STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In Re: Norman Watts, Esq.
PRB File No. 2019-006

Decision No. 224

Disciplinary Counsel and Respondent initiated these proceedings by filing a proposed stipulation of facts along with jointly proposed conclusions of law. The parties also submitted Exhibits 1 and 2 for the Panel's consideration along with the proposed stipulation. The parties have waived their right to any further hearing in connection with this matter.

Pursuant to Administrative Order 9, Rule 11(D)(5)(a), the Panel hereby accepts the proposed stipulation of facts and joint exhibits, with minor exceptions, and concludes that further evidence is unnecessary.

With the factual record complete, the Panel issues the following findings of fact, conclusions of law and order:

FINDINGS OF FACT

Respondent is an attorney licensed to practice law in Vermont. He was admitted to the Vermont Bar in 1987. The majority of Respondent's practice consists of employment law litigation. He employs two paralegals in his practice.

As a solo practitioner in private practice who handles client funds, Respondent is required under the Rules of Professional Conduct to establish and maintain one or more client trust accounts with a financial institution. At a minimum, Respondent is required to maintain and administer an IOLTA account.[1] Respondent maintains an IOLTA account in connection with his law practice.

[1] Rules 1.15, 1.15A, and 1.15B of the Vermont Rules of Professional Conduct address trust accounts. An IOLTA account is a pooled interest-bearing trust account for client or third-party funds that are not expected to earn any significant amount of interest because they are "of a small amount or are held for a period of short duration."

On December 19, 2018, a certified public accountant performed a compliance examination of Respondent's IOLTA account for the period November 1, 2017 through October 31, 2018 ("the audited period"). Respondent was present for and participated in the examination. He was cooperative.

During the audited period Respondent did not utilize checks in connection with disbursements from his IOLTA account and did not maintain a check register for the account. Nor did Respondent create and maintain individual client trust ledger cards with a comprehensive listing of deposits to and disbursements from his IOLTA account and a running balance for each client's funds.

Respondent utilized online banking to make deposits under $10,000.00 to the account; deposits over $10,000.00 were made in person either by Respondent or an assistant. Respondent relied entirely on online banking to make transfers from his IOLTA account to his operating account. He did not review bank statements. Instead, he utilized internet banking to monitor the account when he was engaging in transactions.

In most instances, Respondent's employee made a notation on a printed copy of the account's transaction history attributing a transaction to a specific client. However, the transaction history obtained from the bank did not allow Respondent to track or obtain a comprehensive report showing deposits and disbursements from the IOLTA account on a client-by-client basis.

During the audited period Respondent did not perform reconciliation of his IOLTA account.

In several instances during the audited period Respondent transferred funds into or out of his IOLTA account without documenting the client or the purpose of the transfer.

V.R.Pr.C. 1.15B, Reporter's Notes – 2009 Amendment, at 808. The interest that accrues in an IOLTA account is periodically paid over to the Vermont Bar Foundation "to support legal services for the poor or for public education on the legal system." *Id.*

In several instances during the audited period Respondent deposited into his operating account, before transferring to his IOLTA account, client funds that had been paid in advance for legal fees and expenses.

During the majority of the audited period Respondent engaged in a practice of charging clients a refundable retainer in the amount of $2,500.00, which Respondent represented would be held in his IOLTA account and eventually refunded if a settlement were reached in the client's case. In several instances the collected retainer was deposited in Respondent's IOLTA account and subsequently transferred to his operating account prior to any settlement.

In several instances during the audited period Respondent made deposits in excess of $1,000.00 into his IOLTA account and subsequently disbursed those funds from the IOLTA account in less than two business days. None of the checks related to a transfer in less than two business days were returned as uncollectable.

