

NEW HAMPSHIRE SUPREME COURT
PROFESSIONAL CONDUCT COMMITTEE

a committee of the attorney discipline system

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* *non attorney member*
Barbara J. Guay, Legal Assistant

Phillips, Roger B. advs. Attorney Discipline Office - #18-035

CONDITIONAL REPRIMAND AND ORDER ON COSTS

On October 20, 2020, the Professional Conduct Committee deliberated the Hearing Panel's Recommendation; the Stipulation as to Facts and Rules Violations; the Stipulation to Sanction; and the Agreement to Pay Costs of Disciplinary Matter.

The Committee approved the facts as stipulated by clear and convincing evidence. It further found that Mr. Phillips's conduct violated Rules of Professional Conduct 1.15; 3.3; 5.3; 8.4(a) and Sup. Ct. R. 50, as stipulated.

The Committee also concluded that the proposed sanction of a Public Censure, reduced to a Reprimand if certain conditions are met, is appropriate. Its sanction is in accord with the purposes of attorney discipline. *See e.g., Conner's Case* 158 N.H. 299, 303 (2009); *Richmond's Case*, 152 N.H. 155, 159-60 (2005). The sanction is also in accord with the *ABA Standards for Imposing Lawyer Sanctions* (2005) ("*Standards*").

Having approved the stipulated sanction, the Committee approved the agreement that Mr. Phillips shall reimburse the Committee for all costs of investigation and prosecution of this matter.

November 5, 2020

/S/ David M. Rothstein
David M. Rothstein
Chair

cc: Sara S. Greene, Disciplinary Counsel
Mark P. Cornell, Assistant General Counsel
Russell F. Hilliard, Esquire
File

**NEW HAMPSHIRE SUPREME COURT
PROFESSIONAL CONDUCT COMMITTEE**

Phillips, Roger B.

advs.

Attorney Discipline Office

#18-035

PARTIAL STIPULATION AS TO FACTS AND VIOLATIONS

Respondent Roger B. Phillips, Esq., and the Attorney Discipline Office (ADO) enter into the following Partial Stipulation as to Facts and Rule Violations, in lieu of a Notice of Charges and Answer thereto:

A. Stipulated Facts

1. The parties agree that the following factual allegations are true:
2. Mr. Phillips is an attorney licensed to practice law in New Hampshire.
Mr. Phillips was admitted to practice in 1969.
3. Mr. Phillips is not admitted to practice law in any other jurisdiction.
4. At all times material to this proceeding, Mr. Phillips practiced law at the law firm of Phillips Law Office, located at 104 Pleasant Street, Concord, NH 03301.
5. Mr. Phillips does not have a previous disciplinary history.
6. This disciplinary matter was initiated by a letter of self-report dated November 9, 2018 ("Self-Report Letter").

7. The Self-Report Letter indicated that the Phillips Law Office IOLTA account located at TD Bank ("IOLTA Account") was not in compliance with Supreme Court Rule 50 and that the IOLTA Account had been out of trust.
8. In June 2017, Kathryn W. Sneed, Mr. Phillips's office manager of 42 years retired. Prior to her retirement, the office manager's duties included reconciling the IOLTA Account. Mr. Phillips hired his sister-in-law, Michelle Bean, to work part time as a bookkeeper. One month later, Mr. Phillips hired Michelle Bean's daughter, Kirstie Bean, to work two days a week in his office. Kirstie Bean's duties included administrative office work and paying bills through QuickBooks. She last worked for Mr. Phillips in May 2018.
9. During this time period, Mr. Phillips did not review the bank statements from the IOLTA Account each month, nor did he review the monthly reconciliations of the IOLTA Account. Instead, Mr. Phillips originally relied upon Kathryn Sneed, and later, on Michelle Bean, to reconcile the IOLTA Account.
10. On October 26, 2018, Mr. Phillips attended the Developments in the Law CLE program put on by the New Hampshire Bar Association. At this CLE, Mr. Phillips was reminded that the bank statements for the IOLTA Account should be reviewed every month by an attorney responsible for the IOLTA Account. When he returned to the office, he met with Michelle Bean and asked to see the bank statements for the IOLTA Account for

the previous year. They were unable to locate all of the statements and assumed that they had been misfiled. Over the next week, neither Mr. Phillips nor Michelle Bean were able to locate the September 2017 through April 2018 statements for the IOLTA Account.

