

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF)
DALE EUGENE DUNCAN,)
) VSB DOCKET NO.: 10-042-082497
Respondent)

ORDER OF REVOCATION

This matter came to be heard on February 21, 2014, before a duly convened panel of the Virginia State Bar Disciplinary Board (the “Board”) on the Subcommittee Determination for Certification by a Subcommittee of the Fourth District Committee, Section II, pursuant to Part 6, §IV, ¶ 13 – 18 of the Rules of the Supreme Court of Virginia. The Board impaneled for this matter consisted of Robert W. Carter, Lay Member, Richard J. Colten, Acting Chair (Presiding), John A. C. Keith, Bretta Marie Zimmer Lewis, and Esther J. Windmueller. The Virginia State Bar was represented by Kathleen Maureen Uston, Assistant Bar Counsel. The Respondent, Dale Eugene Duncan (the “Respondent”) was present and represented himself in connection with this matter.

The Chair polled the members of the Board as to whether any of them had any personal or financial interest or bias which would prevent any of them from fairly hearing this matter and serving on the panel, and each member responded that the member had no such interest or conflict. The Chair also confirmed his ruling, made during the pre-hearing conference call, sustaining the Virginia State Bar’s objection to Respondent’s identification of Kathleen Maureen Uston, Assistant Bar Counsel, as a witness pursuant to Part 6, §IV, ¶ 13 – 30. J of the Rules of the Supreme Court of Virginia. Angela N. Sidener, a certified court reporter, Chandler &

Halasz, PO Box 9349, Richmond, Virginia 23227 (804) 730-1222, after duly being sworn, reported the hearing and transcribed the proceedings.

I. FINDINGS OF FACT

Virginia State Bar Exhibits 1 – 11 were admitted without objection. The Bar, in its case in chief, called witnesses, Patrick Hofer, Esquire, and David W. Jackson. The Respondent called Arthur G. Bennett.

After consideration of the testimony presented and the exhibits, the Board recessed to consider the disposition of the case. After deliberation, the Board made the following findings of fact on the basis of clear and convincing evidence:

1. At all times relevant hereto, Dale Eugene Duncan (hereinafter "Respondent") was an attorney licensed to practice law in the Commonwealth of Virginia. The Respondent received proper notice of this proceeding as required by Part Six, §IV, ¶13-12C and 13-18C of the Rules of the Virginia Supreme Court.
2. Bishop Byrne Council Home, Inc. (hereinafter "Bishop Byrne"), a nonprofit corporation organized under the laws of the District of Columbia, was created in 1956 to own, maintain, manage and operate a Home, Club House and Social, Cultural and Recreational Center on certain improved real property located in Maryland, commonly known as "Byrne Manor", for charitable and religious purposes. Bishop Byrne's membership consisted of the members in good standing of the Bishop Patrick J. Byrne Council of the Knights of Columbus, a fraternal order of Catholic laymen dedicated to various social, religious, and charitable good works.
3. In May 2005, First Mount Vernon Industrial Loan Association ("FMV") extended a loan to Bishop Byrne in the original principal amount of \$750,000.00 (the "First FMV Loan"). The First FMV Loan was secured by Byrne Manor, as well as all associated personal property, which together constituted essentially all assets of Bishop Byrne.
4. Respondent represented FMV in connection with the First FMV Loan and prepared all documents necessary to effect and close that loan.
5. In February 2006, FMV extended a second loan to Bishop Byrne, in the original principal amount of \$750,000.00 (the "Second FMV Loan"). The Second FMV Loan was also secured by essentially all of Bishop Byrne's assets.

6. Respondent represented FMV in connection with the Second FMV Loan and prepared all documents necessary to effect and close that loan.
7. In June 2006, the First FMV Loan was modified by FMV so that the maturity date was extended and the underlying principal obligation was increased to \$766,500.00 (the "FMV Extension"). At the time of the FMV Extension, the First FMV Loan was in arrears, and Bishop Byrne was not regularly making payments to FMV as they came due.
8. Respondent represented FMV in connection with the FMV Extension and prepared all documents necessary to effect and close that extension.
9. Approximately one month later, in July 2006, S.F.C. II, L.L.C. ("SFC") extended a loan to Bishop Byrne (the "SFC Loan") with a maximum principal obligation of \$2,750,000.00. The SFC Loan was intended to pay off the outstanding FMV loans, which were delinquent, and to provide some additional capital to Bishop Byrne for improvements to Byrne Manor.
10. From this total loan amount, SFC initially advanced \$2,215,000.00, with the remaining funds to be available for later draws.
11. Respondent represented Bishop Byrne in connection with the SFC Loan.
12. At the time the SFC Loan was made, Respondent was still representing FMV in other matters.
13. In addition, from approximately 2000 to the present, Respondent's office has been located in FMV's office at 6019 Tower Court, Alexandria, Virginia.
14. Further, from 1993 until approximately 2007, Respondent provided ongoing legal services to FMV. In approximately 2007, Respondent became a full-time employee of FMV. During the period from 2000-2007, Respondent's legal services to FMV consisted primarily or exclusively of assisting FMV in considering, documenting, executing and administering loans made by FMV.
15. Respondent has acknowledged that he is also personal "friends" with a number of employees of FMV, including Arthur Bennett, President of FMV.
16. From the initial advance on the SFC Loan, a total of \$1,682,408.03 was paid to FMV to fully pay off the First FMV Loan and the Second FMV Loan, which were substantially in arrears.
17. Respondent has represented that FMV, "does not ever want to control property" (as would have resulted if foreclosure on the FMV loans had become necessary), but instead that it, "wants to loan money and get paid back."