During the audited period Respondent did not maintain individual client ledger accounts to keep track of IOLTA deposits and disbursements related to each individual client. Respondent had no efficient method of determining whether or not a client had funds in the IOLTA account at any particular time. In several instances during the audited period Respondent's withdrawal of funds from his IOLTA account resulted in clients having negative IOLTA balances. In those instances, Respondent necessarily used the funds of one client to carry out the business of one or more other clients. In two instances, Respondent had failed to account for the transfer to Respondent's operating account of the $2,500.00 refundable retainer that had been paid by the client. In most instances, there were sufficient funds from all other clients in the IOLTA account to avoid an overdraft of the IOLTA account. However, on one occasion a disbursement from the IOLTA account resulted in an overdraft and the bank rejected the check for insufficient funds.

On two occasions during the audited period, Respondent transferred funds from his IOLTA account into his law firm operating account without any documentation as to the client whose funds were transferred or the purpose for the disbursement. In another instance, Respondent transferred funds from his operating account to his IOLTA account and subsequently transferred the funds back to his operating account without any documentation as to the client whose funds were transferred or the purpose for either transfer.

During the audited period Respondent made more than a dozen transfers from his IOLTA account to his operating account in connection with one client matter. Respondent did not notify his client that these transfers of the client's funds from the IOLTA account were being made.

Sometime in the fall of 2018 Respondent revised his fee agreement to state that the requisite $2,500.00 "monetary advance" payment from the client would be "considered earned on receipt" to cover initial work on the case, including initial research and drafting of a complaint and related documents and discovery requests. *See* Stipulation Exhibit 2 (10/8/18 letter). Following this change, the "advance" payments by clients for initial case preparation are no longer deposited in Respondent's IOLTA account. *Id.* As a result, there has been a reduction in the number of transactions involving Respondent's IOLTA account.[2]

[2] The parties' proposed stipulation states that as a result of Respondent's designation of the advance payment as being earned upon receipt "Respondent [is required] to hold only client funds in trust that are derived from litigation settlements and verdict awards." *See* ¶ 16. That statement is derived from Respondent's description of what transpires in a typical contingency case. *See* Ex. 2. But aside from the issue of the "advance" payment, a contingency option is not the only option available to Respondent's clients. The engagement letter currently used by Respondent offers clients the option of paying for legal services on an hourly basis as the case proceeds or through a contingency arrangement that does not require periodic payments from the client. If a client selects the "hourly basis" option and a client makes any advance payment for such services, the portion unearned at the time of payment would have to be deposited in the IOLTA account. Moreover, under both the contingency and hourly-basis options the client remains responsible for the payment of litigation expenses. If advance payments are made for such expenses, they would also have to be deposited in the IOLTA account until used. For these reasons, the Panel rejects that paragraph of the stipulation.

Respondent has implemented changes to address the deficiencies identified in the report. These changes include the conversion to an "earned on receipt" non-refundable retainer, the creation and maintenance of a ledger for his IOLTA account and the maintenance of individual ledger cards for Respondent's clients that track client payments and receipts and disbursements from the IOLTA account.[3] One of Respondent's paralegals is assigned to trust account management tasks.

Respondent has no prior disciplinary record. No evidence was presented that Respondent intentionally took or misused client funds. No evidence was presented that any client funds were ever lost as a result of the overdrafts in the IOLTA account or otherwise.

CONCLUSIONS OF LAW

Rule 1.15A of the Vermont Rules of Professional Conduct provides, in pertinent part, as follows:

> (a) Every lawyer or law firm holding funds of clients or third persons . . . shall hold such funds in one or more accounts in a financial institution or, in appropriate circumstances, a pooled interest-bearing trust account pursuant to Rule 1.15B. 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 or a fiduciary relationship shall be clearly identified as a "trust" account or shall be identified as a fiduciary account, such as an estate, trust, or escrow account, to distinguish such funds from the lawyer's own funds. *** 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 appropriate entries identifying the source of the receipts and the nature of the disbursements;
>
> (2) a record for each client or person for whom property is held, which shall show all receipts and disbursements and carry a running account balance;
>
> (3) records documenting timely notice to each client or person of all receipts and

[3] Respondent maintains that he "recognized some of the shortcomings of his trust account management" and began implementing changes to the system around "the middle of the compliance exam period." *See* Proposed Stipulation, ¶ 10(b). However, with the exception of the change in Respondent's retainer practice, there was no specific information provided to support this statement. Moreover, the earliest letter provided to the Panel that reflects the change to an "earned on receipt" retainer is a letter dated October 8, 2018 – near the end of the audit period.

disbursements from the account or accounts; and

(4) records documenting timely reconciliation of all accounts maintained as required by this rule and a single source for identification of all accounts maintained as required in this rule. "Timely reconciliation" means, at a minimum, monthly reconciliation of such accounts.[4]

V.R.Pr.C. 1.15A(a).

