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[22-Oct-2002]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: Howard Sinnott, Esq.
PRB File No. 2001.190

Decision No. 43
Violation of Code Only

Respondent is charged violation of Rule 1.5 of the Vermont Rules of Professional Conduct which requires that fees be reasonable fee and with failing to promptly deliver to his client funds to which she was properly entitled in violation of Rule 1.15(b) of the Vermont Rules of Professional Conduct. This matter was heard on the issue of violation of the code only on August 15, 2002 before Hearing Panel No. 2, consisting of Douglas Richards, Esq., Paul Ferber, Esq. and Michael Filipiak. Michael E. Kennedy appeared as Disciplinary Counsel. Respondent was present and was represented by Lisa Shelkrot, Esq.

The central issue in this case is the propriety of a non-refundable fee agreement which provides that in the event of termination of the attorney-client relationship, the lawyer is entitled to a termination fee which is set forth in the agreement and is determined without regard to the standards for reasonable fees set forth in Rule 1.5.

The Panel finds by clear and convincing evidence that such an agreement violates the provision of Rules 1.5(a) of the Vermont Rules of Professional Conduct. The charge of violation of Rule 1.15(a) is dismissed. A further hearing on the issue of sanctions will be scheduled.

Facts

Facts Relating to Respondent's Practice

Respondent is licensed to practice law in Vermont and in New York. He was admitted to the Vermont Bar in 1986 and the New York Bar in 1976. He is the sole member of the Bennington firm of Daly & Sinnott Law Centers, PLLC, which at times is also know as the Daly, Murphy & Sinnott Law Centers, P.L.C., The Daly Law Centers and The Law Centers for Consumer Protection. Both the Respondent in particular and the firm in general devote their practice almost exclusively to assisting clients who have difficulties with unsecured debt, generally credit card obligations which can carry interest rates of 18 to 24 per cent per annum. Respondent's usual procedure is to negotiate with a client's creditors for a lump sum settlement of the obligation in an amount less than the face value of the debt. According to the Respondent's testimony this can be in the range of 50 to 70 cents on the dollar.

Upon entering what the Respondent' firm calls the debt reduction program a client signs an agreement allowing the Law Centers to make automatic monthly deductions from the client's bank account. These amounts are placed in either the "office fees account" or the "creditor reserve account." In addition there is a $16.00 per month "account maintenance fee." The Respondent testified that the office fees account was not an IOLTA account. There was no testimony as to whether the creditor reserve account was an IOLTA account. Once the creditor reserve account has reached a level that makes negotiation of the debt practical, the Law Centers will attempt resolution of the client's debts. Usually the fee charged is calculated as a percentage of the difference between the amount of the debt and the amount of the settlement. The fee is then taken from the office fees account.

Facts Relating to the Complainant's Case

Juanita Gibbs lives in Union City New Jersey. In late 2000 she was in extreme financial difficulty. She had approximately $60,000 in consumer debt. She was a recently divorced single mother with a child in college and no regular job. She alternated between doing free lance video work and receiving unemployment. One of her obligations was an $18,000 debt to American Express. She was trying to keep up with the required payments but could not, and in November of 2000 received a letter from a New Jersey law firm which had been hired to collect the debt. She had heard of the Law Centers from her ex-husband and in November of 2000 she called them. She spoke with Milton Smith, a non-attorney employee of the Law Centers whose job it was to do initial client intake. Mr. Smith discussed the Law Centers' program and Ms. Gibbs' financial situation including her monthly income and expenses. She told Smith of her debt to American Express and asked whether or not they would be in a position to negotiate this for her. She also asked whether they had dealt with American Express in the past. Mr. Smith assured her that they had and that her case would not be a problem for the firm. Ms. Gibbs was anxious that negations with American Express begin immediately, and Mr. Smith assured her that they would do so as soon as she returned the necessary paperwork to enroll her as a client of the firm.

Ms. Gibbs did not reveal to Mr. Smith the $42,000 in consumer debt which was in addition to the American Express obligation. Respondent testified that this was significant because the Law Centers would have found it difficult to negotiate a reduction of one of complainant's debts while others were being paid in the full amount. Had they known about this additional debt, they might have rejected her as a client because she did not have sufficient income to satisfy even a reduced portion of her total debt. While this may well have been true, it does not affect these disciplinary proceedings.

Respondent's witnesses testified that it was the practice for an initial debt counseling session to take approximately 45 minutes to an hour during which time the counselor would go over the client's financial situation and discuss in detail the fee structure for representation. Ms. Gibbs testified that she spent approximately 20 minutes discussing the details of her case and the representation and another twenty minutes discussing family and children.

Shortly after this telephone call Ms. Gibbs received from the Law

Centers a Legal Representation Agreement, a Notice of Representation, and Credit Notification Letter. It is undisputed that Ms. Gibbs signed the Legal Representation Agreement. She admitted that she did not read the fine print carefully and testified that Mr. Smith had been so vague about the fee that she did not understand how it would be calculated or paid. Ms. Gibbs testified that she signed the agreement and returned it to Mr. Smith. The evidence is clear that Ms. Gibbs had no further conversations with the respondent's firm regarding the fee agreement or the details of the representation after she had received the paperwork. All fee discussions were during the initial telephone interview before Ms. Gibbs had seen the paper work.

The Legal Representation Agreement that Ms. Gibbs signed authorized the Law Centers to negotiate her American Express debt. It authorized them to withdraw the sum of $300 per month from her bank account. The agreement provided that for the first four months the sum of $284 would be allocated to Monthly Office Fee, zero would be allocated to the Creditor Reserve Fund and $16 would be charged for a Monthly Account Maintenance Fee. For the next thirteen months the sum of $142 would be allocated to the Monthly Fee Account, $142 to the Creditor Reserve Fund and $16 to Monthly Account Maintenance. For the next 19 months $284 would be allocated to the Creditor Reserve and $16 to Account Maintenance.

The agreement also had a paragraph entitled Fees Earned in Event of Termination which provided as follows:

> I understand that the Law Center will necessarily incur administrative costs as a result of accepting me as a client, expenses as a result of negotiations with creditors, and it may incur costs for representing me in litigation, all of which would have been included in the 28% reduction of claims fees resulting from the completion of the program. I agree that if I do not complete, the Law Center will have earned from office fee payments $500 a month in administrative costs with a maximum of $1500 and $150/hr. in litigation costs, with a maximum of $1,500 per case.

Ms. Gibbs testified and the Panel finds that the terms of the agreement were not fully explained to her.

