a lawyer has a professional duty to cooperate with the PCC investigation. . . ." *Feld's Case*, 149 N.H. 19, 29 (2002).

² There is no reference in the case to the *Standards*. The case was decided in 1999 prior to the time that the N.H. Supreme Court began looking to the *Standards* for guidance.

As in *Morgan's Case*, Mr. Bennett supplemented the shortfall in the trust account with his own funds. However, this was done more than a year after the investigation and audit began and after the Notice of Charges was filed. Accordingly, the Committee does not assign it substantial mitigating weight. Moreover, even if there was no actual harm to any client, there was a risk that the client's funds would be subjected to claims of creditors – including claims of the IRS. This is especially significant given that Mr. Bennett acknowledged that there had been an IRS levy to attach money owed to his office by the State of New Hampshire under an indigent defense contract with the Judicial Council. (Levy for 941 taxes, dated 5/18/2011 for 03/31/2010 and 06/30/2010 tax periods and released on 8/10/2011; see ADO Exh. 5, p.195; Exh. 7, p. 187.).

Unlike Morgan, Mr. Bennett did not self-report. The failure to maintain proper accounting systems and other mismanagement of client funds only came to light after he failed to pay his staff. In addition, Mr. Bennett blamed the staff for his financial difficulties, and never acknowledged to the Department of Labor that he brought the problems on himself. But for the report by Ms. Ross, Mr. Bennett might still be operating his firm in the manner to which he had become accustomed over a substantial period of time. Although he became aware of problems in 2010, Mr. Bennett turned a blind eye to his financial mismanagement.

Turning next to *Coddington's Case*, unlike Coddington, Mr. Bennett cooperated with the ADO and the disciplinary process. However, Mr. Bennett has far more experience than did Coddington and the record lacks any explanation, such as mental illness, for his conduct. While Mr. Bennett's misconduct extended over a substantial period of time, there is no indication that Mr. Coddington had ignored his failings for a lengthy period.

The Committee concludes that suspension is the appropriate sanction for Mr. Bennett's misconduct. It has considered the mitigating and aggravating factors and agrees with the Hearing Panel's recommendation of a two-year suspension with one year stayed on the conditions set forth below.

Accordingly, taking into consideration the four-part analysis set forth in the *Standards* and the purposes of attorney discipline in New Hampshire, the Committee recommends that Mr. Bennett be suspended from the practice of law for two years. The first year of the suspension shall run beginning thirty (30) days after the date the order of the N.H. Supreme Court becomes final. The second year of the suspension is stayed and will not go into effect if Mr. Bennett establishes within a reasonable time before he seeks reinstatement that he has complied with the following conditions:

- A. Retaining at his expense the services of financial and office practices consultants to assist him in the implementation of bookkeeping and accounting systems designed to ensure that all accounts are handled and maintained in compliance with applicable rules, including Supreme Court Rule 50;
- B. Implementation of procedures to employ and train staff to assist in office management systems;

- C. Becoming familiar with, regularly monitoring of and approving accounting and client billing procedures, including monthly reconciliations of client trust accounts;
- D. Entering into a written agreement with the ADO regarding a quarterly reporting system of his practice's financial management and agrees to random audits by the staff auditor with the costs of such audits to be paid by Mr. Bennett;
- E. Compliance with all requirements for reinstatement set forth in Supreme Court Rule 37(14), and
- F. Reimbursement of, or establishment of a plan to reimburse the Committee for all expenses as set forth in the costs assessment outlined below.

The above conditions shall remain in effect for one year after Mr. Bennett is reinstated and until terminated by the Committee. Should Mr. Bennett fail to comply with any of the foregoing conditions, he should be required to show cause (bearing the burden of proof by clear and convincing evidence) why the suspension should not be imposed. After one year from the date of reinstatement, Mr. Bennett may petition the Committee to have the conditional suspension terminated.

V. COSTS


The Professional Conduct Committee accepts the Stipulation that Mr. Bennett agrees to pay the expenses incurred by the Committee in the investigation and enforcement of this disciplinary matter. *See* Sup. Ct. R. 37(19)(b). Costs can include, but are not limited to: mileage, stenographers, transcripts, copying, inventory and audit expenses. The assessment shall become final unless Mr. Bennett responds in writing, within thirty (30) days of receipt of the Committee's statement of expenses, listing each disputed expense and explaining the reasons for disagreement. Sup. Ct. R. 37(19)(b). The Committee may resolve the matter, or enforce the assessment by petition to the superior court in any county in the state. Sup. Ct. R. 37(19)(b).

The Committee may file a copy of the final assessment with the superior court in any county in the state, where it shall be docketed as a final judgment and shall be subject to all legally available post-judgment enforcement remedies and procedures. *See* Sup. Ct. R. 37(19)(c). Mr. Bennett shall be responsible for all costs incurred as a result of the Attorney Discipline Office's collection efforts.

VI. CONCLUSION

For all of the above reasons, the Professional Conduct Committee directs Assistant Disciplinary Counsel to file a petition in the New Hampshire Supreme Court for a two year suspension of Paul J. Bennett with the second year stayed for one year.

October 16, 2013



David M. Rothstein, Chair

Distribution:

Elizabeth L. Murphy, Assistant Disciplinary Counsel
Justin C. Shepherd, Esquire
File