Respondent's system of accounting for his IOLTA account failed to meet any of the requirements of subdivisions (1) – (4). Respondent relied on incomplete and inaccurate records of deposits and disbursements. He failed to put in place a comprehensive and coordinated accounting system for his IOLTA accounts that would allow him to document, by individual client and client matter, all receipts and disbursements. In addition, he failed to undertake reconciliation of his IOLTA accounts during the audited period.

Rule 1.15(a)(1) provides, in pertinent part, that "[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." V.R.Pr.C. 1.15(a)(1).

In several instances, Respondent deposited checks in his operating account before transferring those funds, or a portion of the funds that was allocable to the client, to his IOLTA account. Upon receiving those checks, Respondent should have deposited them into his IOLTA account and only then transferred to his operating account any portion of the funds that had already been earned by Respondent or incurred by Respondent as expenses. Respondent's conduct violated Rule 1.15(a)(1).

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[4] The reconciliation procedure is set forth in a guidance document issued by the Professional Responsibility Program. *See Managing Client Trust Accounts – Rules, Regulations, and Tips* (revised 1/6/2010 & 10/14/2014) at 10 ("Once a month you will receive your bank statement. The account balance on the bank statement *must* be reconciled to the account balance shown in your check register. *** Differences between the bank statement balance and the checkbook balance *should be investigated immediately and corrected* either in your records or by the bank") (emphasis added); *see also id.* (providing for further reconciliation to a "list of clients" and associated balances for each).

Rule 1.15(c) provides that:

> [u]nless a lawyer has entered into a nonrefundable fee agreement that complies with Rule 1.5(f), a lawyer shall deposit legal fees and expenses that have been paid in advance into 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. Such funds are to be withdrawn by the lawyer only as fees are earned or expenses incurred.

V.R.Pr.C. 1.15(c).

In connection with the $2,500 retainers collected by Respondent during the majority of the accounting period – a retainer which Respondent represented would either be refundable upon settlement or verdict or would be utilized upon final resolution of the lawyer's representation as a setoff against attorney's fees due – on several occasions Respondent withdrew those funds from his IOLTA account before final resolution of a case. That conduct violated Rule 1.15(c).

Rule 1.15(f)(1) provides, with some specified exceptions, that:

> [a] lawyer shall not disburse funds held for a client or third person unless the funds are "collected funds." For purposes of this rule, "collected funds" means funds that a lawyer reasonably believes have been deposited, finally settled, and credited to the lawyer's trust account.

V.R.Pr.C. 1.15(f)(1).

The parties agree that the funds from the checks that are the subject of the charges under Rule 1.15(f)(1) in this proceeding were not "collected" funds under the rule until the second business day following the deposit. *See* Stipulation Ex. 1, at 3.[5]

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[5] The Professional Responsibility Program's guidance document for trust accounts includes the following:

> Often banks make funds available for withdrawal before those funds have been collected due to the requirements set forth in Federal Reserve Regulation CC. *The only items that are recognized as collected when deposited are cash and wire transfers.* All other deposit items, including cashier's checks, money orders, and certified checks, will have varying times for collection. [C]heck with your bank to determine the length of time you need to wait before making a disbursement.

Managing Client Trust Accounts – Rules, Regulations, and Tips (revised 1/6/2010 & 10/14/2014) at 9 (emphasis in original).