The Law Center's activity on behalf of Ms. Gibbs is as follows:

1. Initial telephone interview on November 11, 2000.

2. Packet of forms sent to Ms. Gibbs.

3. Material received, reviewed and some returned to Ms. Gibbs for further signatures.

4. On November 27, 2000 the Law Centers sent Ms. Gibbs a welcoming letter. This was a form letter into which the date, Ms. Gibbs name, address and client number were inserted.

5. On November 25, 2000 the Law Centers mailed the Credit Reporting Agency Notification Letter that Ms. Gibbs had signed.

6. On November 27, 2000 the Notice of Representation letter which Ms. Gibbs had signed was mailed to the creditor. This was a form letter into which the date and creditor name and address were inserted.

7. On February 20, 2001 Ms. Gibbs called the Law Centers. At that time she was told that the firm was negotiating on her behalf.

8. On the same day someone from the Law Centers placed a call to American Express to find out how much money Ms. Gibbs owed.

9. On February 21, 2001 Ms. Gibbs was served with a summons relating to her American Express debt. She called the Law Centers twice that day. On neither occasion did she speak to an attorney.

10. On February 26, 2001 Ms. Gibbs called and asked how much would be required to settle her debt. One of the employees told her that it would be between seven and ten thousand dollars.

11. On March 5, 2001 Ms. Gibbs called to ask why nothing was being done. She was told that it was because she had only $1100 in the program.

12. On March 12, 2001 she called again to complain that nothing was being done on her behalf.

13. On March 20, 2001 she called and spoke to Myron Thomas and told him she wanted to withdraw from the program.

14. On March 21, 2001 the Law Centers received Ms. Gibbs letter stating that she was withdrawing from the program and requesting a refund of her money and an explanation of how the firm incurred $500 per month in administrative costs.

There was no evidence presented of other activity by the Law Centers on behalf of Ms. Gibbs. Respondent suggests that there were three to four hours of non-attorney time expended to establish Ms. Gibbs as a client. This was based solely on his experience with other clients. He had no contact with Ms. Gibbs nor did he act on her behalf at any time. Based upon the testimony the Panel finds that this is a more than generous estimate given the routine nature and obvious automation of the tasks all, of which were performed by non-lawyer staff. It is undisputed that neither Respondent nor anyone in his firm made any attempt to negotiate Ms. Gibbs' American Express debt.

Five months after Ms. Gibbs letter of withdrawal and request for a refund, respondent wrote to her as follows:

> This letter accounts for your financial transactions with the Law Centers. Pursuant to your written retainer agreement, you made monthly payments for debt settlement and attorney's fees of $284.00. Before you discharged us as your attorneys, you in fact made four such payments, adding to a total of $1,136.00, You also agreed to pay a $16.00 per month account maintenance fee. You also

> explicitly agreed in the event of an early discharge (i.e. before your debt could be settled), that you would be obligated to pay all administrative fee of $500.00 per month to be capped at $1,500.00 total. Since you remained in the program for four months, we properly imposed this fee of $1,500.00, although we will not seek remuneration from you above and beyond the $1,136.00 paid by you to us.
>
> I hope this satisfactorily explains your transactions with the Law Centers. I am sorry that you feel dissatisfied.
>
> Please feel free to contact me directly at (802) 753-2444 to discuss this matter further if you wish. 1 will be happy to discuss our fees and make an effort to fairly and amicably accommodate any concerns you might have about the effect of our mutually-agreed upon fee provisions in light of your short tenure as a client following the execution of your retainer agreement.

Despite the statement in the letter, Ms. Gibbs had in fact paid $1200 to the Law Centers. The difference is accounted for by the charge of $16 per month account maintenance fee. At trial Respondent testified that his firm would have been justified in charging the $1500 set forth in the agreement. Ms. Gibbs never accepted Respondent's invitation to call to discuss the fee.

The Respondent and his office manager both testified that the more creditors a client has, the more work the Law Centers is required to do on their behalf. Whether a client has one creditor like Ms. Gibbs or multiple creditors, or whether the client has been in the program for years or for four months like Ms. Gibbs, the client is charged the same amount in administrative costs upon withdrawing from the program.

The Respondent introduced no evidence to support a charge of $500 per month in administrative costs as a result of having a client in the program, nor was there any evidence presented that the Law Centers incurred $1200 in administrative costs in connection with its representation of Ms. Gibbs. In addition there is no evidence that Respondent or anyone on his staff reviewed Ms. Gibbs file at the time of her withdrawal to determine whether the charges to her were reasonable. With the exception of the August 31, 2001 letter from Respondent, Ms Gibbs had no contact with him or with any other lawyer in the firm

The panel finds that the amount charged Ms. Gibbs was unrelated to the amount of work done on her behalf or any of the other factors in Rule 1.5 of the Vermont Rules of Professional Conduct. The fee was charged solely on the basis of the terms of the Legal Representation Agreement and is the same fee that was charged at that time to all clients who withdrew from the program. Respondent testified that at the time of the firm's representation of Ms. Gibbs they had in excess of 7000 clients. He also testified that it was not unusual for a client to withdraw from the program before the client's debts were negotiated.

Neither Respondent nor Disciplinary Counsel presented expert testimony to show that the fee was either reasonable or unreasonable when measured against the standards of Rule 1.5 of the Vermont Rules of Professional Conduct.

Conclusions of Law

Rule 1.5

Rule 1.5 of the Vermont Rules of Professional Conduct provides that "[a] lawyer's fee shall be reasonable." Respondent argues that the termination fee charged to Ms. Gibbs is pursuant to the contract and therefore reasonable as a matter of contract law and that consequently he owes nothing to her.

In a sense the agreement between the Respondent and Ms. Gibbs had two fee provisions. In the event that the matter was carried to conclusion and a reduction of the debt obtained, the firm would be paid a percentage of the amount of the savings. Thus, the greater the reduction in the client's debt, the greater the payment to the Respondent. This portion of the contract calls for a standard contingency fee with which we find no fault.

It is the other portion of the agreement which provides for fees on termination of the attorney client relationship which bear no relation to either the amount of work performed or the result obtained for the client which we find to be unethical.

General Retainers vs. Special Retainers or Fee Advances

There are two different forms of retainers in use by the bar and it is important to preserve the distinction.

> A retainer can serve one of two purposes, or some combination of the two. Either it is a fee paid in advance to ensure the lawyer's availability and to compensate the lawyer for forgoing the opportunity to be hired by the client's adversary --in effect, an option -- or it is an advance deposit for fees not yet earned.(FN1)

What we are dealing with here is an advance deposit for fees. Even though it is characterized as a termination fee in the event of discharge, it is treated under the fee agreement as an advance toward the eventual fees to be paid when the matter is concluded. This opinion makes no judgment about the use of general retainers which are paid to ensure a lawyer's availability.