11. On November 6, 2018, Mr. Phillips went to TD Bank to obtain copies of the missing bank statements. At that time, he learned that Kirstie Bean had been embezzling money from the IOLTA Account by forging Mr. Phillips's signature on checks from the IOLTA Account. The forged checks were payable to Kirstie Bean or were payable in blank.
12. After reviewing the bank statements, the following checks were determined to have been forged:

Check #	Date Negotiated	Payee	Amount
1325	10/18/2017	Kirstie Bean	\$5,000.00
1351	11/17/2017	<BLANK>	\$3,564.00
1352	12/19/2017	<BLANK>	\$5,312.00
1375	1/8/2018	Kirstie Bean	\$3,857.00
1374	3/14/2018	Kirstie Bean	\$2,124.00
1348	4/10/2018	Kirstie Bean	\$1,330.00
1349	4/5/2018	Kirstie Bean	\$1,750.00
		Total:	\$22,937.00

13. Restitution of the \$22,937.00 that had been embezzled was immediately paid by Michelle Bean and Kirstie Bean's grandmother. The restitution payment was deposited into the IOLTA Account on November 9, 2018. Mr. Phillips self-reported to the ADO the same day.
14. During the investigation of this matter, the ADO learned that Mr. Phillips had not been reconciling his IOLTA Account in accordance with the

requirements of Supreme Court Rule 50. At that time, Mr. Phillips was not able to identify the owner of all the funds in the IOLTA Account.

15. It is not clear when the IOLTA Account fell out of compliance with Supreme Court Rule 50's requirements, but Mr. Phillips had not been conducting a proper three-way reconciliation of the IOLTA Account for several years.
16. Mr. Phillips and his staff have since been able to reconstruct the missing trust accounting records.
17. Mr. Phillips determined that he was holding funds that were the property of former clients whose matters have been closed. He has now returned these funds to his former clients. In total, Mr. Phillips has returned \$6,033.41 to nine former clients, in amounts ranging from \$12.33 to \$2,751.06. There are seven additional payments totaling \$3,815.92 to be made to former clients in amounts ranging from \$170.00 to \$1,118.96 that are awaiting verification of address before the funds can be returned.
18. In addition, Mr. Phillips was unable to return funds to one client. Mr. Phillips was holding \$332.67 for client R.M. R.M. has passed away and Mr. Phillips has recently been able to locate the heirs to R.M.'s estate and will be able to return these funds.
19. Mr. Phillips was also holding funds in the IOLTA Account that were not client funds nor being held in connection with the representation of a client.

20. First, Mr. Phillips was holding security deposits for residential tenants in his IOLTA Account and has previously used the IOLTA Account to temporarily hold funds that were paid to him in his capacity as Clerk of the Concord School Board. When candidates paid a filing fee to run for office, he deposited the filing fee into the IOLTA Account and thereafter transferred them to the Concord School District. Mr. Phillips is no longer using his IOLTA Account for these purposes.
21. Second, Mr. Phillips was also holding \$7,729.64 in the IOLTA account for funds that had been withheld from his paychecks to reimburse a loan he had taken from his retirement account. It appears that the withholding from the paychecks continued longer than necessary to repay the loan from the retirement account. These funds have since been withdrawn from the IOLTA account and paid to Mr. Phillips.
22. Since the security deposits, Concord School Board filing fees, and the funds being held for repayment of the retirement account loans were not “property of clients or third persons that is in the lawyer’s possession in connection with a representation” (See Rule 1.15(a)), they should not have been deposited in the IOLTA Account. Mr. Phillips fully understands this distinction and is aware that his previous practice constituted “commingling.”
23. Mr. Phillips is not certain when his IOLTA Account was last properly reconciled as required by Supreme Court Rule 50(2)(C)(vi) because the reconciliations were performed by his staff. Mr. Phillips acknowledges

that his IOLTA Account has not been properly reconciled since at least November 2016, the time period covered by the period of limitations on this matter. See Supreme Court Rule 37A(1)(i).