The prohibition in Rule 1.15(f)(1) on disbursing funds that have not been collected is subject to certain exceptions, including the following one:

> [A] lawyer may disburse trust account funds deposited for or on behalf of a client or third person in reliance on that deposit even though the deposit does not constitute collected funds if the lawyer reasonably believes that the instrument or instruments deposited will clear and will constitute collected funds in the trust account within a reasonable period of time:
> ***
>
> (4) When the deposit is a personal check or checks in an aggregate amount that does not exceed $1,000 per transaction.

V.R.Pr.C. 1.15(g)(4).

On several occasions, Respondent transferred funds to his operating account on account of a client matter on the same day that he deposited an individual check in an amount greater than $1,000 on account of the same client. Although all of those checks ultimately cleared and the funds were collected, the transfers constituted disbursements in violation of Rule 1.15(f)(1).

Rule 1.15(f)(2) states that "a lawyer shall not use, endanger, or encumber money held in trust for a client or third person for purposes of carrying out the business of another client or person without the permission of the owner given after full disclosure of the circumstances." V.R.Pr.C. 1.15(f)(2). In several instances during the audited period Respondent's withdrawal of funds from his IOLTA account resulted in clients having negative IOLTA balances. In several instances, there were sufficient funds from all other clients in the IOLTA account to avoid an overdraft of the IOLTA account. In those instances, Respondent necessarily used the funds of one client to carry out the business of one or more other clients, in violation of Rule 1.15(f)(2).

SANCTIONS DETERMINATION

The Vermont Rules of Professional Conduct "are 'intended to protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar.'" *In re PRB Docket No. 2006-*

167, 2007 VT 50, ¶ 9, 181 Vt. 625, 925 A.2d 1026 (quoting *In re Berk*, 157 Vt. 524, 532, 602 A.2d 946, 950 (1991)). The purpose of sanctions is not "to punish attorneys, but rather to protect the public from harm and to maintain confidence in our legal institutions by deterring future misconduct." *In re Obregon*, 2016 VT 32, ¶ 19, 201 Vt. 463, 145 A.3d 226 (quoting *In re Hunter*, 167 Vt. 219, 226, 704 A.2d 1154, 1158 (1997)).

Applicability of the ABA Standards for Imposing Lawyer Sanctions

Hearing panels are guided by the ABA Standards when determining appropriate sanctions for violation of the Vermont Rules of Professional Conduct:

> When sanctioning attorney misconduct, we have adopted the *ABA Standards for Imposing Lawyer Discipline* which requires us to weigh the duty violated, the attorney's mental state, the actual or potential injury caused by the misconduct, and the existence of aggravating or mitigating factors.

In re Andres, 2004 VT 71, ¶ 14, 177 Vt. 511, 857 A.2d 803.

"Depending on the importance of the duty violated, the level of the attorney's culpability, and the extent of the harm caused, the standards provide a presumptive sanction. *** This presumptive sanction can then be altered depending on the existence of aggravating or mitigating factors." *In re Fink*, 2011 VT 42, ¶ 35, 189 Vt. 470, 22 A.3d 461.

The Duty Violated

The ABA Standards recognize a number of duties that are owed by a lawyer to his or her client. *See Standards for Imposing Lawyer Sanctions* (ABA 1986, amended 1992) (*"ABA Standards"*), Theoretical Framework, at 5. Other duties are owed to the general public, the legal system, and the legal profession. *Id.* In this case, Respondent owed a duty to his clients to safeguard and preserve their property through adherence to the trust account rules. *See also id.* (providing that the "duty of loyalty" includes a duty to "preserve the property of a client.").

Mental State

"The lawyer's mental state may be one of intent, knowledge, or negligence." *ABA Standards*, § 3.0, Commentary, at 27. For purposes of the sanctions inquiry, "[a lawyer's] mental state is [one] of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result." *Id.*, Theoretical Framework, at 6. The mental state of "knowledge" is present "when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct [but] without the conscious objective or purpose to accomplish a particular result." *Id.* The mental state of "negligence" is present "when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." *Id.*; *see also id.*, at 19 (definitions of "intent," "knowledge," and "negligence"). "[A]pplication of these definitions is fact-dependent" and "[t]he line between negligent acts and acts with knowledge can be fine and difficult to discern . . . ." *In re Fink*, 2011 VT 42, ¶ 38.

