

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: Elizabeth L. Hibbitts, Esq.
PRB File No. 2010.227

Decision No. 145

The parties have filed a Stipulation of Facts, proposed Conclusions of Law and a Recommendation for Sanctions. Respondent has waived certain procedural rights including the right to an evidentiary hearing. The panel accepts the stipulated facts and recommendations and orders that Respondent be Publicly Reprimanded and placed on probation for inadequate trust accounting practices resulting in a trust account overdraft and for failure to maintain her funds separate from her client funds in violation of Rule 1.15A(a)(1), Rule 1.15A(a)(2), Rule 1.15(A)(3) and Rule 1.15(a) of the Vermont Rules of Professional Conduct.

Facts

Respondent is a sole practitioner. She was admitted to the Vermont Bar in 2000. Her practice focuses on criminal defense work and during the period relevant to this matter she did not have a bookkeeper.

In May of 2010, Respondent's bank notified Disciplinary Counsel that a check drawn on Respondent's trust account had been presented against insufficient funds. Disciplinary Counsel investigated, and in September of 2010, notified Respondent that her trust account would be audited for compliance with the Vermont Rules of Professional Conduct.

In November of 2010, a Certified Public Accountant met with Respondent to audit her trust accounting system. The audit covered the period from January 1, 2008 through November 18, 2010 (hereinafter “the accounting period”).

In March of 2011 Disciplinary Counsel received the report of the audit. Throughout the accounting period, Respondent lacked a formal trust accounting system. Essentially, she relied on her checkbook and other handwritten notes. She had no ledger or other system that identified receipts and disbursements from her trust account. For each client for whom Respondent held funds she did not keep records showing receipts, disbursements and a running balance, nor did she maintain records documenting timely notice to clients of all receipts and disbursements from her trust account. Respondent conceded that her trust accounting system did not meet the minimum requirements of Rule 1.15A

Throughout the accounting period, Respondent failed to withdraw earned fees from her trust account. Her practice was to leave funds in the trust account even after they had been earned and to disburse them for personal use and expenses as needed. This resulted in Respondent’s funds being commingled with funds being held for clients in connection with her representation.

The overdraft that spurred Disciplinary Counsel’s investigation was caused by an error in arithmetic; an error that itself resulted from Respondent’s lack of a formal trust accounting system. Respondent rectified the error as soon as her bank notified her of the overdraft, and around the same time she scheduled a meeting with an accountant in order to learn how to improve her trust accounting system.

Respondent cooperated with Disciplinary Counsel’s investigation, including the

audit. By the time the audit took place, Respondent had hired a certified public accountant on her own to implement a trust accounting system that complied with the Rules of Professional Conduct. Respondent did not hide this from the auditor or otherwise attempt to pass off her new trust accounting system as the one that had previously been in place.

The audit did not reveal any evidence of fraud, theft of client funds or misappropriation of client funds.

Disciplinary sanctions have never been imposed against Respondent's license, and she has never been the subject of formal disciplinary charges.

Conclusions of Law

Record Keeping

From the beginning of the accounting period through August 31, 2009, Rule 1.15A(a) of the Vermont Rules of Professional Conduct provided as follows:

Every attorney in private practice or who otherwise receives client funds . . . shall maintain a trust accounting system that shall include, at a minimum, the following features:

- (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 disbursements;
- (2) a separate page record or columns for each client for whom property is held, which shall show all receipts and disbursements and carry a running account balance;
- (3) records documenting timely notice to clients of all receipts and disbursements from trust accounts; and
- (4) an index, or equivalent single source for identification of all trust accounts, including special interest-bearing trust accounts, probate accounts, custodial accounts, and client agency accounts.

Effective September 1, 2009, Rule 1.15A(a) was amended to read as follows:

Every lawyer or law firm holding funds of clients or third persons in connection with a representation as defined in Rule 1.15(a)(2) shall hold such funds in one or more accounts in a financial institution. An account in which funds are held that are in the lawyer's possession as a result of a representation in a lawyer-client relationship shall be clearly identified as a "trust" account. An account in which funds are held that are in the lawyer's possession as a result of a fiduciary relationship that arises in the course of a lawyer-client relationship or as a result of a court appointment shall be clearly identified as a "fiduciary" account. The lawyer shall take all steps necessary to inform the financial institutions of the purpose and identity of all accounts maintained as required in this rule. The lawyer or law firm shall maintain an accounting system for all such accounts that shall include, at a minimum, the following features:

- (1) a system showing all receipts and disbursements from the account or accounts with appropriated entries identifying the source of the receipts and the nature of the disbursements;
- (2) a record for each client for whom property is held, which shall show all receipts and disbursements and carry a running account balance;
- (3) records documenting timely notice to clients of all receipts and disbursements from the account or accounts; and
- (4) a single source for identification of all accounts maintained as required in this rule.

During the accounting period Respondent had no separate client records and no system to tract receipts and disbursements identifying their nature and source. Her records did not meet the minimum requirements of either of the applicable versions of the above Rule, and we find a violation of Rule 1.15A(a)(1), Rule 1.15A(a)(2) and Rule 1.15(A)(3) of the Vermont Rules of Professional Conduct.

