

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF STEVEN SCOTT BISS
VSB Docket No. 07-033-070921

MEMORANDUM ORDER

This matter came on to be heard on October 18, 2010, by the Disciplinary Board of the Virginia State Bar (the Board) by telephone conference upon an Agreed Disposition between the parties, which was presented to a panel of the Board consisting of Steven A. Wannall (lay member), John S. Barr, Timothy J. Coyle, Samuel R. Walker and William E. Glover, Chair, presiding (the Panel).

Edward L. Davis, Bar Counsel, appeared as counsel for the Virginia State Bar, and the Respondent, Steven Scott Biss, appeared pro se.

Pursuant to the Rules of the Supreme Court of Virginia, Part 6, Section IV, Paragraph 13-6.H, the Bar and Respondent entered into a written proposed Agreed Disposition and presented same to the Panel.

The Chair swore the Court Reporter and polled the members of the Panel to determine whether any member had a personal or financial interest that might affect or reasonably be perceived to affect his or her ability to be impartial in these matters. Each member, including the Chair, verified they had no such interests.

The Panel heard argument from counsel and reviewed Respondent's prior disciplinary record with the Bar and thereafter retired to deliberate on the Agreed Disposition. Having considered all the evidence before it, a majority of the Panel accepted the Agreed Disposition.

I. FINDINGS OF FACT

The Disciplinary Board finds the following facts by clear and convincing evidence:

1. During all times relevant hereto, the Respondent, Steven Scott Biss, was an attorney licensed to practice law in the Commonwealth of Virginia.
2. Complainant Edward H. Shield is a business owner engaged in, among other things, providing financing to small businesses.
3. One of Shield's companies, United Leasing (ULC) took over a refuse company (Garcia).
4. Shield created United Refuse, LLC (UR) to manage Garcia.
5. One of Shield's employees, James Lehner, managed UR.
6. A dispute developed and Lehner tried to assert ownership of UR against ULC and Mr. Shield. Litigation followed in the Hanover County Circuit Court, the Richmond Circuit Court, and the U.S. Bankruptcy Court. Biss represented Lehner and UR in the circuit court matters and in the appeal of the bankruptcy matter.
7. Shield obtained an ex parte injunction in the Hanover Circuit Court freezing UR's assets.
8. Biss defended Lehner and UR in the matter and succeeded in having the injunction dissolved.
9. Shield also obtained a garnishment in the Hanover County Circuit Court against the UR bank accounts. Biss, however, succeeded in having the garnishment lifted as well.
10. In February 2004, simultaneous with Shield's filing suit in Hanover, Biss, on behalf of Lehner and UR, filed suit against ULC and Shield in the Richmond Circuit Court seeking declaratory judgment to determine the ownership of UR.
11. The only named plaintiff in this action, brought by Biss, was UR.
12. Biss alleged bad faith on the part of ULC and Shield - that the Lehnners had arranged financing to pay off the leases owed to ULC, but that they could not do so because Shield would not provide a payoff figure. UR, through Biss, sought a declaration that certain notes owed to ULC/Shield had been paid, and a declaration of the amount owed on the remaining notes.
13. In April 2004, United Refuse filed for bankruptcy protection. The Richmond and Hanover cases were stayed as a result of the bankruptcy filing.