24. On each of the Trust Account Compliance Certification ("TACC") forms submitted for the 2016, 2017, and 2018 reporting years ending on May 31st, Mr. Phillips answered the question "Did you perform monthly reconciliations for each client who had funds in your trust account, pursuant to New Hampshire Supreme Court Rule 50(2)(C)(vi)?" affirmatively. This response was not accurate.
25. On each TACC for the reporting years 2016, 2017, and 2018, Mr. Phillips checked the box next to the statement:

I hereby attest to the following: I have read Rule 1.15 of the Rules of Professional Conduct and New Hampshire Supreme Court Rule 50, and that based upon my own personal knowledge, client funds maintained by me (or my firm) in New Hampshire were held in accounts in full compliance with the foregoing rules during the reporting period, unless otherwise noted on this form. To the extent that there were any trust accounts in another jurisdiction, said accounts were maintained in compliance with the rules and regulations of that jurisdiction.

This response was not accurate for the 2016, 2017, and 2018 reporting years.

26. By submitting the TACC forms for 2016, 2017, and 2018, Mr. Phillips affirmatively represented to the New Hampshire Supreme Court that the representations on the TACC were "based upon [his] own personal knowledge."

27. Mr. Phillips's TACC for the reporting year ending May 31, 2019, did indicate that he was out of trust during that year and referenced the pending matter with the ADO.

B. Contested Facts

28. The ADO alleges, but Mr. Phillips contests, the following factual allegations:
29. The representations Mr. Phillips made on the 2016, 2017, and 2018 TACC were not based upon Mr. Phillips's personal knowledge.
30. At the time that Mr. Phillips made the above representations on his 2016, 2017, and 2018 TACC forms, he knew that one or more of the representations were not true.

C. Stipulated Rule Violations

31. The parties agree that Mr. Phillips's conduct in this case violates the New Hampshire Rules of Professional Conduct, as follows:

Rule 1.15: Safekeeping Property and Supreme Court Rule 50

32. The facts set forth above are incorporated by reference.
33. Rule 1.15 states as follows:
- (a) 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, in accordance with the provisions of the New Hampshire Supreme Court Rules. The lawyer shall maintain the minimum financial records with respect to the client and third party funds as may be required by the New Hampshire Supreme Court Rules and shall comply with every other aspect of those Rules. Sufficient records of all other property of clients or third persons shall be kept by the lawyer and

shall be preserved for a period of six years after final distribution of such other property or any portion thereof. All client and third party property shall be identified as such and appropriately safeguarded.

- (b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount appropriate for that purpose.
- (c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.
- (d) Funds may be disbursed from lawyer trust accounts upon
 - (A) (i) deposit, receipt of which is acknowledged by the receiving financial institution, of cash, bank cashier's check, certified check, or electronic transfer of funds at least equal to the sum of such disbursements, or (ii) clearance of any other form of deposit by such receiving financial institution, and
 - (B) availability of such funds to the lawyer from the receiving financial institution.
- (e) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and upon request by the client or third person, shall promptly render a full accounting regarding such property.
- (f) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

34. Supreme Court Rule 50(2)(C)(ii) states: "attorneys who have authorized persons under their direct supervision to deal with a client trust account shall remain responsible for any and all transactions authorized by such persons[.]"

35. Mr. Phillips's failure to properly reconcile the IOLTA Account violates Rule 1.15 and Supreme Court Rule 50.
36. Mr. Phillips's previous practice of leaving funds in the IOLTA Account not "held in connection with a client matter" was impermissible commingling and violates Rule 1.15 and Rule 50.
37. Mr. Phillips's failure to properly reconcile the IOLTA Account resulted in:
 - (1) holding funds in the IOLTA Account that Mr. Phillips was not able to identify the owner of;
 - (2) failing to discover that Kirstie Bean had embezzled funds from the IOLTA Account for more than one year, resulting in the IOLTA Account being out of trust; and
 - (3) commingling client funds with personal funds. These actions likewise violate Rule 1.15 and Supreme Court Rule 50.

Rule 5.3: Responsibilities Regarding Nonlawyer Assistants

38. The facts set forth above are incorporated by reference.
39. Rule 5.3 states as follows:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) Each partner, and each lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) Each lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

- (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
- (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

40. Supreme Court Rule 50(2)(C)(ii) states: “attorneys who have authorized persons under their direct supervision to deal with a client trust account shall remain responsible for any and all transactions authorized by such persons[.]”

