

**VIRGINIA:**

**BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD**

**IN THE MATTER OF  
DAVID ALLEN DOWNES**

**VSB DOCKET NO.: 09-070-077121**

**ORDER OF PUBLIC REPRIMAND, WITH TERMS**

**THIS MATTER** came to be heard on April 26, 2013, before a panel of the Disciplinary Board (the "Board") consisting of Martha JP McQuade, Chair; Timothy A. Coyle; Michael S. Mulkey; Tony H. Pham; and W. Ray Inscoc, Lay Member. The matter came before the Board on the Determination for Certification made by the Seventh District Subcommittee.

The Virginia State Bar (the "Bar") was represented by Assistant Bar Counsel Alfred L. Carr. The Respondent, David Allen Downes, appeared in person and was represented by Craig S. Cooley. Tracy J. Stroh, a registered professional court reporter, Chandler & Halasz, P.O. Box 9349, Richmond, VA 23227, (804) 730-1222, after being duly sworn, reported the hearing and transcribed the proceedings.

The Chair polled the members of the Board as to whether any of them had any personal or financial interest or bias which would impair, or could reasonably be perceived to impair, his or her ability to be impartial in this matter. Each member, including the Chair, responded in the negative.

The Chair then put on the record a number of rulings and agreements made at the April 16, 2013 Pre-Hearing Conference: All witnesses listed by each of the parties will be permitted to testify, with the exception of William Bassler, who has been withdrawn from the Respondent's list. The Bar's Exhibit A, Tabs 1-19 inclusive, is admitted into evidence without objection. Tab 20 of the Bar's Exhibit A is withdrawn. The Respondent's Exhibit A, Tabs 1-5 inclusive, is also admitted into evidence without objection. Consistent with the Pre-Hearing Order, both sides

reserved, and would retain even without such reservation, the right to present additional exhibits in the sanctions phase of the case. The following Stipulations of Facts, Misconduct, Mitigating Factors and Aggravating Factors (the "Stipulations") are admitted as Joint Exhibit A:

#### I. STIPULATIONS OF FACT

1. At all times relevant to this complaint, David Allen Downes (hereinafter "Respondent"), was a duly licensed attorney in Virginia.
2. In October of 2006, Respondent received a medical payment check from GMAC Insurance Company made payable to "Samantha Grady & James Brown, Parents of James Michael Brown, Jr., Deceased [and] David Downes" in the amount of \$15,000. Respondent represented James Brown, Sr.
3. On October 11, 2006, the \$15,000 check was deposited and credited in Respondent's fiduciary account number 5137422796, maintained at BB&T Bank.
4. The \$15,000 check was deposited into Respondent's fiduciary account without the required signatures of the Respondent, Samantha Grady, or James Brown, his client.
5. Respondent informed his client, James Brown, that Respondent had received a \$15,000 medical payments check from GMAC Insurance Company and returned it (as he mistakenly believed) because it was improperly made out.
6. On May 7, 2007, Respondent closed the BB&T fiduciary account and deposited the funds from the medical payment into Respondent's law

office operating account maintained at Marathon Bank, which was bought out by United Bank.

7. On May 23, 2007, the Respondent deposited, \$44,816.86 into his new IOLTA account at First Citizens Bank.
8. Complainant, Attorney Steven M. Levine (hereinafter "Complainant") was conducting an investigation of the October 2006 \$15,000 medical payment check on behalf of an insurance company, Complainant's client.
9. Complainant contacted Respondent, in writing, several times as follows:
  - a. September 22, 2008, letter advising Respondent that the \$15,000 medical payment check was mailed to him in October of 2006.
  - b. September 29, 2008 letter requested a full accounting of the disbursement or location of the \$15,000 and a refund of the \$15,000 plus interest.
  - c. October 1, 2008 letter advising Respondent that he has not responded to previous letters.
  - d. October 10, 2008 letter advising Respondent to respond in writing.
  - e. October 17, 2008 letter advising Respondent that Complainant's investigation revealed that GMAC insurance company mailed the \$15,000 medical payment check to Respondent in October of 2006 and on October 10, 2006, Respondent deposited the \$15,000 check into his fiduciary account without proper endorsement of payees.
10. In response to the notice and correspondence from Complainant, Respondent did the following:

