

VIRGINIA:

BEFORE THE TENTH DISTRICT SUBCOMMITTEE, SECTION II
OF THE VIRGINIA STATE BAR

IN THE MATTER OF
SUE ELLA EASTERLING KOBAK

VSB Docket Nos. 07-102-070344, 07-102-070249, 07-102-064898, 07-102-070665,
and 08-102-071254

SUBCOMMITTEE DETERMINATION
(PUBLIC REPRIMAND WITH TERMS)

On February 6, 2009, a meeting in this matter was held before a duly convened Tenth District Subcommittee, Section II consisting of Elsey Harris, III, Esq., chair, Stanford T. Mullins, Esq., member and Linda F. Rasnick, lay member.

Pursuant to Part 6, Section IV, Paragraph 13.G.4. of the Rules of the Virginia Supreme Court, the Tenth District Subcommittee, Section II of the Virginia State Bar hereby serves upon the Respondent the following Public Reprimand with Terms:

I. FINDINGS OF FACT

1. Respondent was at all times relevant an attorney licensed to practice law in the Commonwealth of Virginia.
2. At all times relevant, Respondent had a private law practice and drew clients from the general public.
3. As part of her private law practice, Respondent represented clients in the areas of personal injury, decedent's estates, and trust administration. Respondent also represented special education children on a pro bono basis.
4. As part of the nature of her law practice, Respondent maintained at least one escrow and trust account to handle client funds.
5. Respondent also maintained a general operating account for her law practice.
6. Respondent was required to perform audits, reconciliations, and periodic trial balances

balances on her escrow and trust account(s), as required by Rule 1.15 of the Virginia Rules of Professional Conduct, and was required to perform other administrative functions in accordance with the Virginia Rules of Professional Conduct. Respondent slowly over a seven year period delegated more and more responsibility for such tasks to her administrative assistant, Stephanie Williams. By trusting and in turn placing Ms. Williams in charge of reviewing and administering Respondent's accounts and books, Respondent gave Stephanie Williams more and more access to these accounts and books.

7. According to the Respondent and the investigation to date, it now appears that Stephanie Williams, during that seven year period and especially from the latter part of 2005, intentionally took money out of Respondent's office and personal accounts. It further appears that Ms. Williams diverted funds Respondent was holding in Trust for a client (Client A). Specifically, it appears that Ms. Williams used forged documents to take Client A's money out of a Certificate of Deposit and out of Respondent's Trust Account. Because Respondent delegated her responsibilities under the Rules of Professional Conduct to monitor her own accounts, and because of what Respondent considers to be the negligence and recklessness of local banks, Respondent was unaware of the diversion of the funds from Client A.

8. Beginning March 20, 2007, Ronald L. Crabtree, Senior Vice President for Lee Bank & Trust Company notified Respondent of the following overdrafts on trust account # 392804:

- a. On March 14, 2007, R had an overdraft of \$134.63.
- b. On April 5, 2007, R had an overdraft of \$537.71.
- c. On April 11, 2007, R had an overdraft of \$453.04.
- d. On April 12, 2007, R had an overdraft of \$1,158.04.
- e. On May 16, 2007, R had an overdraft of \$446.26.
- f. On June 19, 2007, R had an overdraft of \$63.48.

9. The Virginia State Bar subsequently commenced an investigation to determine the reason for the overdrafts. Stephanie Williams prepared and submitted the initial responses to the Virginia State Bar, which she falsely represented were by and from Respondent. Because Respondent had delegated her responsibilities to Stephanie Williams under the Rules of

Professional Conduct and because of the resulting conduct of Ms. Williams, Respondent was unaware of the overdrafts or the Bank's notifications of the overdrafts. Respondent was also unaware of the Bar's correspondence regarding the investigation and Ms. Williams' responses in Respondent's name.

10. Respondent only learned of the Bar's investigation in an August 2007 conversation with the Bar's investigator to schedule an interview. Respondent advised the investigator that she was unaware of any overdrafts to her trust account and that she had not received any correspondence regarding the overdrafts, either from the Bank or the Bar.

11. Respondent did not make the withdrawals from her trust account that caused the overdrafts. Respondent states that all instances of insufficient or nonsufficient funds occurred because of fraudulent checks issued on her account.

12. Respondent subsequently contacted the Virginia State Police because Respondent believed that Stephanie Williams had stolen from her. The Virginia State Police assigned Special Agent James Scott to investigate the matter.

13. Respondent has fully cooperated with the Bar's investigation since learning of it in August 2007. Respondent produced three computers used in her office to the Bar's investigator. These computers were imaged. The hard drive used by Stephanie Williams had been damaged so badly that no information can be recovered. Additionally, several bags of documents were shredded before the investigators from the Bar and the Virginia State Police arrived at Respondent's office. Respondent did not shred these documents and was unaware that they were shredded. It appears that Ms. Williams destroyed all records (hard copy and computerized) pertaining to Respondent's personal and business dealings.