41. Mr. Phillips’s failure to properly supervise his employees to ensure that the IOLTA Account was maintained in compliance with Rule 1.15 and Supreme Court Rule 50 violates Rule 5.3.

Rule 8.4(a): General Rule

42. Having found the foregoing violations, there is clear and convincing evidence that Mr. Phillips’s conduct, as described herein, violated N.H. R. Prof. Conduct 8.4(a).

D. Contested Rule Violation

43. The ADO alleges, but Mr. Phillips contests, that Mr. Phillips’s conduct in this case violates the New Hampshire Rules of Professional Conduct, as follows:

Rule 3.3. Candor Toward the Tribunal

44. The facts set forth above are incorporated by reference.
45. Rule 3.3 states as follows:
- (a) A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
 - (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
 - (c) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.
 - (d) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
46. By submitting a TACC form that falsely stated that the IOLTA Account was being reconciled in compliance with Supreme Court Rule 50(2)(C)(iv), Mr. Phillips violated Rule 3.3. Mr. Phillips had an awareness of attendant circumstances about whether or not he was performing

monthly reconciliations. He was not performing them, but stated otherwise on his TACC.

47. By submitting a TACC form that falsely stated that the representations made in the TACC form were based on his own personal knowledge, Mr. Phillips violated Rule 3.3.


E. Effect of Partial Stipulation

48. Mr. Phillips understands that the Hearing Panel may accept, reject, or conditionally accept the Partial Stipulation pursuant to Rule 37A(III)(aa)(2)(C),(D).
49. Mr. Phillips acknowledges that the admissions of misconduct contained in this Partial Stipulation are freely, knowingly, and voluntarily submitted; that he is not entering this Partial Stipulation as a result of any threats, coercion, or duress, or of any promises or inducements not set forth in the Partial Stipulation.
50. Mr. Phillips has been represented by counsel in reaching this Partial Stipulation and he is fully aware of the consequences of the Partial Stipulation.
51. Mr. Phillips hereby waives any rights he may have in connection with the filing and service of a formal Notice of Charges, filing an Answer thereto, discovery, and any hearing process contemplated under N.H. Supreme Court Rule 37A(III), except as such rights relate to the disputed factual issues and disputed rule violation as set forth in this Partial Stipulation, as well as the disputed issue of the appropriate sanction.

52. Mr. Phillips understands that all records and proceedings relating to this matter (other than work product, internal memoranda, and deliberations) shall be available for public inspection, pursuant to N.H. Supreme Court Rule 37(20)(b).


Respectfully submitted,

Dated: JANUARY 19, 2020



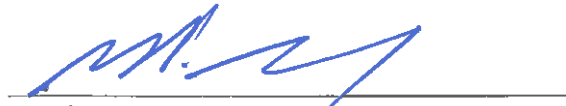
Roger B. Phillips, Jr., Esquire
Respondent

Dated: 1/13 2020



Russell F. Hilliard, Esquire
Counsel for Respondent

Dated: 1/22/ 2020



Mark P. Cornell, Esquire
Deputy General Counsel

NEW HAMPSHIRE SUPREME COURT

HEARINGS COMMITTEE

Phillips, Roger B.

advs.

Attorney Discipline Office

#18-035

**STIPULATION TO RULE 3.3 AND PROPOSED SANCTION:
REPRIMAND WITH CONDITIONS**

Respondent Roger B. Philips, Esq., and the Attorney Discipline Office (ADO) stipulate as follows:

A. Facts

1. Mr. Phillips is an attorney licensed to practice law in New Hampshire. Mr. Phillips was admitted to practice in 1969.
2. Mr. Phillips is not admitted to practice law in any other jurisdiction.
3. At all times material to this proceeding, Mr. Phillips practiced law at the law firm of Phillips Law Office, located at 104 Pleasant Street, Concord, NH 03301.
4. Mr. Phillips does not have a previous disciplinary history in his over 50 year legal career.
5. This disciplinary matter was initiated by a letter of self-report dated November 9, 2018 ("Self-Report Letter").
6. The Self-Report Letter indicated that the Phillips Law Office IOLTA account located at TD Bank ("IOLTA Account") was not in compliance

with Supreme Court Rule 50 and that the IOLTA Account had been out of trust.