- a. Respondent promptly conducted an investigation based on Levine's letter dated September 22, 2008. Respondent immediately reviewed his Quickbook records and could not find where a deposit was reflected for an amount of \$15,000 in October or November, 2006. An inspection of the copy of the check provided by Levine caused Respondent further alarm since it had a deposit stamp that Respondent had never used, Respondent's signature was not on the check, the check was improperly made out to "Samantha Grady," Respondent had no personal knowledge of depositing the subject check and remembered advising his former paralegal to return the check, and Respondent's BB&T bank indicated that the tracking on the back of the check reflected a deposit at either Charleston, West Virginia, or Charlotte, North Carolina. Consequently, Respondent conducted further investigation based on Levine's inquiries.
- b. On September 23, 2008, BB&T provided a copy of Respondent's bank statements reflecting deposits for October and November. However, they provided statements for 2005 instead of the requested year, 2006.
- c. On October 2, 2008, BB&T provided Respondent with a deposit statement for the applicable month of October, 2006. It reflected a total deposit on October 11, 2006 of \$47,593.93 into Respondent's

fiduciary account, but did not provide a breakdown of the individual checks, etc. within the deposit.

- d. Respondent received Complainant's letter dated October 17, 2008 at 2:45 p.m. on October 21, 2008. At 3:00 p.m., Respondent obtained a long awaited copy of his fiduciary deposit slip from the main Front Royal office of BB&T. That deposit slip showed that the medical payment check for \$15,000 was in fact deposited on October 11, 2006.
- e. On March 22, 2013, Respondent discovered the original deposit slip book that specifically identified funds for each client which notes "returned" with a big "X" over top of the Brown entry plus the notation "32,593.35 dep" indicating that only \$32,593.35 was deposited instead of \$47,593.35.
- f. On October 21, 2008, Respondent advised Complainant, that there was a \$15,000 medical payment check deposited in his fiduciary account, unbeknown to Respondent, and Respondent would promptly endorse a check for said amount to an individual or individuals that Complainant and the attorney for the Estate of James Brown, Jr., Eugene Gunter, could agree upon.
- g. The Respondent offered, in the alternative, to forward a check to the Clerk of the Warren County Circuit Court in the amount of \$15,000 if Complainant and Mr. Gunter could not agree as to the proper recipient of said check.

- h. On or about October 22, 2008, Respondent delivered a \$15,000 check to E. Eugene Gunter, Esquire, Counsel for the Administrator of the Estate of James Brown, Jr., from Respondent's new IOLTA trust account number 008922085262, maintained at First Citizen's Bank. Complainant now agrees that was an appropriate recourse by the Respondent.
- 11. On October 17, 2008, Complainant filed this complaint.
- 12. On April 22, 2010, during an interview with Virginia State Bar Investigator Ronald Pohrivchak, Respondent stated that he did not know if his accountant was performing quarterly reconciliations of his fiduciary and law office operating accounts during the time period in question, but in any event, Respondent stated that he did not review any reconciliations of the fiduciary accounts.
- 13. In a Supplemental Investigation dated March 5, 2012, Investigator Pohrichak traced the \$15,000 medical payment check and found the following:
  - a. October 11, 2006, Respondent deposited the \$ 15,000 check into Respondent's fiduciary account number 5137422796, maintained at BB&T.
  - b. On May 7, 2007, Respondent wrote two checks that effectively closed the BB&T fiduciary account and deposited both checks into Respondent's law office operating account.