Absent evidence that a lawyer who has failed to comply with the trust accounting requirements disregarded information indicating a need to act promptly to prevent loss or potential loss of a client's funds, the lawyer's mental state in trust accounting cases has generally been considered to be negligent. *See In re PRB No. 2013-145*, 2017 VT 8, ¶ 1, 204 Vt. 612, 621, 165 A.3d 130, 140 (concluding that "Respondent acted negligently when he failed to set up his Quicken accounting system in accordance with the Rules of Professional Conduct. *** Respondent was negligent when he failed to perform timely reconciliations of the IOLTA account. Respondent was also negligent when he failed to correct entry errors that led to an incorrect running balance . . . ."); *In re PRB Docket No. 2014-133*, 2015 VT 63, 199 Vt. 640, 643, 136 A.3d 564, 567 (finding, in part, that "Respondent did not reconcile his trust account to his monthly bank statement" and concluding that "Respondent was negligent in his failure to follow the trust accounting rules.").

Disciplinary Counsel presented no evidence suggesting that Respondent acted with an improper purpose or with knowledge of a need to act to prevent loss of client funds.[6] Accordingly, the Panel concludes that Respondent's mental state should be considered to be that of negligence.

Injury and Potential Injury

The ABA Standards consider "the actual or potential injury caused by the lawyer's misconduct." *ABA Standards*, § 3.0(c), at 26. The term "injury" is defined as "harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. The level of injury can range from 'serious' injury to 'little or no' injury." *Id.*, Definitions, at 9. The term "potential injury" refers to harm that is "reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct." *Id.* Under the ABA Standards, "[t]he extent of the injury is defined by the type of duty violated and the extent of actual or potential harm." *Id.* at 6.

Here, there was no evidence of any actual injury to any client. No client funds were ever lost as a result of the deficiencies in Respondent's trust accounting procedures and other violations of the rules. Nevertheless, there was some potential for injury to Respondent's clients. Respondent's IOLTA account was overdrawn on one occasion. In addition, Respondent's failure to account on a client-by-client basis resulted in some negative client balances and, as a result, other clients' funds were

[6] In their proposed stipulation of facts, the parties included a statement that "Respondent *understands* his obligations under the Rules of Professional Conduct relative to managing client trust accounts, including his IOLTA account." (emphasis added). Disciplinary Counsel has not explained the relevancy of this proffered statement. As a present tense statement, it cannot be considered as evidence of Respondent's mental state at the time of the violations. Moreover, assuming the statement is intended to inform a possible future evaluation of Respondent's state of mind in the event of any future violations of the trust account rules, it stands to reason that following an audit and the filing of disciplinary charges a respondent would be deemed to be well aware of his or her obligations under the Rules relating to trust accounts. Absent an explanation, the statement does not seem to be relevant to the decision in this case.

necessarily used for some period of time to cover the disbursements that generated the negative balances.

Finally, the premature deposit of client funds in Respondent's operating account, resulted in commingling of Respondent's funds with client funds and thereby placed client funds in jeopardy. "The rule against commingling has three principal objectives: to preserve the identity of client funds, to eliminate the risk that client funds might be taken by the attorney's creditors, and most importantly, to prevent lawyers from misusing/misappropriating client funds, whether intentionally or inadvertently." *In re Farrar*, 2008 VT 31, ¶ 7, 183 Vt. 592, 594, 949 A.2d 438, 440 (2008)). As the Court explained in *Farrar*, even though there was no intention to misuse client funds "[t]here was potential for injury to respondent's clients because respondent might have inadvertently used client funds or client funds could have been attached by respondent's creditors." *Id.* ¶ 8. Moreover, the Court reached this conclusion even though the respondent's assistant in that case undertook monthly reconciliation of the trust account. In this case, no reconciliation was being performed by Respondent.