7. The parties have engaged in considerable investigation, discovery, and discussion regarding the merits of the underlying complaint and related issues.
8. The parties have executed and submitted to the Hearing Panel a Partial Stipulation as to Facts and Violations (“Partial Stipulation”), dated January 22, 2020. That Stipulation sets forth the underlying facts giving rise to the disciplinary matter, as well as the extensive efforts undertaken by the ADO and Mr. Phillips with regard to his IOLTA Account.
9. Pursuant to the terms of the Partial Stipulation, Mr. Phillips admitted that he violated N.H.R. Prof. Conduct 1.15 and 5.3 and Supreme Court Rule 50.
10. The ADO also charged a Rule 3.3 violation. Mr. Phillips initially contested this violation and a hearing on the merits was scheduled.
11. The parties submit this Stipulation, wherein Mr. Phillips admits he violated Rule 3.3, as set forth further below. This Stipulation, in combination with the prior Partial Stipulation, resolves all issues in this matter. This Stipulation also proposed a sanction which the parties agree will serve the purposes of discipline.
12. Mr. Phillips has filed a Trust Accounting Compliance Certificate (“TACC”) each year since 1981, initially on behalf of his firm, and for the last 20 years, as a solo practitioner. His long-time office manager handled the

bank accounts in his office until her retirement in 2017. Until that time, Mr. Phillips believed, based on his conversations with his office manager and his experience in making disbursements from the IOLTA Account without incident or overdrafts, that the IOLTA account was balanced each month and the amounts in the account on behalf of each client were correct. The employee theft that occurred in this matter occurred after his office manager's retirement. Though Mr. Phillips admits herein to a Rule 3.3 violation, he did not act intentionally to deceive the Court.

13. On each of the TACC forms submitted for the 2016, 2017, and 2018 reporting years ending on May 31st, Mr. Phillips answered the question "Did you perform monthly reconciliations for each client who had funds in your trust account, pursuant to New Hampshire Supreme Court Rule 50(2)(C)(vi)?" in the affirmative. This response was not accurate.
14. On each TACC for the reporting years 2016, 2017, and 2018, Mr. Phillips checked the box next to the statement:

I hereby attest to the following: I have read Rule 1.15 of the Rules of Professional Conduct and New Hampshire Supreme Court Rule 50, and that based upon my own personal knowledge, client funds maintained by me (or my firm) in New Hampshire were held in accounts in full compliance with the foregoing rules during the reporting period, unless otherwise noted on this form. To the extent that there were any trust accounts in another jurisdiction, said accounts were maintained in compliance with the rules and regulations of that jurisdiction.

This response was not accurate for the 2016, 2017, and 2018 reporting years.

15. By submitting the TACC forms for 2016, 2017, and 2018, Mr. Phillips affirmatively represented to the New Hampshire Supreme Court that the representations on the TACC were “based upon [his] own personal knowledge.”
16. Mr. Phillips’s TACC for the reporting year ending May 31, 2019, did indicate that he was out of trust during that year and referenced the pending matter with the ADO.

B. Rule Violations

17. The parties agree that Mr. Phillips’s conduct in this case violates the New Hampshire Rules of Professional Conduct, as follows:

Rule 3.3. Candor Toward the Tribunal

18. The facts set forth above are incorporated by reference.
19. Rule 3.3 states in pertinent part:
 - (a) A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
20. By submitting a TACC form that falsely stated that the IOLTA Account was being reconciled in compliance with Supreme Court Rule 50(2)(C)(iv), Mr. Phillips violated Rule 3.3. Mr. Phillips had an “awareness” of attendant circumstances about whether or not he was performing monthly reconciliations. He was not performing them, but stated otherwise on his TACC.

21. Mr. Phillips' state of mind is addressed further *infra*, in the sanction analysis.
22. The representations Mr. Phillips made on the 2016, 2017, and 2018 TACC were not based upon Mr. Phillips's personal knowledge.
23. At the time that Mr. Phillips made the above representations on his 2016, 2017, and 2018 TACC forms, he knew that one or more of the representations were not true.

Rule 8.4(a): General Rule

24. Having found the foregoing violation, there is clear and convincing evidence that Mr. Phillips's conduct, as described herein, violated N.H. R. Prof. Conduct 8.4(a).