14. Because of Respondent's failure to discover and thereby prevent Ms. Williams' actions, Respondent, during the Bar's investigation, could provide little or no documentation regarding her bank accounts, including her Trust and operating accounts.

15. Because of the nature of the defalcation and cover-up by Stephanie Williams, it is difficult to quantify the amount of money stolen from Respondent's accounts. The Virginia State Police has made an estimate of the amount taken from all of Respondent's accounts including her operating and personal accounts. The losses from Respondent's non-trust accounts are not directly relevant to this Disposition, but they are illustrative of the nature and breadth of the defalcation.

16. Respondent maintains that only one client has been affected by the thefts. Respondent is in communication with her bonding company, her malpractice insurance carrier, and with more than one Bank and will seek restitution in criminal proceedings anticipated against Stephanie Williams, all in Respondent's effort to reimburse Client A's funds. Respondent will herself reimburse Client A if Respondent cannot timely recover from any of these entities and/or persons.

17. Respondent, due to poor health, was retiring her law practice when she first learned of the defalcations. Respondent seeks to continue the practice of law in the Commonwealth of Virginia solely to represent special education children on a *pro bono* basis. Respondent has stated that she is phasing out her practice and that she only has two to three more files to complete. Upon completion of these files, Respondent intends to limit her practice solely to the representation of special needs children. As a practicing attorney in Virginia for 20 years and having had a client Trust account for the past 15 years, Respondent asserts this is the first incident where monies that Respondent held in Trust for a client was diverted and stolen.

Respondent regrets this incident and by the nature of her oath as a lawyer accepts her lawyer responsibilities to address the consequences of the diversion and theft brought about by her once trusted long time employee. Respondent did not intentionally violate any of the Rules of Professional Conduct, acknowledges that she had direct supervisory authority over Stephanie Williams, and acknowledges that over the years of association with Stephanie Williams a more rigorous adherence to the record keeping requirements of Rule 1.15 of the Rules of Professional Conduct and delegations of fewer of Respondent's record keeping duties to Stephanie Williams may have alerted Respondent earlier to the diversion of funds Respondent was holding for Client A.

18. Respondent has retained a certified public accountant to make sure that her escrow and trust account record keeping is in accordance with the requirements of Rule 1.15 of the Rules of Professional Conduct.

II. NATURE OF MISCONDUCT

Such conduct by Sue Ella Easterling Kobak constitutes misconduct in violation of the following provisions of the Rules of Professional Conduct:

RULE 1.15 Safekeeping Property

- (e) Record-Keeping Requirements, Required Books and Records. As a minimum requirement every lawyer engaged in the private practice of law in Virginia, hereinafter called "lawyer," shall maintain or cause to be maintained, on a current basis, books and records which establish compliance with Rule 1.15(a) and (c). Whether a lawyer or law firm maintains computerized records or a manual accounting system, such system must produce the records and information required by this Rule.
 - (1) In the case of funds held in an escrow account subject to this Rule, the required books and records include:

- (i) a cash receipts journal or journals listing all funds received, the sources of the receipts and the date of receipts. Checkbook entries of receipts and deposits, if adequately detailed and bound, may constitute a journal for this purpose. If separate cash receipts journals are not maintained for escrow and non-escrow funds, then the consolidated cash receipts journal shall contain separate columns for escrow and non-escrow receipts;
 - (ii) a cash disbursements journal listing and identifying all disbursements from the escrow account. Checkbook entries of disbursements, if adequately detailed and bound, may constitute a journal for this purpose. If separate disbursements journals are not maintained for escrow and non-escrow disbursements then the consolidated disbursements journal shall contain separate columns for escrow and non-escrow disbursements;
 - (iii) subsidiary ledger. A subsidiary ledger containing a separate account for each client and for every other person or entity from whom money has been received in escrow shall be maintained. The ledger account shall by separate columns or otherwise clearly identify escrow funds disbursed, and escrow funds balance on hand. The ledger account for a client or a separate subsidiary ledger account for a client shall clearly indicate all fees paid from trust accounts;
 - (iv) reconciliations and supporting records required under this Rule;
 - (v) the records required under this paragraph shall be preserved for at least five full calendar years following the termination of the fiduciary relationship.
- (2) in the case of funds or property held by a lawyer or law firm as a fiduciary subject to Rule 1.15(d), the required books and records include:
- (i) an annual summary of all receipts and disbursements and changes in assets comparable to an accounting that would be required of a court supervised fiduciary in the same or similar capacity. Such annual summary shall be in sufficient detail as to allow a reasonable person to determine whether the lawyer is properly discharging the obligations of the fiduciary relationship;
 - (ii) original source documents sufficient to substantiate and, when necessary, to explain the annual summary required under (i), above;