The panel is persuaded by the reasoning in a similar case in New York in which the Court of Appeals found non-refundable retainers, which were in effect fee advances, to be in violation of ethical rules similar to our Code of Professional Responsibility which preceded the present Rules of Professional Conduct. The ethical constraints are the same. The Cooperman case (FN2) involved retainers for representation in criminal cases. One such agreement provided in part "This is the minimum fee no matter how much or how little work I do in this investigatory stage . . . and will remain the minimum fee and not refundable even if you decide prior to my completion of the investigation that you wish to discontinue the use of my services for any reason whatsoever."(FN3) Here the court began by analyzing the nature of the attorney client relationship. While it is, as the Respondent argues, a contractual relationship, it is one which carries with it certain unique characteristics and with overriding duties which

the attorney owes to the client. The relationship is one based upon trust and fiduciary responsibility. The New York Court stated that:

> [t]he attorney's obligations, therefore transcend those prevailing in the marketplace. The duty to deal fairly, honestly and with undivided loyalty superimposes onto the attorney-client relationship a set of special and unique duties including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interest over the lawyers.(FN4)(Citations omitted).

Nature of Attorney-Client Relationship

One of the unique characteristics of the attorney-client relationship is that the client is entitled to discharge the attorney at any time with or without cause. While a client in Ms. Gibbs situation has the right to discharge her attorney, if she is not entitled to any refund of the retainer, the client is understandably reluctant to forfeit the money paid to the attorney as a condition of engaging new counsel. This is especially true in the case of a client such as Ms. Gibbs. She hired the Respondent's firm because of difficulty with financial obligations. After terminating the Respondent's services and negotiating a settlement on her own with American Express she was short a substantial sum of money which she could have used to apply to her obligation to American Express.

The Cooperman court used strong language to condemn such restraints on a client's ability to discharge his or her lawyer.

> Special non-refundable retainer fee agreements diminish the core of the fiduciary relationship by substantially altering and economically chilling the client's unbridled prerogative to walk away from the lawyer. To answer that the client can technically still terminate misses the reality of the economic coercion that pervades such matters. If special nonrefundable retainers are allowed to flourish , clients would be relegated to hostage status in an unwanted fiduciary relationship -- an utter anomaly. Such circumstances would impose a penalty on a client for daring to invoke a hollow right to discharge.(FN5)

The Iowa Supreme court reached a similar result in a 1998 case involving a nonrefundable retainer in a criminal matter.(FN6) The court discussed the difference between general and special retainers, holding that the case involved a special retainer or advance fee. As in the Cooperman case the court was concerned about the detrimental effect of such contracts on the ability of the client to discharge the attorney and concluded: "[w]e hold that a nonrefundable fee in these circumstances is void and unethical. Such a fee violates DR2-106(A)."(FN7) The Iowa court approved the holding in Cooperman stating

> [w]e do, however, think Cooperman and Gastineau stand on solid ground with respect to advance payments resulting from a special retainer. As to those, we hold fees are refundable notwithstanding any agreement to the contrary because "[a] lawyer cannot charge a fee for doing nothing. Citing Brinkman and Cunningham, Nonrefundable Retainers Revisited, 72 N.C.L.Rev. at 17.(FN8)

A similar result was arrived at by the Colorado Supreme Court under rules identical to our own.(FN9) This case like several others arises under both Rule 1.5, mandating "reasonable fees" and Rule 1.15 requiring that all advance fees be placed in the lawyer's trust account until earned. Since Disciplinary Counsel did not charge the Respondent with a violation of this rule we make no finding of violation but we do wish to make it clear that it is our opinion that all advance fees must be held in the attorney's trust account until earned. This serves to protect the client from the lawyer's creditors and insures that any funds not earned will be available to be refunded to the client.

The Sather case involved a retainer in a civil matter. The court discussed the difference between an engagement retainer which is earned upon receipt and an advance for fees and concluded that the case involved a fee advance. Sather was not charged with violation of Rule 1.5 (charging an unreasonable fee). Though he had treated the funds as his own when he received them, he had in fact at a later date provided the client with an accounting and returned a portion of the retainer. The Sather court makes it explicit that not only it is impermissible for a lawyer to charge for work not done, but that it is improper to label a retainer agreement as nonrefundable.

> A fee labeled "non-refundable" misinforms the client about the nature of the fee and interferes with the client's basic rights in the attorney client relationship. Attorney's fees are always subject to refund if they are excessive or unearned. . . . Because the label is inaccurate and misleading, and discourages a client from exercising the right to discharge an attorney, we hold that attorneys may not enter into "non-refundable fee" agreements or otherwise communicate to their clients that the fees are non-refundable.(FN10)

A recent ethics opinion from Missouri also considered the issue of non-refundable retainers holding that

> Despite the fact that a lawyer and client entered into an agreement providing for a "non-refundable" retainer, when the representation ceases and the client demands a refund of the retainer the lawyer should refund all fees in excess of those earned at a reasonable hourly rate. . . (FN11)

North Carolina issued a recent ethics opinion on the obligation of an attorney
to refund to the client unearned fees.

> A lawyer may treat an advance payment of a fee as the lawyer's money and deposit it in the lawyer's or the firm's account only if the client agrees that the payment may be treated as earned by the lawyer when paid. However, regardless of the type of fee paid, the lawyer has a duty to refund any portion of a fee that is clearly excessive.(FN12)

Application of the law to the Sinnott Case

In the petition for misconduct disciplinary counsel has charged a violation of the rules with respect to the $284 per month which the

Respondent collected from Ms. Gibbs and allocated to "Monthly Office Fee." The petition makes no mention of violation with respect to the $16.00 per month charged as "Monthly Account Maintenance Fee." While it does not effect the outcome of this disciplinary process, the Panel sees no difference between the two charges. Both are subject to the requirements of Rule 1.5.

The key issue here is whether the attorney is providing services of value to the client for which the attorney is entitled to be paid or whether as the Apland court suggested, the lawyer is charging the client for doing nothing.(FN13)

The Panel is persuaded by the cases discussed above that the use of non-refundable retainers, here styled as Fees in the Event of Termination, violates Rule 1.5 of the Vermont Rules of Professional Conduct. It was a fee charged without regard to whether or not work was performed for the client or whether or not the client received any value for the services. Further, the amount of the fee is calculated without regard to the factors set for in Rule 1.5 such as the "time and labor required" or "the results obtained."

Respondent argues that we should analyze this case using the yardstick of the Rule 1.5 factors and that because disciplinary counsel has not introduced expert testimony that the fee was unreasonable he has not met his burden of proof and this charge should be dismissed. To take this approach would be to concede that the fee agreement was presumptively reasonable and that bar counsel here, or the client in a claim against the lawyer, must show otherwise.