C. Recommended Sanction

25. The Attorney Discipline Office and Mr. Phillips jointly agree that a Reprimand with Conditions is the appropriate sanction in this matter. This sanction would serve the purposes of attorney discipline.
26. Both case law and the American Bar Association's *Standards for Imposing Lawyer Sanctions* (2005) ("*Standards*") support this sanction.
27. 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 sanction . . . must take into account the severity of the misconduct." *Coffey's Case*, 152 N.H. 503, 513 (2005).

28. Although the Court has not adopted the *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.
29. 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").

**Sanction: Baseline Analysis (Duty Violated,
State of Mind, and Injury)**

30. Under the first prong of the analysis, Mr. Phillips violated duties owed to clients and the legal system. He failed to properly account for and report on the maintenance and handling of his trust accounts and failed to properly supervise his employees' work reconciling the IOLTA Account.

He also submitted false TACCs to the Court. *See Standards* §§ 4.1, 6.1, and 7.0.

31. With respect to Mr. Phillips's mental state under the second prong of the sanction analysis, the parties agree that Mr. Phillips's mental state was both negligent and knowing.
32. Mr. Phillips did not actually know his niece was stealing money from the IOLTA Account at the time she transferred the funds. He likewise did not know with specificity that certain client matters were out of trust in particular amounts. He admits, however, that the reason he did not know this was due to a failure to properly attend to his IOLTA Account. In this respect, he had an "awareness" of the "attendant circumstances" that he had not personally reconciled his IOLTA Account for the years noted herein, nor had he sufficiently supervised the accounting efforts of an employee during these years. Thus, he knew or should have known that he was violating Rule 1.15 and Supreme Court Rule 50.
33. The third prong of the sanction analysis requires an assessment of the actual or potential injury caused by Mr. Phillips's misconduct.
34. Mr. Phillips's conduct caused potential injury to his clients by failing to properly reconcile the IOLTA Account and by his funds with his clients' funds. By commingling his funds with those of his clients, Mr. Phillips subjected his clients' property to possible claims by Mr. Phillips's creditors (including but not limited to the IRS). His conduct caused actual injury by failing to detect his employee's embezzlement from the

IOLTA Account for over one year. However, Mr. Phillips promptly remedied the embezzlement with personal funds once he discovered it.

35. Mr. Phillips's conduct also caused actual injury or potential injury to the legal system by failing to accurately complete the annual TACC form. The integrity of the system to monitor compliance with Supreme Court Rule 50 and Rule 1.15 relies in large part upon the accuracy of TACC forms submitted by the members of the bar.
36. Mr. Phillips's 1.15 rule violation implicates Section 4.1 of the *Standards*.

That Section provides:

Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:

- 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 Reprimand [Public Censure] is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.**
- 4.14 Admonition¹ [Reprimand] 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.

(emphasis added).

¹The term "admonition," as used in the *ABA Standards*, is analogous to a reprimand in New Hampshire. The term "reprimand," as used in the *ABA Standards*, is analogous to a public censure in New Hampshire.

37. Mr. Phillips's conduct in this matter, when considered under *Standard* 4.12 and 4.13, would call for a baseline sanction of a public censure suspension.

38. Mr. Phillips's 3.3 rule violation implicated Section 6.1 of the *Standards*.

That Section provides:

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court:

6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

6.13 Reprimand [Public Censure] is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

6.14 Admonition [Reprimand] is generally appropriate when a lawyer engages in an isolated instance of neglect in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding.

(emphasis added).

39. Mr. Phillips's conduct in this matter, when considered under *Standard* 6.12, would call for a baseline sanction of a suspension.

40. Mr. Phillips's 5.3 rule violation implicates Section 7.0 of the *Standards*.

That Section provides:

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving false or misleading communication about the lawyer or the lawyer's services, improper communication of fields of practice, improper solicitation of professional employment from a prospective client, unreasonable or improper fees, unauthorized practice of law, improper withdrawal from representation, or failure to report professional misconduct.

7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty as a professional and causes injury or potential injury to a client, the public, or the legal system.

7.3 Reprimand [Public Censure] is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

7.4 Admonition [Reprimand] is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the lawyer's conduct violates a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system.

41. Mr. Phillips's conduct in this matter, when considered under *Standard* 7.3, would call for a baseline sanction of a public censure.