- (iii) the records required under this paragraph shall be preserved for at least five full calendar years following the termination of the fiduciary relationship.
- (f) Required Escrow Accounting Procedures. The following minimum escrow accounting procedures are applicable to all escrow accounts subject to Rule 1.15(a) and (c) by lawyers practicing in Virginia.
 - (2) Deposits. All receipts of escrow money shall be deposited intact and a retained duplicate deposit slip or other such record shall be sufficiently detailed to show the identity of each item;
 - (3) Deposit of mixed escrow and non-escrow funds other than fees and retainers. Mixed escrow and non-escrow funds shall be deposited intact to the escrow account. The non-escrow portion shall be withdrawn upon the clearing of the mixed fund deposit instrument;
 - (4) Periodic trial balance. A regular periodic trial balance of the subsidiary ledger shall be made at least quarter annually, within 30 days after the close of the period and shall show the escrow account balance of the client or other person at the end of each period.
 - (i) The total of the trial balance must agree with the control figure computed by taking the beginning balance, adding the total of monies received in escrow for the period and deducting the total of escrow monies disbursed for the period; and
 - (ii) The trial balance shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.
 - (5) Reconciliations.
 - (i) A monthly reconciliation shall be made at month end of the cash balance derived from the cash receipts journal and cash disbursements journal total, the escrow account checkbook balance, and the escrow account bank statement balance;
 - (ii) A periodic reconciliation shall be made at least quarter annually, within 30 days after the close of the period, reconciling cash balances to the subsidiary ledger trial balance;
 - (iii) Reconciliations shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.

- (6) Receipts and disbursements explained. The purpose of all receipts and disbursements of escrow funds reported in the escrow journals and subsidiary ledgers shall be fully explained and supported by adequate records.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

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

- (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

III. PUBLIC REPRIMAND WITH TERMS

Accordingly, it is the decision of the subcommittee to offer the Respondent an opportunity to comply with certain terms and conditions, compliance with which will be a predicate for the disposition of a Public Reprimand with Terms of this complaint. The terms and conditions are:

- (1) Within 30 days of the entry of the Subcommittee's Disposition in this matter, Respondent shall provide Bar Counsel with the name of the Certified Public Accountant ("CPA") that will conduct the audits and inspections encompassed in this Agreed Disposition. The CPA shall, if he/she/the firm has not done so, certify familiarity with the requirements of Rule 1.15 of the Rules of Professional Conduct. The CPA must be pre-approved by Bar Counsel to review Respondent's attorney trust account record-keeping, accounting, and reconciliation methods and procedures to ensure compliance with Rule 1.15 of the Rules of Professional Conduct. In the event the CPA determines that Respondent is in compliance with Rule 1.15, the CPA shall so certify in writing to Respondent and the Virginia State Bar. In the event the CPA determines Respondent is NOT in compliance with Rule

with Rule 1.15, the CPA shall notify Respondent and the Virginia State Bar, in writing, of the measures Respondent must take to bring herself into compliance with Rule 1.15. Respondent shall provide the CPA with a copy of the Agreed Disposition at the outset of the CPA's engagement.

- (2) Respondent's CPA shall provide as soon as practicable a report of his or her audit of all of Respondent's operating and trust accounts, using Generally Accepted Accounting Principles ("GAAP") for the last seven years (the period of time during which Respondent employed Ms. Williams). In order to assist the CPA, Respondent shall share with the CPA any and all information she has, and she shall request from the State Police any information they have been able to recreate. It is understood that the task will be difficult given the destruction of computer and hard copy data. If the information cannot be audited, the CPA shall so state in writing and shall include the time period for which the information cannot be audited.
- (3) Respondent is obligated to pay when due the CPA's fees and costs for services (including provision to the Virginia State Bar and to Respondent of information concerning the matter).
- (4) In the event the CPA determines that Respondent has not complied with Rule 1.15, Respondent shall have forty-five (45) days following the date the CPA issues a written statement of the measures Respondent must take to comply with Rule 1.15 within which to bring her into compliance. The CPA shall then be granted access to Respondent's office, books, and records, following the passage of the forty-five (45) day period to determine whether Respondent has brought herself into compliance as required. The CPA shall thereafter certify in writing to the Virginia State Bar and to Respondent either that Respondent has brought herself into compliance with Rule 1.15 within the forty-five (45) day period or that she has failed to do so. Respondent's failure to comply with Rule 1.15 as of the conclusion of the forty-five (45) day period shall be considered a violation of the Terms set forth herein.
- (5) Unless an extension is granted by the Bar for good cause shown to accommodate the CPA's schedule, the Terms specified in paragraphs 1, 2, and 3, shall be completed no later than June 30, 2009.
- (6) In June 2010, and no later than June 30, 2010, the CPA engaged pursuant to paragraph 1 shall reassess Respondent's attorney's trust account record-keeping, accounting, and reconciliation methods and procedures to ensure continued compliance with Rule 1.15 of the Rules of Professional Conduct. In the event the CPA determines that Respondent has NOT remained in compliance with this Rule, such non-compliance will be considered a violation of the Terms set forth herein.