- c. On May 23, 2007 Respondent deposited into a new IOLTA account at First Citizens Bank a total deposit of \$44,816.86.
14. In response to Investigator Pohrivchak's request for documentation to show that Respondent deposited \$15,000 from his law office operating account at Marathon Bank into the second trust account maintained at First Citizens Bank, Respondent could not provide the Bar with any proof that Respondent made a \$15,000 deposit from the law office operating account to Respondent's second trust account from which he paid the \$15,000 over to the Estate of James Brown, Jr.
15. Investigator Pohrivchak reviewed Respondent's First Citizens IOLTA account for the period May 1, 2007 through October 21, 2008. Investigator Pohrivchak noticed that beginning in May, 2007 and continuing through August, 2008 on numerous occasions the First Citizens IOLTA account dropped below \$15,000.

## II. STIPULATIONS OF MISCONDUCT

Such conduct by David Allen Downes constituted misconduct in violation of the following provisions of the Rules of Professional Conduct:

### **RULES 1.15 Safekeeping Property**

(a) All funds received or held by a lawyer or law firm on behalf of a client, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

- (1) funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution may be deposited therein; or

(2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(b) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(c) A lawyer shall:

(1) promptly notify a client of the receipt of the client's funds, securities, or other properties;

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; and

(4) Promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

(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 disbursement journal shall contain separate columns for escrow and non-escrow disbursement;

(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 separate subsidiary 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 insufficient 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."

### III. STIPULATIONS OF FACTS IN MITIGATION

1. Respondent fully cooperated with the VSB investigation of this matter.
2. Prompt restitution of the \$15,000.00 to the Estate of James Brown, Jr.
3. Respondent exhibited remorse for the lack of compliance with record keeping requirements.
4. Respondent had no dishonest or selfish motives, nor any intent to defraud.

5. Respondent has no training in or prior experience in accounting, bookkeeping, and record keeping.
6. This incident occurred six and one-half years ago. Respondent has taken remedial measures by declining all personal injury cases and has remained in compliance with Rule 1.15 by personally conducting the accounting reconciliations without further incidents.

#### IV. STIPULATIONS OF FACTS IN AGGRAVATION

1. Prior disciplinary record.
2. Substantial experience in the practice of law.

In accordance with the Stipulations, the misconduct set forth above was accepted by the Board as proven by clear and convincing evidence. It is noted that the charged violations of Rules 1.3(a) and 1.4(c) of the Rules of Professional Conduct were withdrawn by the Bar and that the only misconduct found is a violation of the sections of Rule 1.15 set forth in the Stipulations.

#### V. ADDITIONAL EVIDENCE AND ARGUMENT

Misconduct having been stipulated, the sole issue to be determined by the Board was the appropriate sanction to be imposed.

Following opening statements by Bar Counsel and Counsel for the Respondent, the Bar called no witnesses. Counsel for the Respondent called a total of five witnesses, including the Respondent. Prudence Matthews, a public accountant, has known the Respondent for 20 years and testified to his good character and efforts to improve record keeping in his office. Attorneys Douglas W. Harold, Jr. and David P. Baugh testified concerning Respondent's good character and favorable reputation in the community. Millard F. Gulley testified that he has worked for the Respondent since 2006, that the Respondent represents his clients well, and that he has sole

custody of his six-year old twins and is doing an excellent job of raising them. The Respondent testified concerning the efforts he took to investigate matters when it came to his attention that there was too much money in his trust account, and to straighten things out as it became apparent that the problem was that the \$15,000 medial payment check had, in fact, been deposited to the account, rather than being returned to GMAC as he believed it had been. He also testified that he had made subsequent efforts to improve record keeping and the safekeeping of client's property in the form of monies held in trust.

Bar counsel offered Respondent's prior disciplinary record which was introduced into evidence, without objection, as the Bar's Exhibit B. Counsel for Respondent offered a Memorandum as to Disposition which was introduced into evidence, without objection, as Respondent's Exhibit B.