Presumptive Standard under the ABA Standards

ABA Standard 4.13 applies in this case. It provides that "[r]eprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client." *ABA Standards* § 4.13. As discussed above, Respondent was negligent and, while there was no actual injury as a result of Respondent's trust account violations, there was some potential for injury. Thus, Standard 4.13 is the proper standard. *See, e.g., PRB No. 2013-145*, 2014 Vt. at 621-622 (applying Standard 4.13 as presumptive standard where respondent failed to reconcile trust account for 9 months).

The Panel concludes that Standard 4.14, which provides for a private admonition if a lawyer is negligent when dealing with client property "and causes little or no actual or potential injury to a client," is not appropriate in this case. Respondent's IOLTA accounting system was fundamentally deficient

and resulted in numerous violations of Rules 1.15 and 1.15A. The violations were fundamental and extensive in nature and therefore merit a public reprimand. See, e.g., *Farrar*, 2008 VT 31, ¶ 7 (rejecting private admonition for trust account violations and observing that "[p]rivate reproval should be used only 'in cases of minor misconduct, when there is little or no injury to a client . . . .'").

At the same time, the Panel concludes that the presumptive standard for a sanction of suspension – applicable under Standard 4.12 when a lawyer "knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client" – should not apply here. Although Respondent's IOLTA accounting system did not comply with the requirements of the rule, Respondent did monitor his account regularly and there was no evidence presented that he actually intended to commingle funds. The circumstances in this case differ from those in the *Farrar* case, where the Court applied the presumptive standard calling for suspension to a lawyer who had, over the course of five years, used his trust account as both a personal savings account and as a holding account for excess operating funds to ensure that he had sufficient funds to make payroll. *Farrar*, 2008 VT 31, ¶ 3.

Aggravating and Mitigating Factors Analysis

Next, the Panel considers any aggravating and mitigating factors and whether they call for increasing or reducing the presumptive sanction of public reprimand. Under the ABA Standards, aggravating standards are "any considerations, or factors that may justify an increase in the degree of discipline to be imposed." *ABA Standards*, § 9.21, at 50. Mitigating factors are "any considerations or factors that may justify a reduction in the degree of discipline to be imposed." *Id.* § 9.31, at 50-51.

The following aggravating factors under the ABA Standards are present:

§ 9.22(d) (multiple offenses) – Respondent's conduct involved multiple violations of the trust account rules. The violations were fundamental in nature and extensive.

§ 9.22(i) (substantial experience in the practice of law) – Respondent had approximately 30 years of practice at the time of the violations.

(b) Mitigating Factors

The following mitigating factors under the ABA Standards are present:

§ 9.32(a) (absence of prior disciplinary record) – Respondent has no record of any prior disciplinary action having been taken against him.

§ 9.32(b) (absence of a dishonest or selfish motive) – There was no evidence presented that Respondent took or misused client funds or otherwise engaged in any dishonest conduct, or that he sought to advance his own interests.

§ 9.32(e) (full and free disclosure to disciplinary board or cooperative attitude toward proceedings) – Respondent cooperated during the course of the audit and cooperated in the disciplinary process. However, this factor is not entitled to significant weight because Respondent has a duty under V.R.Pr.C. 8.1(b) to cooperate in connection with any disciplinary investigation. *See, e.g., In re Richmond's Case*, 872 A.2d 1023, 1030 (N.H. 2005) ("[W]e do not ascribe significant weight to this factor because a lawyer has a professional duty to cooperate with the committee's investigation").[7]

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[7] The parties propose that the Panel apply the mitigating factor under § 9.32(d) – "timely good faith effort to make restitution or to rectify consequences of misconduct"– based on the fact that Respondent changed his billing practices to make the previously refundable $ 2,500 deposits "earned upon receipt," thereby qualifying for the Rule 1.15(g)(4) exception to the "no disbursement until collected" prohibition in Rule 1.15(f)(2). However, taking steps to correct non-compliance with the Rules of Professional Conduct is not restitution; nor does it rectify the *consequences* of misconduct. The Panel therefore rejects application of this factor.