14. On March 14, 2005, the United States Bankruptcy Court decided that the Lehnrs held bare legal title to United Refuse for the benefit of United Leasing. The Court ordered the Lehnrs to quitclaim their interest to United Leasing, which they did.
15. Biss appealed the adverse bankruptcy decision for the Lehnrs. Since the Lehnrs had been dismissed as parties, he filed the appeal in the name of UR. The appeal was unsuccessful.
16. In January 2006, Biss filed suit on behalf of the Lehner Family Business Trust (LFBT) against ULC, Shield and other named defendants.
17. The suit sought to assert claims against ULC that had been assigned to LFBT by Garcia, the original failed refuse company. Garcia assigned these claims to LBFT in January 2006.
18. The theory of the case was that Shield and ULC collected an excessive amount of money from Garcia, resulting in claims that Garcia assigned to LBFT.
19. Although he served as counsel for UR in the 2004 suits and on appeal in the bankruptcy matter, in this case Biss alleged that UR was “a dummy company, organized by ULC to perpetrate fraud, gain an unfair advantage, and commit injustice,” and that UR was ULC and Shield’s “agent and stooge.”
20. The defendants moved to disqualify Biss as counsel in the matter on the basis that Biss was taking a position contrary to his position in the 2004 suit and to the detriment of his former client, UR, in a substantially related matter.
21. The Circuit Court for the City of Richmond granted the motion, stating that in this case and the previous 2004 case, “There is a common thread of facts and issues which are identical or essentially the same,” and that “there is the high likelihood that Biss acquired information about United Refuse (UR) during his prior representation that would assist him in the course of this litigation because he argued a directly contrary position in the previous case.”
22. Following this development, Biss’ clients nonsuited the matter.
23. Despite his disqualification from the Richmond case, Biss continued to represent the Lehnrs in the revived Hanover County suit brought against them by ULC. ULC moved to disqualify Biss on the similar grounds as in the Richmond suit and prevailed again.
24. In granting the motion to disqualify Biss, the Hanover County Circuit Court stated that, “The Lehnrs now employ Mr. Biss, who was once counsel for United Refuse (UR). United Refuse is a former client of Mr. Biss, whose best interests may run contrary to the Lehnrs’.”
25. The Court found that Mr. Biss represented the Lehnrs against a former client, UR, in a substantially related matter, citing Rule 1.9 of the Rules of Professional Conduct. Rule 1.9 provides that a lawyer who has represented a client in a matter shall not thereafter represent another person in the same or substantially related matter if the interest of that person is adverse in any material respect to the interest of the former client.

26. The Court also noted that the Lehnrs had quitclaimed all of their interests in UR to ULC, and that UR had become a wholly owned subsidiary of ULC, the party adverse to Biss and his clients in the matter.
27. In neither the Hanover nor the Richmond cases did Biss have the consent of UR or its owners to proceed in these adversary actions.
28. In May 2007, Biss filed suit again for LBFT against ULC and Shield in the Richmond Circuit Court. This time the suit alleged breach of contract and conversion of personal property belonging to Garcia, the original failed refuse company.
29. Fourteen months later, after a series of motions, UR petitioned to intervene in the case and counsel moved to disqualify Biss again.
30. The motion to disqualify alleged that although UR was not a named defendant in the case, the factual allegations were against both ULC and UR, and that the allegations contradicted Biss' previous positions.
31. The Circuit Court for the City of Richmond denied the motion, stating that it would have entertained a mistrial if Biss had tried to bring UR into the suit. It also said that the defense should have made the motion much sooner. Shield made no motion for mistrial because Biss followed the Circuit Court admonition concerning United Refuse.
32. On this occasion, the LBFT won a jury verdict against Shield and ULC which was affirmed by the Richmond Circuit Court and further affirmed on appeal by the Supreme Court of Virginia.

II. NATURE OF MISCONDUCT

The Disciplinary Board finds that certain conduct by Steven Scott Biss constitutes misconduct in violation of the following Rules of Professional Conduct:

RULE 1.9 Conflict of Interest: Former Client

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation.

III. IMPOSITION OF SANCTION

Having considered all the evidence before it and determined to accept the Agreed Disposition, the Disciplinary Board ORDERS that the Respondent, Steven Scott Biss, receive a Public Reprimand for his Misconduct and the Respondent is hereby Reprimanded effective October 18, 2010.

It is further ORDERED that costs shall be assessed by the Clerk of the Disciplinary System pursuant to the Rules of the Supreme Court of Virginia, Part Six, Section IV, Paragraph 13-9.E.

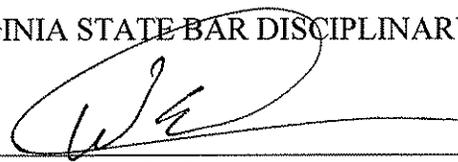
It is further ORDERED that the Clerk of the Disciplinary System shall send a certified copy of this order by certified mail to Steven Scott Biss at his last address of record with the Virginia State Bar, and hand delivered to Edward L. Davis, Bar Counsel, Virginia State Bar, 707 E. Main Street, Suite 1500, Richmond, Virginia 23219.

Valerie L.S. May, RPR, Chandler & Halasz Court, P.O. Box 9349, Richmond, Virginia 23227 (804) 730-1222, was the court reporter for the hearing and transcribed the proceedings.

ENTERED: October 19, 2010

VIRGINIA STATE BAR DISCIPLINARY BOARD

By:

A handwritten signature in black ink, appearing to read 'W. E. Glover', is written over a horizontal line. The signature is stylized and somewhat cursive.

William E. Glover, Chair