The notes to Rule 1.5 make clear the lawyer's obligation in the event of termination of his or her services. "A lawyer may require advance payment of a fee, but is obligated to return any unearned portion."(FN14) The ABA/BNA Manual suggest the same. "When a lawyer withdraws, or is discharged, from the representation before its contemplated completion, he is ethically required to return to the client the unearned portion of any advance payment of his fee or costs the client has made."(FN15)

The manual goes on the state that the lawyer's recourse in the event of termination is quantum meruit. This places the burden on the attorney to show the value of the services rendered to the client, rather than requiring the client to prove that the contract charges were excessive.

> The overarching rule is that when a lawyer is discharged by the client for any reason -- or withdraws for good cause -- before the completion of the representation, the lawyer loses the right to recover the compensation set forth in the fee agreement and instead becomes entitled to the reasonable value of his services to the time of discharge or withdrawal. This quantum meruit rule has gained increasing support among the courts as being consistent with the rule that a client has an absolute right to discharge his lawyer, with or without good cause, at any point in the representation. The client would be deterred from exercising this right if he were required to pay the full amount of the contractual fee despite having discharged his attorney.(FN16)

The Cooperman court also suggest that when the client discharges the lawyer the lawyer's remedy for fees is quantum meruit, not the fee

agreement.(FN17)

To summarize the Panel finds that the use of a non-refundable retainer in which the attorney is paid a fee upon termination without regard to the factors set forth in Rule 1.5 (a) subsections 1 through 8 is unethical and in violation of this rule. The Panel makes no ruling on general retainers which are paid to insure a lawyer's availability or on flat fees in which the client is charged a set fee for the work the attorney engages to do, though in the latter case, our reasoning with respect to funds held by the attorney upon termination prior to completion of the matter would apply.

Rule 1.15(b).

Disciplinary Counsel has charged a violation of Rule 1.15 which deals generally with the safekeeping of property of others, either clients or third parties, which comes into the hands of a lawyer. Subsection (b) provides

> [u]pon 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.(FN18)

Disciplinary Counsel argues that this rule requires the refund to Ms. Gibbs of the unearned portion of the funds paid to respondent. While a reading of this rule could cover Ms. Gibbs' situation, we believe that this rule is designed to cover occasions where property of a client comes into the attorney's possession such as tort settlements or estate proceeds rather than as advance fees.

The present situation is more accurately covered by the provisions of Rule 1.16 on Declining or Terminating Representation which provides:

> [u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law. (emphasis added).(FN19)

Because we believe that Respondent's conduct is more properly covered under Rule 1.16 rather than Rule 1.15(b), we decline to find a violation of Rule 1.15(b). This finding does not relieve Respondent of his ongoing obligation under Rule 1.16(b) to refund to Ms. Gibbs any unearned fees nor does it preclude Disciplinary Counsel from bringing further charges should he fail to do so.

Conclusion

The Panel finds that the Respondent's use of a non-refundable retainer violates VRPC Rule 1.5. The charges of violation of Rule 1.15(b) are dismissed. This matter will be set for a hearing on the issue of Sanctions.

Dated: 10/23/02

HEARING PANEL NO. 2
/s/
_____
Douglas Richards, Esq., Chair

_____
Paul Ferber, Esq.

/s/
_____
Michael H. Filipiak

Footnotes

FN1. ABA/BNA Lawyer's Manual on Professional Conduct, 45:110.

FN2. Matter of Cooperman, 633 N.E.2d 1069 (1994).

FN3. Id. at 1070.

FN4. Id. At 1071.

FN5. Id. at 1072.

FN6. Iowa Supreme Court Bd. of Ethics v. Apland, 577 N.W.2d 50 (Iowa 1998).

FN7. Id. at 58. DR 2-106(A) is the predecessor to VRPR 1.5 and provides that "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee."

FN8. Id. at 57.

FN9. In the Matter of Sather, 3 P.3d 401 (Col. 2000).

FN10. Id. at 27.

FN11. Missouri Opinion 000080 (3/00-4/00) ABA/BNA Ethics Opinions.

FN12. North Carolina Opinion 2000-5 (7/21/00) ABA/BNA Ethics Opinions.

FN13. Apland, 57.

FN14. Comment to Rule 1.5, Vermont Rules of Professional Conduct.

FN15. ABA/BNA Lawyers' Manual on Professional Conduct, 41:2012, citing

Rule 1.16d.

FN16. Ibid.

FN17. Cooperman 1072.

FN18. VRPC 1.5(b).

FN19. VRPC 1.16(d). This result is also suggested in the comment to Rule 1.5 which references Rule 1.16(d) in discussing the obligation of an attorney to refund unearned fees to the client.

Concurring in part and Dissenting in part

I agree with the majority's decision finding a violation of Rule 1.5. I disagree with the conclusion that there has not been a violation of Rule 1.15(b). Rule 1.5

I would add an additional reason to find that Respondent violated Rule 1.5 by charging an unreasonable fee. To the extent that this provision was an effort to provide for liquidated damages, it clearly failed to comply with Vermont law. Under the rule adopted in Highgate Associates Ltd. v. Merryfield, 157 Vt. 313 (1991), the sum must reflect a reasonable estimate of the likely damages. Respondent's own testimony proved that there was no connection between the amount set and the services which might be rendered. The same amount is set if the client withdraws one day after entering the program or a year after entering the program. The same amount applies whether, as here, no attorney time was spent on the representation or if 100 hours attorney time was spent on the matter. The primary effect is to burden the client's decision to terminate the attorney-client relationship. These are hallmarks of a penalty provision. This reinforces the majority's decision that Respondent violated Rule 1.5.

Rule 1.15(b)

Contrary to the majority's conclusion, I believe that the facts establish a violation of Rule 1.15 which deals generally with the safekeeping of property of others, either clients or third parties, which comes into the hands of a lawyer. Subsection (b) provides:

> [u]pon 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."

This rule is sufficiently broadly drafted to require the refund to Ms. Gibbs of the unearned portion of the funds paid to Respondent. Once the firm had been discharged, Respondent was under an immediate obligation under Rule 1.15(b) to return all amounts Ms. Gibbs had paid the firm less an amount to compensate the firm for the value of the legal services actually rendered. See, In re Hartke,529 N. W.2d 678 (Minn. 1995). The

language of Rule 1.15(b) is comprehensive and deals with any "funds or other property in which a client ... has an interest" and promptly deliver it to the client. Although the conduct might also have violated Rule 1.16(d), that does not preclude finding a violation of Rule 1.15(b).