In addition, the parties have provided no factual support for application of the mitigating factor under § 9.32(l) – "remorse." No expression of remorse appears in the parties' proposed stipulation of facts or any other submission by Respondent. The letter from Respondent to Disciplinary Counsel attached as Stipulation Exhibit 2 does not contain an expression of remorse. The letter explains some of the steps taken by Respondent to address the deficiencies identified in the audit. The purpose of the letter seems to have been, first, to convince Disciplinary Counsel that corrective steps were taken and, secondly, to support Respondent's contention that he should not be expected to hire an additional staff member to manage his IOLTA account. Moreover, even assuming evidence of remorse had been presented, it would receive little weight from the Panel. Expressing

(c) Weighing the Aggravating Mitigating Factors

Although the mitigating factors outnumber the aggravating factors, the Panel concludes that the balance of the factors does not call for any adjustment of the presumptive sanction. Although the absence of a prior disciplinary record and absence of a selfish motive are entitled to consideration, the Panel places great weight on the extensive nature of the violations committed and Respondent's substantial experience as a lawyer. Respondent's accounting system for his IOLTA account failed to comply with every fundamental requirement of the trust accounting rules set forth in Rule 1.15A(a)(1)-(4). All the other violations committed by Respondent flowed from these extensive defects. Respondent had no excuse for this pervasive non-compliance. Accordingly, the Panel concludes that there should be no downward adjustment of the presumptive sanction of public reprimand.

* * *

Having in mind that "[i]n general, meaningful comparisons of attorney sanction cases are difficult as the behavior that leads to sanction varies so widely between cases," *In re Strouse*, 2011 VT 77, ¶ 43, 190 Vt. 170, 34 A.3d 329 (Dooley, J., dissenting), the Panel must nevertheless consider whether a public reprimand is consistent with past disciplinary determinations. The facts in this case most closely resemble those in *In re Hibbitts*, PRB Decision # 145 (issued 11/3/11). The hearing panel in that case found that during the time period audited the respondent "lacked a formal trust accounting system;" *id.* at 2; relied exclusively on her checkbook and handwritten notes; maintained no ledger or other system identifying receipts and disbursements from her trust account; and failed to document timely

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remorse while self-reporting non-compliance is qualitatively different than a post-investigation expression of remorse. Even allowing for the possibility that Respondent feels remorse, it would not change the Panel's ultimate balancing of the aggravating and mitigating factors in this case.

notice to clients of receipts and disbursements from the account. *See id.* In short, the panel concluded, respondent's trust accounting system "did not meet the minimum requirements of Rule 1.15A." *Id.* In addition, the panel found that the respondent had commingled her earned fees with her client's advances in the trust account and that an overdraft had resulted from the respondent's lack of a formal trust accounting system. *Id.* Even though the respondent promptly addressed the overdraft, cooperated in Disciplinary Counsel's investigation, and promptly hired an accountant to put a fully compliant accounting system in place – and even though there was no evidence of fraud and the respondent had never been disciplined previously – the panel imposed a public reprimand. The facts in the current case are strikingly similar to those in *Hibbitts*.

While private admonitions have been issued in several cases involving a variety of failures to follow the trust account rules, the lack of a basic trust accounting system and the extensive scope of the violations in this case calls for a pubic reprimand. In essence, Respondent failed to comply with the most fundamental requirements of the trust accounting rules. The Panel concludes that a public reprimand is appropriate.

ORDER

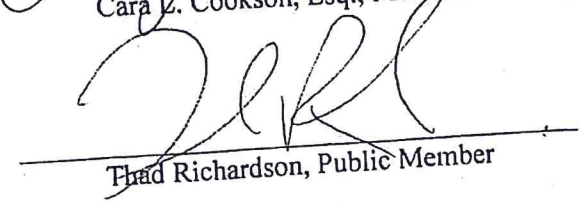
Based on the Panel's findings of fact and conclusions of law, Respondent is hereby publicly reprimanded for violations of Rule 1.15 and 1.15A of the Rules of Professional Conduct.

Dated: April 15, 2019

Hearing Panel No. 4

Mary K. Parent, Esq., Chair

Cara L. Cookson, Esq., Member



Thad Richardson, Public Member