42. Taken together, the *ABA Standards* set the baseline sanction at either a public censure or a suspension. [*Standards* §§ 4.12, 4.13, 6.12 and 7.3]

Aggravating and Mitigating Factors: Downward Departure

43. The baseline sanction must be considered in light of any aggravating and mitigating factors. *E.g.*, *Conner's Case*, 158 N.H. at 303.
44. In this case there is one aggravating factor present, Mr. Phillips's substantial experience in the practice of law. *See Standards* § 9.22.
45. Mitigating factors in the case are numerous, and they include the absence of prior disciplinary record (over a fifty-year career), absence of a dishonest or selfish motive, full and free disclosure to disciplinary board, a cooperative attitude toward the disciplinary proceedings, an excellent reputation and character, and remorse. In addition, Mr. Phillips made a good faith effort to rectify the consequences of misconduct. He provided documentation to the ADO and worked with General Counsel to cover 19 years of financial records for the IOLTA Account in order to identify the owners of all of the funds held in the IOLTA Account. *See Standards* § 9.32. This effort is more fully set forth in the Stipulation filed on January 22, 2020, at ¶¶ 13-22.
46. Finally, although not a recognized mitigating factor under the *Standards*, it is important to note that Mr. Phillips immediately self-reported the out of trust situation to the ADO. The Parties agree that the self-report is a mitigating factor in this case. He also ensured the funds embezzled were immediately returned to the IOLTA Account.
47. The parties agree that given the baseline sanction, that the mitigating circumstances outweigh aggravating circumstances, a downward

departure to a reprimand serves the purposes of discipline and is an appropriate sanction in this case.

48. However, the parties also agree that given Mr. Phillips' failure to properly reconcile his IOLTA account over a period of years, conditions should be imposed to ensure Mr. Phillips understands and executes his obligations under Rule 1.15 and Supreme Court Rule 50 to avoid this results in the future.

D. Mandatory Conditions; Procedures for Alleged Violation of Conditions

49. As set forth further below, should Mr. Phillips breach a condition of this Stipulation, he agrees that a public censure is the appropriate sanction.
50. If Mr. Phillips complies with the conditions of this Stipulation, he agrees he shall be sanctioned with a reprimand.
51. Mr. Phillips agrees to comply with the following conditions during the six-month monitoring period², which shall begin on the date the Professional Conduct Committee accepts this Stipulation:
- a. Mr. Phillips will engage in no professional misconduct during the monitoring period.
 - b. Mr. Phillips shall, for a period of six months:

² The ADO normally requires a one-year monitoring period for trust account violations. However, in this case, Mr. Phillips has gone through extensive efforts to correct his trust accounting records and has been providing the ADO with evidence that he is currently reconciling his IOLTA Account in compliance with Rule 50. The parties agree that a six-month monitoring period is appropriate in this case.

- (1) submit monthly reconciliations that comply with Sup. Ct. Rule 50(2) to the ADO. The first submission shall be on the 15th day of the month following the PCC's approval of the Stipulation, and Mr. Phillips shall file with the ADO his monthly client trust account reconciliations on the 15th of each month thereafter for a period of six consecutive months.
- (2) Mr. Phillips agrees to attend a two-credit CLE regarding client trust accounting in New Hampshire and will submit a certificate for his attendance to Disciplinary Counsel within 180 days of the date the Professional Conduct Committee accepts this Stipulation.

52. If it is alleged that Mr. Phillips violated any of the conditions enumerated at Paragraph 51(b) above, the following shall apply:

- a. Upon motion by the ADO, the Professional Conduct Committee may determine whether any of the conditions enumerated at Paragraph 51(b) have been violated. If it determines that a condition has been violated, the Committee may impose a public censure. If the Committee determines that no condition of this Stipulation has been violated, the Stipulation shall continue in force and effect pursuant to its terms.
- b. Respondent may request that the Professional Conduct Committee remand the matter to the Hearings Committee so that a Hearing Panel may be appointed to decide the sole issue of whether a condition

under Paragraph 51(b) of this Stipulation has been violated. During such hearing, it shall be the burden of the ADO to demonstrate by a preponderance of evidence that a condition listed in Paragraph 51(b) has been violated.