- (7) Within 30 days of the entry of the Subcommittee's Disposition in this matter, Respondent shall provide a list to Bar Counsel of all financial institutions in which she maintains trust, escrow, fiduciary or other account to comply with CRESPA, and shall promptly notify Bar Counsel each time she opens a new one for a period of five years.
- (8) Respondent shall attend at least four hours of CLE in law office management, trust account compliance, or other related CLE and provide proof of attendance to Bar Counsel. In addition, Respondent shall take an additional 6 hours of CLE within a one year period from the date of the Subcommittee's Determination. Such hours shall be in addition to Respondent's mandatory CLE requirements.
- (9) Respondent warrants and represents to the Bar that to the best of her knowledge and belief the loss identified to Client A in the approximate amount of \$58,088.15 constitutes the total loss caused by Ms. Williams' actions. To the extent that Respondent discovers other defalcations to any client of Respondent, either in the course of the audits of her books and records, or otherwise, and to the extent the CPA discovers such defalcations, Respondent shall immediately, and no later than 10 days of learning of the loss, report the loss in writing to the office of Bar Counsel.
- (10) Respondent shall make full restitution, and provide proof to the Office of Bar Counsel of the same, to Client A within a period of five years from the date of the Subcommittee's disposition.
- (11) For the next five years, Respondent shall submit to the office of Bar Counsel an annual report detailing the payments Respondent has made to any affected client(s), including Client A, the date(s) such payment(s) have been made, and Respondent shall submit proof to the office of Bar Counsel that such payment(s) have been made. Respondent shall also include within the annual report a statement attesting that no further claims have been discovered or that additional claims have been discovered, the amount of such claims, the date of discovery, and the extent to which such claims have been paid. If additional claims are discovered, and if Respondent does not attest to the Bar that such claims have been paid, investigation shall be conducted to determine the nature of the loss. If the loss resulted from Ms. Williams' actions and Respondent's failures described herein, then Respondent shall provide Bar Counsel with a plan for restitution, and Respondent will remain obligated to make such restitution.

Upon satisfactory proof that such terms and conditions have been met, this matter shall be closed. If the terms and conditions are not met by the specified dates, this subcommittee shall impose the alternative sanction of a Certification for Sanction Determination for the imposition of

of an alternative disposition of a specific period of suspension of license pursuant to Part Six, Section IV, Paragraph 13.G.5. of the Rules of Court. The sole issue to be determined by the Tenth District Section II Committee will be Respondent's compliance with the terms herein. The Respondent shall bear the burden of proof by clear and convincing evidence that she has met all the terms. Respondent has waived her right to have a three judge panel pursuant to Va. Code Ann. Section 54.1-3900 *et seq.* hear such matter.

Any notice required to be given by Rule to Show Cause shall be by Certified Mail, Return Receipt Requested to Respondent at her address of record with the Virginia State Bar. Any notice required shall be deemed given and complete by Bar Counsel depositing such notice as set forth herein.

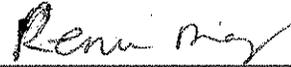
Pursuant to Part Six, Section IV, Paragraph 13.B.8.c. of the Rules of the Virginia Supreme Court, the Clerk of the Disciplinary System shall assess costs.

TENTH DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

By Elsy A. Harris III
Elsy Allen Harris, III
Chair

CERTIFICATE OF SERVICE

I certify that on 23rd of February, 2009, I mailed by Certified Mail, Return Receipt Requested, a true and correct copy of the Subcommittee Determination PUBLIC Reprimand with Terms to Sue Ella Easterling Kobak, Esquire, Respondent, at P.O. Box 428, Pennington Gap, VA 24277-0428, Respondent's last address of record with the Virginia State Bar, and by first class mail, postage prepaid to Henry Keuling-Stout, Esq., Respondent's Counsel, at Keuling-Stout, P.C., 125 Clinton Avenue East, P.O. Box 400, Big Stone Gap, VA 24219.



Renu Mago, Assistant Bar Counsel