Commingling

From the beginning of the accounting period trough August 31, 2009, Rule 1.15(a) of the Vermont Rules of Professional Conduct provided as follows:

A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in accordance with Rules

1.15A, B and C. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of six years after termination of the representation.

Effective September 1, 2009, Rule 1.15(a) was renumbered as Rule 1.15(a)(1) and amended to read as follows:

A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in accordance with Rules 1.15A and B. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of six years after termination of the representation.

Respondent's practice of retaining earned fees in her trust account and later using them for personal use and expenses resulted in her funds being commingled with those of her clients in violation of Rule 1.15(a)(1) of the Vermont Rules of Professional Conduct and its predecessor Rule 1.15(a).

Sanctions

The parties have recommended that we publicly reprimand Respondent. This recommendation is consistent with Section 4.13 of the ABA Standards for Imposing Lawyer Sanctions as well as Vermont case law, and the panel accepts the recommendation.

Section 4.13 of the ABA Standards provides as follows: "Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client." Respondent was clearly negligent in the manner in which she managed her trust account. No client lost money, and therefore there was no injury, but there was the potential for injury. When Respondent's check was returned for insufficient funds, she was able to make good on the check immediately. Had she not

been able to do so, other client's money would have been at risk. The other potential for injury arises out of the commingling of Respondent's funds with her client funds. This meant that there was the potential for client funds to be attached in an action against Respondent.

This decision is also consistent with the Supreme Court's decision in *In re Farrar*, 2008 VT 13, 183 Vt. 592, 949 A.2d.438. In that case, Respondent had regularly transferred his own funds to his trust account which he would then withdraw to pay his payroll taxes. Like *Farrar*, Respondent had no selfish motive and cooperated fully with Disciplinary Counsel. As in *Farrar* no client funds were lost, but in both cases there was the potential for injury.

In the *Farrar* case, Respondent argued for admonition rather than reprimand. The Court, in reviewing the ABA Standards, determined that suspension was the presumptive sanction. The Court then looked at aggravating and mitigating circumstances and determined that a public reprimand was the appropriate sanction. The same mitigating circumstances are present here. Respondent has no prior disciplinary record and has cooperated fully with disciplinary counsel. It appears that the returned check was a wake-up call for her, and she engaged a certified public accountant before Disciplinary Counsel required her to do so.

The facts in this case are very similar to those in *Farrar* and we therefore accept the recommendation for public reprimand.

The parties have also recommended to the panel that we impose probationary period of one year to insure Respondent's continued compliance with the trust account management rules of the Rules of Professional Conduct. Probation may be imposed in

connection with any other sanction, and the requirements are set forth in Rule 8 (A) (6) of Administrative Order No. 9.

Order

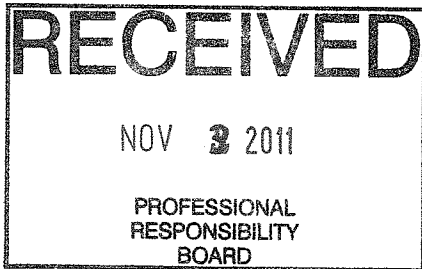
Respondent Elizabeth Hibbitts is hereby Publicly Reprimanded for violation of Rule 1.15A(a)(1), Rule 1.15A(a)(2), Rule 1.15(A)(3) and Rule 1.15(a) of the Vermont Rules of Professional Conduct and placed on probation on the following terms:


1. Respondent shall be placed on probation as provided in Administrative Order No. 9, Rule 8A(6).
2. Probation shall be for a period of one year commencing on the date this decision becomes final.
3. The probation shall be supervised by a probation monitor acceptable to Disciplinary Counsel.
4. During the period of probation Respondent shall have a Certified Public Accountant provide Disciplinary Counsel with written reports certifying that Respondent's trust accounting system includes the minimum features mandated by Rule 1.15 A(a).
5. The reports to Disciplinary Counsel shall be provided monthly, no later than the 15th of each month, and shall refer to every trust account maintained by Respondent, including trust accounts other than the trust account which was the subject of this complaint. The report shall indicate whether Respondent's trust accounts reconciled at the end of the previous month. Respondent's personal accounts are not subject to the terms of this probation.
6. All expenses of probation shall be the responsibility of Respondent.

7. Respondent shall accept and implement all reasonable suggestions offered by the accountant.
8. Respondent shall permit Disciplinary Counsel to discuss the results of the audit and any recommendations with the accountant.
9. Respondent's probation shall be renewed or terminated after one year as provided in A.O. 9, Rule 8(A)(6).

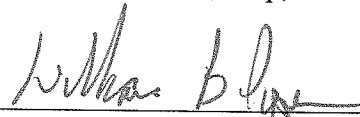
Dated: 11/3/11

Hearing Panel No. 4





Bruce C. Palmer, Esq., Chair



William Piper, Esq.



Florence Chamberlin