- c. If a Hearing Panel determines that a condition has been violated, the Panel may impose a public censure. If the Hearing Panel determines that no condition of the Stipulation has been violated, the Stipulation shall continue in force and effect pursuant to its terms. The PCC shall review the decision of the Hearing Panel.

53. If a new grievance or referral is filed against Mr. Phillips during the monitoring period, thus implicating the condition at Paragraph 51(a), the following shall apply:

- a. So long as a grievance or referral is filed within the monitoring period (“the subsequent proceeding”), and the alleged misconduct occurred, at least in part, during the monitoring period, a public censure may be imposed at such time as there is a finding of misconduct in the subsequent proceeding, even if such finding occurs beyond the monitoring period.
- b. Pending the final resolution of the subsequent proceeding, the matter underlying this Stipulation shall not be closed.
- c. If the conditions of Paragraph 51(b) have been met, Mr. Phillips will not have to continue to comply with those provisions while the subsequent proceeding is pending.

54. The Respondent shall bear all costs associated with compliance and enforcement of the terms and conditions of this Stipulation.
55. Nothing herein shall be construed to limit prosecution of any new or referral involving conduct of Respondent occurring during the monitoring period.

E. Costs

56. Subject to the PCC's approval of Mr. Phillips's Stipulation, Mr. Phillips agrees to pay the costs incurred by the ADO in the investigation and enforcement of this disciplinary matter. See Supreme Court Rule 37(19). His agreement to pay the costs incurred by the ADO is the subject of a separate agreement signed by Mr. Phillips.

F. Effect of Stipulation


57. Mr. Phillips understands that this Stipulation represents a recommended disposition, and that the Hearing Panel may accept, reject, or conditionally accept the Stipulation pursuant to Rule 37A(III)(3)(aa)(3).
58. Mr. Phillips acknowledges that the admissions of misconduct and the proposed disposition contained in this Stipulation are freely, knowingly, and voluntarily submitted; that he is not entering this Stipulation as a result of any threats, coercion, or duress, or of any promises or inducements not set forth in the Stipulation
59. Mr. Phillips has been represented by counsel in reaching this Stipulation and he is fully aware of the consequences of the Stipulation.
60. Mr. Phillips knowingly and intelligently waives his right to a hearing.

G. Hearing on Stipulation

61. If the Hearing Panel has questions or concerns regarding this Stipulation, the Panel may request that the Parties appear and address the Stipulation. See Rule 37A(III)(aa)(3)(A) (“Either party may request to appear before the reviewing body to address the stipulation, or the reviewing body may, in its discretion, direct the parties to appear before it to address the stipulation.”)

Respectfully submitted,

Dated: OCTOBER 8, 2020




Roger B. Phillips, Esquire
Respondent

Dated: _____ 2020


Russell F. Hilliard, Esquire
Counsel for Respondent

Dated: 10-8 2020



Sara S. Greene, Esquire
Disciplinary Counsel

Dated: October 8, 2020



Mark P. Cornell, Esquire
Deputy General Counsel

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Respectfully submitted,

Dated: _____ 2020

Roger C. Phillips, Esquire
Respondent

Dated: 10/8 2020



Russell F. Hilliard, Esquire
Counsel for Respondent

Dated: _____ 2020

Sara S. Greene, Esquire
Disciplinary Counsel

Dated: _____ 2020

Mark P. Cornell, Esquire
Deputy General Counsel

NEW HAMPSHIRE SUPREME COURT
PROFESSIONAL CONDUCT COMMITTEE

a committee of the attorney discipline system

David M. Rothstein, Chair
Heather E. Krans, Vice Chair
Elaine Holden,* Vice Chair
* *non attorney member*
Barbara J. Guay, Legal Assistant

Philips, Roger B. - #18-035

ORDER

On November 5, 2020, the Committee issued a Reprimand With Conditions. Disciplinary Counsel has indicated that there have been no further complaints docketed by the Attorney Discipline Office since the November 5, 2020 Order was issued. Mr. Phillips has complied with the terms and conditions of the Committee's Order.

Upon consideration, the matter is closed.

August 24, 2021

/s/ David M. Rothstein
David M. Rothstein
Chair

Distribution:

Brian R. Moushegian, General Counsel
Sara S. Greene, Disciplinary Counsel
Russell F. Hilliard, Esquire
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