At his request, the Complainant, Steven M. Levine, was also allowed to testify. Mr. Levine stated that his primary reason for filing the complaint was concern when investigation revealed that the balance in the Respondent's escrow account had gone below \$15,000 on at least two occasions. He also testified that the problems with the \$15,000 check were not brought to the attention of the Respondent for the first time in September of 2008. He said that he first corresponded with the Respondent in November of 2007 and had numerous conversations with the Respondent from November 2007 until September 2008. Mr. Levine produced a copy of a letter dated November 9, 2007 which he stated that he had mailed to Respondent. Although Mr. Levine said he had provided the letter to the Bar, it was not on the Bar's list of exhibits. Counsel for the Respondent objected to its introduction into evidence, and the Chair sustained the objection.

Bar Counsel and Counsel for the Respondent then presented closing arguments and the Board recessed to deliberate.

#### V. DISPOSITION

After due deliberation, the Board reconvened. The Chair noted that reaching a decision on the appropriate sanction had not been easy. The Board was troubled by the Respondent's prior disciplinary record, in that it includes a trust account violation. Further, it concerned the Board that, in this case, and in accordance with his own testimony, once Respondent became aware that his trust account contained excess funds, he failed to resolve that issue in a timely fashion; rather, the Respondent obtained the bank records which identified the problem only after being repeatedly contacted by Mr. Levine. The Chair advised the Respondent that the Board was divided as to whether to impose a suspension or a public reprimand.

Ultimately, however, based upon consideration of the Stipulations, the testimony, the exhibits, including the Respondent's prior disciplinary record, the factors in aggravation and mitigation, and the argument of counsel, the majority of the Board panel voted to impose a sanction of a Public Reprimand, with Terms.

Accordingly, it is ORDERED that the following sanction be, and it is hereby, imposed on the Respondent, David Allen Downes: PUBLIC REPRIMAND, WITH TERMS, effective April 26, 2013. The Terms with which Respondent must comply are as follows:

1. The Respondent will engage in no further professional misconduct as defined by the Virginia Rules of Professional Conduct for the next 18 months.

2. To ensure full and ongoing compliance with the requirements of Rule 1.15 of the Virginia Rules of Professional Conduct, Respondent shall submit, over the next 18 months, to a minimum of four and up to a maximum of eight periodic random reviews by the Virginia State Bar of his trust account records and reconciliations.
3. All costs and fees for such reviews shall be paid by the Respondent.
4. Should the Respondent fail to comply with the terms as set forth above, he shall receive a two (2) year suspension of his license to practice law in the Commonwealth of Virginia as an alternative disposition of this matter. Should the Virginia State Bar allege that Respondent has failed to comply with the terms of discipline referred to herein and that the alternative disposition should be imposed, a "show cause" proceeding pursuant to the Rules of the Supreme Court of Virginia, Part 6, Section IV, Paragraph 13-18.O will be conducted, at which proceeding the burden of proof shall be on the Respondent to show the disciplinary tribunal by clear and convincing evidence that he has complied with terms of discipline referred to herein.

It is further ORDERED that pursuant to Part 6, Section IV, Paragraph 13-9.E. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess all costs against the Respondent.

It is further ORDERED that the Clerk of the Disciplinary System shall send, by certified mail, an attested copy of this Order to Respondent at his address of record with the Virginia State Bar, that being 14 Chester Street, Front Royal, Virginia 22630-3321; shall also send a copy of such mailing by regular mail to Craig S. Cooley, Esquire, 3000 Idlewood Avenue, Richmond,

Virginia 23221; and shall also send a copy by regular mail to Alfred L. Carr, Assistant Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

ENTERED this 26th day of June, 2013

VIRGINIA STATE BAR DISCIPLINARY BOARD

A handwritten signature in cursive script, reading "Martha JP McQuade". The signature is written in black ink and is positioned above a horizontal line.

Martha JP McQuade, Chair