Therefor, I would find that Respondent's use of a non-refundable retainer violated VRPC Rule 1.5 and the failure to promptly refund amounts advanced but not earned violates Rule 1.15(b).

Dated: October 14, 2002

/s/
Paul Ferber, Esq.

FILED OCTOBER 23, 2002

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43 PRB

[7-Apr-2003]

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

In re: Howard Sinnott, Esq.
PRB File No. 2001.190

Decision No 43
Order on Sanctions

This matter was heard on August 15, 2002 before Hearing Panel No. 2 consisting of Douglas Richards, Esq., Paul Ferber, Esq. and Michael Filipiak on the issue of violation of the Vermont Rules of Professional Conduct. The Panel found that the Respondent violated Rule 1.5. Both parties filed Motions for Reconsideration and on December 20, 2002, the Panel issued an order clarifying but not altering its decision. On January 27, 2003, Disciplinary Counsel and Respondent filed a Joint Recommendation as to Sanction recommending that the Panel publicly reprimand Respondent. In addition Disciplinary Counsel recommends that the Panel order Respondent to make restitution to the complainant. Respondent does not join in this recommendation.

Sanction

The Panel accepts the recommendation and orders that Respondent be publicly reprimanded for violation of Rule 1.5. In accepting the recommendation, the Panel is guided by the ABA Standards on Imposing Lawyer Sanctions (hereafter ABA Standards) and case law. The Panel also orders that Respondent make restitution to the complainant in the amount of $1200.00.

Section 7.3 of the ABA Standards provides that "[r]eprimand 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." The commentary suggests that "[c]ourts typically impose reprimands when lawyers engage in a single instance of charging an excessive or improper fee" (citations omitted). We have also considered the mitigating factors present here. Respondent has no prior disciplinary record, ABA Standards, §9.32(a), he has made a free and full disclosure to Disciplinary Counsel and has been cooperative in the disciplinary proceedings. ABA Standards, §9.32(e). Though there is only one complainant in this matter, the Panel is aware that the fee agreement that Respondent signed with Ms Gibbs, the Complainant, was his standard agreement, at least at the time that she employed him to seek reduction of her debt. The panel is also aware that this case is the first instance of our consideration of such fee agreements providing for fees on termination calculated without regard to the standards of Rule 1.5. This fact bears also on our acceptance of the recommendation for public reprimand.

We do, however, note with approval the approach the Florida Supreme Court took when faced with a very similar situation. In Florida State Bar v. Hollander, 607 So.2d 412 (Fla. 1992), the attorney had a standard fee agreement which provided for fees for termination of services in personal injury contingent fee agreements. In that case the court imposed a public reprimand for charging an excessive fee and placed Respondent on probation. In essence, the terms of the probation were that Respondent modify all his fee agreements to eliminate the offending clause. Were this Panel to be faced with similar facts again, we would be inclined to follow the lead of the Hollander decision.

Restitution

The parties are not in agreement as to whether an order of restitution is appropriate in this matter. Where other sanction is imposed, the Panel has the authority to order the '[r]eimbursement of retainers, fees, trust funds, or other monies collected or received by the lawyer on a client's behalf." A.O.9, Rule 8(A)(7). We agree with Disciplinary Counsel that a case involving an excessive fee is the most appropriate situation for an order of restitution. It would be inappropriate for an attorney to benefit financially from a fee found to be unreasonable and in violation of Rule 1.5. of the Vermont Rules of Professional Conduct.

In discussing the treatment of advance payments of fees, the Commentary to Rule 1.5 of the Vermont Rules of Professional Conduct states that "[a] lawyer . . . is obliged to return any unearned portion." In the case of Matter of Sylvan, 549 N.W.2d 249 (Wis. 1996) the court publicly reprimanded the attorney and ordered that he return to the client that portion of the fee which exceeded a reasonable fee. A similar result was reached in Colorado in the case of In re Wimmershoff, 3 P.3d 417 (Colo. 2000).

A more difficult question is the amount of the restitution. Disciplinary Counsel argues that the entire $1200 paid by the complainant should be refunded to Ms. Gibbs; that because of the manner in which it was calculated, the entire amount is unreasonable. Respondent argues that if restitution is ordered, that it only be for the amount of the fee which was in excess of that which would be reasonable for the services performed.

This case differs from both Sylvan and Wimmershoff in one critical

respect. In both of those cases there was evidence before the court of what would be a reasonable fee in the situation and thus, once the court determined that restitution was appropriate, the exact dollar amount could be determined without difficulty. That is not the case here. There was no evidence presented to the Panel as to what amount, if any, had been earned by Respondent prior to termination of his services. The Panel is not in a position to make that determination. The Panel is thus faced with a choice of declining to make an order for restitution, or ordering restitution of the entire amount paid by complainant. In making the determination that refund of the entire amount is appropriate we have looked to the terms of the fee agreement drafted by Respondent and his approach to Ms. Gibbs request for refund.

It is clear that the only service for which Respondent was retained by Ms. Gibbs was the negotiation of her debt with American Express. Had she continued with the plan proposed by Respondent, and had he successfully renegotiated her debt, the amount of the fee which she would have paid would have been calculated based upon a percentage of the savings. But for the provisions in the agreement which we have found to be in violation of Rule 1.5 of the Vermont Rules of Professional Conduct, Respondent's fee agreement provides for no fees other than those based upon savings. The evidence was clear that Respondent never even began to negotiate the debt and that no reduction was obtained. In addition, when Respondent wrote to Ms. Gibbs in August of 2001, he relied solely on the termination clause of the agreement. He made no claim that he had performed any services of value to Ms. Gibbs.

Looking at the terms of the agreement, other than those we have found to be in violation of the Vermont Rules of Professional Conduct, we find that it is appropriate that the entire amount paid by Ms. Gibbs be refunded to her. The sole remaining issue before the Panel is that of who should make the restitution. Respondent argues that restitution should be made by the law firm, not by him personally. He argues that since Ms. Gibbs lived in New Jersey she would have been represented not by him but by an employee attorney licensed in New Jersey. He also argues that payments by Ms. Gibbs were made to and received by the Law Centers for Consumer Protection, a trade name for the Daly, Murphy & Sinnott Law Centers, PLC, and are not covered by A.O.9, Rule 8 (A)(7) which speaks of "reimbursement of retainers, fees, trust funds, or other monies collected or received by the lawyer. . ." (Emphasis added). Respondent argues that no funds were received by him personally. All funds were paid to the law firm, a separate legal entity and that any order of restitution should run to that legal entity not to Respondent personally.

Respondent's argument here is particularly weak since he is the sole member of the law firm, and thus we might assume is in a position to compel any equitable adjustment from the firm that he might believe appropriate. It would be the height of formalism to allow a lawyer to hide behind the use of a business entity to avoid his basic obligations.

More importantly, the law firm is not a party to these proceedings and not subject to the jurisdiction of the disciplinary system. A.O.9 Rule 5(A) provides that "[t]he Board shall have jurisdiction over . . any lawyer admitted in the state." The rule makes no provision for supervision over or discipline of any legal entity used by an attorney. We believe that in making the rules with respect to restitution the Supreme Court was aware of the fact that it is common practice for

attorneys to do business as either corporations or partnerships. We believe that when the Court spoke of restitution of funds "collected or received" by an attorney, it intended to include funds collected by the attorney and paid over to the legal entity. It is the lawyer, not the disciplinary system, who has the ability to compel repayment by the legal entity.

We found no cases bearing directly on the issue of responsibility for restitution in an attorney discipline case, but we note that the court in Matter of Lehman, 690 N.E.2d 696 (Ind. 1997), ordered an associate in a firm to make restitution without discussion of the issue of liability of the employing firm.

Order

For the foregoing reasons, the Panel orders that Respondent Howard Sinnott be PUBLICLY REPRIMANDED for violation of Rule 1.5 of the Vermont Rules of Professional Conduct and he is hereby ordered to repay to Ms. Gibbs the sum of $1200 within 30 days of the date of this order.

Dated: 4/7/03

HEARING PANEL NO. 2

/s/
_____
Douglas Richards, Esq., Chair

/s/
_____
Paul Ferber, Esq.

/s/
_____
Michael H. Filipiak

In re Sinnott (2003-170)

2004 VT 16

[Filed 12-Feb-2004]

ENTRY ORDER

2004 VT 16

SUPREME COURT DOCKET NO. 2003-170

NOVEMBER TERM, 2003

In re Howard Sinnott, Esq.	}	APPEALED FROM:
	}	
	}	
	}	Vermont Professional
	}	Responsibility Board

}
} PRB FILE No. 2001.190
Decision No. 43

PRB Hearing Panel No. 2

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

¶ 1. This Court reviews, sua sponte, the Professional Responsibility Board Hearing Panel's conclusion that respondent violated Vermont Rules of Professional Conduct 1.5 by charging an unreasonable fee, and its recommendations that respondent be publicly reprimanded and ordered to personally make restitution. We affirm the panel's conclusion and accept its penalty recommendations.

¶ 2. Respondent is a licensed attorney in Vermont and New York. At all times relevant to this complaint he was the sole member of the Bennington law firm Daly & Sinnott Law Centers, PLLC, also known as The Law Centers for Consumer Protection. Respondent's practice consists almost exclusively of assisting clients reduce the amount of unsecured debt they owe to various creditors such as credit card companies. Respondent's firm enrolls clients in its debt reduction program. Under the program agreement, the firm makes automatic deductions from a client's bank account. The client funds accumulate in either the "office fees account" or the "creditor reserve account" until they reach a level that makes debt settlement negotiation viable.

¶ 3. New Jersey resident Juanita Gibbs turned to respondent's firm in November 2000 when she was facing collection of an $18,000 credit card debt owed to American Express. She called respondent's firm and spoke with Milton Smith, a customer service employee who completed a client intake and discussed Gibbs's financial situation, including her American Express debt, monthly income and expenses.

¶ 4. Shortly after Gibbs's phone conversation with Smith, she received a Legal Representation Agreement, a Notice of Representation, and a Credit Notification Letter. The Legal Representation Agreement that Gibbs signed authorized the firm to negotiate her American Express debt. It also authorized the firm to withdraw $300 per month from her bank account. The agreement provided that for the first four months the sum of $284 would be allocated to the monthly office fee, zero would be allocated to the creditor reserve fund (for debt settlement), and $16 would be charged for a monthly account maintenance fee. For the next thirteen months $142 would be allocated to the monthly office fee, $142 to the creditor reserve fund, and $16 to the monthly maintenance fee. Thereafter, for the next nineteen months $284 would be allocated to the creditor reserve and $16 to account maintenance.

¶ 5. The agreement also contained the following clause which is central to this proceeding:

> I understand that the Law Center will necessarily incur administrative costs as a result of accepting me as a client, expenses as a result of negotiations with creditors, and it may incur costs for representing me in litigation, all of which would have been included in the 28% reduction of claims fees resulting

> from the completion of the Program. I agree that if I do not complete, the Law Center will have earned from office fee payments $500 a month in administrative costs with a maximum of $1500 and $150/hr. in litigation costs, with a maximum of $1500 per case.

¶ 6. The panel found that respondent's firm completed a number of "routine" and automated tasks in the course of representing Gibbs. Most of these tasks consisted of mailing out form letters to Gibbs and her creditor and responding to Gibbs's occasional telephone inquiries as to the status of her case. On February 20, 2001, Gibbs called the firm and was told that the firm was negotiating on her behalf. On the next day, Gibbs received a summons from American Express related to her debt. In early March, she informed the firm in writing that she was withdrawing from the program and was requesting an explanation of the $500 monthly administrative costs called for in the fee agreement. The panel made no express finding as to the amount of hours that the firm spent on completing all of these tasks, but stated that it viewed respondent's estimate of between three and four hours of nonattorney time as "more than generous."

¶ 7. Five months after Gibbs's letter of withdrawal and request for refund, respondent replied with a letter of his own. He stated:

> This letter accounts for your financial transactions with the Law Centers. Pursuant to your written retainer agreement, you made monthly payments for debt settlement and attorney's fees of $284. 00 Before you discharged us as your attorneys, you in fact made four such payments, adding to a total of $1,136.00. You also agreed to pay a $16.00 per month account maintenance fee. You also explicitly agreed in the event of early discharge (i.e. before your debt could be settled) that you would be obligated to pay an administrative fee of $500.00 per month to be capped at a $1,500.00 total. Since you remained in the program for four months, we properly imposed this fee of $1,500.00, although we will not seek remuneration from you above and beyond the $1,136 paid by you to us.

The letter goes on to state that respondent would be glad to discuss the situation with Gibbs in an attempt to accommodate her concerns about the fee in light of her short tenure as a client.

¶ 8. When the four months worth of $16.00 monthly account maintenance fees are added to the other fees, respondent's firm had collected $1200 from Gibbs. Respondent testified that his firm would have been justified in charging the full $1500 termination fee called for by the agreement. Respondent also testified, and the panel found, that the "Fees Earned in Event of Termination" Clause contained in the Legal Representation Agreement that Gibbs signed was the only basis for the fee actually charged as well as respondent's claim of entitlement to the additional $300 which he could have, but chose not to charge Gibbs.

¶ 9. The panel heard testimony from respondent and his office manager that the firm does more work for those clients that have multiple creditors than it does for those clients like Gibbs, who sought help with only one of her debts. Respondent testified that it was not unusual for a client to withdraw from the program before the client's debts were negotiated. Nonetheless, the testimony and evidence indicated that respondent used the same fee agreement for almost all of his approximately

7000 clients regardless of whether they were in the program for years or just for a few months.

¶ 10. Based on the foregoing findings, the panel concluded that respondent had violated Vermont Rules of Professional Conduct 1.5 by charging an unreasonable fee which it labeled as a "non-refundable retainer." We review this case on our own motion pursuant to A.O. 9, Rule 11(E). On review, we will accept the panel's findings of fact unless a party demonstrates that these findings are clearly erroneous. In re Blais, 13 Vt. L. Wk. 376, 377, 817 A.2d 1266, 1269 (2002) (mem.). Similarly, the panel's findings, "whether purely factual or mixed law and fact, are upheld if they are 'clearly and reasonably supported by the evidence.' " In re Anderson, 171 Vt. 632, 634, 769 A.2d 1282, 1284 (2000) (mem.) (quoting In re Berk, 157 Vt. 524, 527, 602 A.2d 946, 947 (1991)). While we afford deference to the panel's recommendations, this Court renders the ultimate decision as to the sanction. Blais, 13 Vt. L. Wk. at 377, 817 A.2d at 1269.

¶ 11. The panel began its analysis by distinguishing nonrefundable retainers from general retainers, which are paid solely to ensure the availability of a lawyer for service to the client at any time. It described the former type of retainer as an advanced payment of fees that are not refundable in the event that the client terminates the relationship prematurely - even if the lawyer has not earned all or part of the fee yet. The panel noted that a client is entitled to discharge the attorney at any time with or without cause. It looked to decisions from other jurisdictions that involved similar fees and concluded that such fees were unethical because the possibility of forfeiting the advanced fee restrained a client's ability to terminate the relationship. While there may be valid comparisons between the fee agreement in this case and the fees charged in reported nonrefundable retainer cases from other jurisdictions, the classification of respondent's fee as a nonrefundable retainer is unnecessary to our decision. Accordingly, we do not adopt the panel's conclusion on this issue and reserve judgment for another case that presents the issue squarely. (FN1) See Graham v. Town of Duxbury, 173 Vt. 498, 499, 787 A.2d 1229, 1232 (2001) (mem.) (this Court's review of conclusions of law is plenary and nondeferential); cf. Gochey v. Bombardier, Inc., 153 Vt. 607, 613, 572 A.2d 921, 925 (1990) (Supreme Court "may affirm a correct judgment even though the grounds stated in support of it are erroneous.").

¶ 12. Distilling the panel's decision to its essence and excluding the extraneous discussion of nonrefundable retainers, we are persuaded that the panel's reasoning clearly and reasonably supports its conclusion that the respondent's fee was unreasonable. As the panel stated, "the key issue here is whether the attorney is providing services of value to the client for which the attorney is entitled to be paid or whether . . . the lawyer is charging the client for doing nothing." The panel concluded that the fee violates Vermont Rules of Professional Conduct 1.5 because it was charged without regard to whether the attorney performed any work for the client or whether services provided had any value to the client. In other words, the fee did not account for the "time and labor required," Vt. Rules of Prof'l Conduct 1.5(a)(1), or the "results obtained," Vt. Rules of Prof'l Conduct 1.5(a)(4). (FN2)

¶ 13. The clear and convincing evidence in the record supports the panel's conclusion that the fee calculation had nothing to do with work

performed and that the work performed was of no value to the client. Respondent admitted that the fee was based solely on the terms of the representation agreement and not actual costs incurred representing Gibbs. Neither respondent nor anyone else at his firm reviewed Gibbs's file at the time of withdrawal to ascertain whether the charges were reasonable. Respondent could not even introduce any evidence that showed he historically incurred $500 per month in administrative costs per early-termination client. The panel found that Gibbs retained respondent solely for the purpose of negotiating her debt with American Express. The panel further found that respondent at no time initiated negotiations to settle Gibbs's debt with American Express, and not surprisingly, respondent did not otherwise obtain a reduction of Gibbs's debt. Nothing in the record indicates that any of the "automated" or "routine" tasks completed in the three to four hours the firm spent working on Gibbs's behalf did anything to advance the goals of the representation or facilitate the disposition of her case. Ultimately, Gibbs negotiated a payment plan directly with American Express without any assistance from respondent or his firm.

¶ 14. Rule 1.5 commands that a lawyer's fee be "reasonable." Vt. Rules of Prof'l Conduct 1.5(a). A lawyer who charges an unreasonable fee in violation of Vermont Rules of Professional Conduct 1.5 commits misconduct, and is subject to discipline. See Vt. Rules of Prof'l Conduct 8.4(a) (violation of a Rule of Professional Conduct constitutes professional misconduct). Rule 1.5 enumerates eight factors to be considered in determining the reasonableness of a fee. It makes no sense to apply these factors, however, where, as here, the panel has found that the fee was calculated without regard to actual work performed, and was instead based only on a boilerplate agreement given to all clients.

¶ 15. Respondent argues that disciplinary counsel did not meet his burden of showing a violation by clear and convincing evidence because he did not produce evidence corresponding to each of the eight factors. For example, respondent alleges that disciplinary counsel should have produced expert testimony on what the prevailing legal rates in New Jersey were for the type of work Gibbs's case required because New Jersey, Gibbs's home jurisdiction, was the relevant locality. See Vt. Rules of Prof'l Conduct 1.5(a)(3) (reasonableness may depend on the fee customarily charged in the locality for similar work). Instead of being what respondent termed as a "particularly glaring" example of disciplinary counsel's failure to meet his burden, it is an illustration of the impracticality of examining all the rule factors in this case. The evidence shows that neither respondent nor any lawyer employed by him performed any legal work in New Jersey. We, therefore, fail to see what light expert testimony (FN3) or other evidence on New Jersey legal rates could have shed on the panel's contemplation of this case.

¶ 16. Respondent seeks to justify this fee on the theory that it was based on a valid contract that Gibbs freely and knowingly signed. This argument demonstrates respondent's failure to comprehend the effect of Vermont Rules of Professional Conduct 1.5(a); lawyers, unlike some other service professionals, cannot charge unreasonable fees even if they are able to find clients who will pay whatever a lawyer's contract demands.

¶ 17. Respondent argues vigorously that the panel violated his due process right to have fair notice of the charge against him by basing its decision on a finding that his agreement constituted the unethical use

of a nonrefundable retainer - a charge that was not contained in the complaint against him. Our decision renders respondent's due process argument moot. Unlike the panel, we express no opinion as to whether the fee agreement was a nonrefundable retainer. We base our conclusion, that respondent violated Vermont Rules of Professional Conduct 1.5(a), on the case as presented by both sides and the facts as found by the panel - not on a legal theory that neither of the parties argued below or briefed on review.

¶ 18. Disciplinary counsel also charged respondent with violating Vermont Rules of Professional Conduct 1.15(b). By a two-to-one vote, the panel held that the rule did not apply to respondent's situation. The rule generally covers a lawyer's "safekeeping" duties with respect to funds or property that comes into the lawyer's possession but belongs to a client or third party. Vt. Rules of Prof'l Conduct 1.15(b). The first sentence of the relevant subsection states that "[u]pon 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." Id. This language implicates situations where an attorney receives property or funds from a source other than the client. The panel cited tort settlements or estate proceeds as examples. The notification requirement would make no sense in the current context where a client has paid fees directly to the attorney from her own account and would presumably be aware of when and how much money he or she had paid to the attorney. While parts of the subsection, when read in isolation, may appear to cover fee situations, such a reading is inconsistent with the intent of Vermont Rules of Professional Conduct 1.15.

¶ 19. Both parties accept the panel's recommendation that we sanction respondent with public reprimand. In arriving at this sanction, the panel looked to American Bar Association Standards on Imposing Lawyer Sanctions§ 7.3 (1991) (ABA Standards) which recommends public reprimand for lawyers who negligently engage in a single instance of conduct that amounts to a violation of the lawyer's professional duty. The panel also considered respondent's full and free disclosures to disciplinary counsel and his lack of prior disciplinary record as mitigating factors. See ABA Standards § 9.32(a), (e). We see no reason to impose a different or additional sanction. We trust, however, that if and when respondent returns to law practice, he will take care to see that his general fee structure comports with the views expressed in this opinion. (FN4)

¶ 20. The panel also recommended that respondent be ordered to personally pay restitution of the full $1200 in variously labeled fees he collected from Gibbs. Respondent agrees that Gibbs should receive any portion of the fee found to be excessive, but argues that he is entitled to an unspecified portion of the $1200 as quantum meruit compensation for the services his firm actually provided Gibbs. The panel noted that it had no evidence on which it could determine what fee would have been reasonable in this case. Nonetheless, the panel concluded that the work respondent's firm performed for Gibbs did nothing to advance the sole goal of the representation: settling Gibbs's debt with American Express. We agree with the panel's apparent conclusion that respondent at no time performed any service of value to Gibbs and thus was not entitled to any remuneration.

¶ 21. The Court also agrees with the panel's recommendation that respondent personally make restitution to Gibbs. Respondent objects and argues that his firm, the Law Centers for Consumer protection, should make restitution because Gibbs paid fees to the firm's accounts, and not to

respondent's personal accounts. Respondent argues that the funds at issue are not covered by A.O. 9, Rule 8(A)(7) that provides for "reimbursement of retainers, fees, trust funds, or other monies collected or received by the lawyer." (Emphasis added.) The panel correctly points out that it has jurisdiction over individual lawyers admitted to practice in Vermont, but lacks jurisdiction over the legal entities those lawyers create to facilitate their practice. The panel notes that it "would be the height of formalism to allow a lawyer to hide behind the use of a business entity to avoid his basic obligations." It would be highly inequitable for us to hold that the reimbursement sanction provided for in A.O.9, Rule 8(A)(7) applies only to those lawyers who practice outside of the firm context, and not to the many lawyers who have, for whatever reason, organized their practice under some other entity like a legal corporation. As the board pointed out, the lawyer is in the best position to compel repayment from the legal entity. This is especially true in the present case because respondent is the sole member of his firm.

Affirmed.

BY THE COURT:

_____
Jeffrey L. Amestoy, Chief Justice

_____
Denise R. Johnson, Associate Justice

_____
Marilyn S. Skoglund, Associate Justice

_____
Frederick W. Allen, Chief Justice (Ret.),
Specially Assigned

_____
Ernest W. Gibson III, Associate Justice (Ret.), Specially Assigned

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Footnotes

FN1. Disciplinary counsel's complaint did not charge respondent with the use of a nonrefundable retainer. Neither disciplinary counsel, nor respondent presented evidence or legal arguments on this issue before the

panel. The panel raised this issue, sua sponte, for the first time in its decision. This issue has implications in Vermont beyond the resolution of this case, and we agree with both parties that it is too important to consider on appeal in a case that lacks adversary presentation on the issue.

FN2. We take care to distinguish the use of fixed or flat fees for all-inclusive representation. For example, some attorneys will charge a fixed amount to draft a will or represent a client in a divorce. In such instances, the fees are generally calculated based on the lawyer's historical assessment of the time and labor required in completing the task, as well as the standardized value delivered to the client when the results are obtained. See Vt. Rules of Prof'l Conduct 1.5(a)(1),(4),(8) (reasonableness of a fee may depend on time and labor required, the results obtained and whether the fee is fixed). While there may be specific instances where a lawyer charges unreasonable fixed fees for all-inclusive representation packages, this opinion should not be read to generally prohibit the use of such fee structures. The current case differs in that the attorney only assessed the charge in question when the client terminated the representation prior to the completion of the legal task.

FN3. Without citation to authority, respondent asserts that

> [r]eported cases in which attorneys are adjudicated to have violated the professional responsibility rules by charging an unreasonable fee rely on expert testimony. Whether an expert testifies simply that the fee charged was unreasonable, or whether the expert offers an opinion of what should have reasonably been charged under the circumstances, the adjudicative body is not asked to speculate . . . about the propriety of the fee.

While it may be true that there are reported professional responsibility cases that rely on expert testimony, we have not previously established that expert testimony is required to meet the burden of production to show a violation. We decline respondent's invitation to do so here. As in other areas of law, expert testimony may be used to assist the trier of fact determine a fact in issue or understand evidence that is outside the expertise or perception of the fact finder. See V.R.E. 702. The facts of this case were so straightforward that an expert would do little to enhance the panel's understanding of the case. Though this will not always be the case in professional responsibility cases generally, or in cases brought under Vermont Rules of Professional Conduct 1.5(a), it is all the more reason to allow the unique circumstances of each case to dictate the kind and quantum of evidence needed to show a violation. See Reporter's Note V.R.E. 702 (expert testimony is of "no greater probative weight" than other testimony and its necessity to sustain findings is determined by this Court on a cases-by-case basis).

FN4. At oral argument respondent's counsel informed the Court that respondent has indefinitely suspended his law practice.