18. Respondent did not advise Bishop Byrne of any potential or actual conflict of interest arising from his simultaneous representation of FMV and Bishop Byrne. Respondent failed to obtain any consent or waiver from Bishop Byrne regarding any potential or actual conflict of interest arising from his simultaneous representation of FMV and Bishop Byrne.
19. Respondent received \$13,750.00 in fees paid from the initial advance on the SFC Loan as payment for his services as counsel to Bishop Byrne.
20. Of the initial \$2,215,000.00 advance on the SFC Loan, SFC retained \$275,000.00 (10% of the maximum principal obligation) as a "loan discount," and over \$100,000.00 (approximately 5% of the maximum principal obligation) was paid out as broker fees. Respondent did not advise Bishop Byrne of the nature and extent of either of these fees.
21. Bishop Byrne received only \$1,143.57 from the initial \$2,215,000.00 advance on the SFC Loan for the intended improvements to Byrne Manor.
22. Respondent issued a legal opinion letter in connection with the SFC Loan asserting, among other things, that the execution of the SFC Loan documents by Bishop Byrne (a) did not violate any Maryland or District of Columbia laws; (b) was consistent with Bishop Byrne's By-Laws; and (c) was properly authorized by Bishop Byrne.
23. Respondent has acknowledged that he was not licensed in either Maryland or the District of Columbia at the time he issued this legal opinion. Respondent has also acknowledged that he was not familiar with the applicable provision(s) of District of Columbia law referenced in his legal opinion letter.
24. Respondent has failed to produce any records of Bishop Byrne demonstrating that there was a properly noticed meeting of the directors of Bishop Byrne at which a majority of the directors approved the SFC Loan.
25. No meeting of the membership of Bishop Byrne was called to approve the First FMV Loan, the Second FMV Loan, the FMV Extension, or the SFC Loan. Similarly, at no time was there any vote taken by the membership to approve any of the associated obligations of Bishop Byrne.
26. As such, the SFC Loan appears, on its face, to violate District of Columbia code Section 29-805 which provides in pertinent part that: "Any property of the corporation may be...encumbered by mortgage or deed of trust...when authorized by...a vote of the majority of the directors...if the same be not a stock corporation, at a meeting called for the purpose, the proceedings of which meeting shall be duly entered in the records of the corporation...."

27. Further, the SFC Loan appears, on its face, to violate the By-Laws of Bishop Byrne, which require that any expense or obligation in excess of \$2,000.00 be approved in advance by a vote of the membership of Bishop Byrne at a meeting called for that purpose. For the same reason, it does not appear that the execution of the SFC Loan documentation was properly authorized by Bishop Byrne.
28. Bishop Byrne was unable to service the SFC Loan, failing to make timely payments thereon, which ultimately resulted in SFC foreclosing on Byrne Manor.

II. MISCONDUCT

The Certification charged violations of the following provisions of the Virginia Rules of Professional Conduct:

RULE 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

RULE 1.3 Diligence

- (c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

RULE 1.4 Communication

- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
- (c) A lawyer shall inform the client of facts pertinent to the matter....

RULE 1.5 Fees

- (b) The lawyer's fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

RULE 1.7 Conflict of Interest: General Rule

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client;
or
 - (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client consents after consultation, and:
- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) the consent from the client is memorialized in writing.

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.

RULE 1.16 Declining Or Terminating Representation

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
 - (1) the representation will result in violation of the Rules of Professional Conduct or other law...

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law...

III. DISPOSITION

At the conclusion of the evidence and arguments of Bar Counsel and the Respondent, the Board recessed to consider the findings of fact, all evidence presented by the witnesses and exhibits regarding misconduct, and to deliberate. After due deliberation, the Board reconvened and stated its findings as follows:

1. The Board determined that the Bar failed to prove by clear and convincing evidence any violation of Rules 1.3(c), 1.4(c), 1.5(b), 1.7(b)(1), 1.7(b)(2), 1.7(b)(3), and 1.9(a).
2. The Board determined that the Bar did prove by clear and convincing evidence that the Respondent was in violation of Rules 1.1, 1.4(b), 1.7(a)(1), 1.7(a)(2), 1.7(b)(4), 1.16(a)(1), 8.4(a) and 8.4(c).

Thereafter, the Board received further evidence of aggravation and mitigation from the Bar and Respondent, including the Respondent's prior disciplinary record. Respondent's disciplinary record and Certification thereof was distributed and entered into evidence, without objection, as Virginia State Bar Exhibit 12. The Board recessed to deliberate what sanction to impose upon its findings of misconduct by Respondent. After due deliberation and consultation of the ABA Standards for Imposing Lawyer Sanctions, the Board reconvened to announce the sanction imposed. The Chair announced the sanction as revocation of Respondent's license effective February 21, 2014.

Accordingly, it is ORDERED that the license of the Respondent, Dale Eugene Duncan, to practice law in the Commonwealth of Virginia is REVOKED effective February 21, 2014.

It is further ORDERED that Respondent must comply with the requirements of Part Six, Section IV, Paragraph 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the suspension of his

license to practice law in the Commonwealth of Virginia to all clients for whom is he currently handling matters and to all opposing attorneys and presiding judges in pending litigation.

Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his client(s). Respondent shall give such notice within fourteen (14) days of the effective date of suspension, and make such arrangements as required herein within forty-five (45) days of the effective date of suspension. The Respondent shall also furnish proof to the Bar within sixty (60) days of the effective date of suspension if such notices have been timely given and such arrangements made for the disposition of matters.

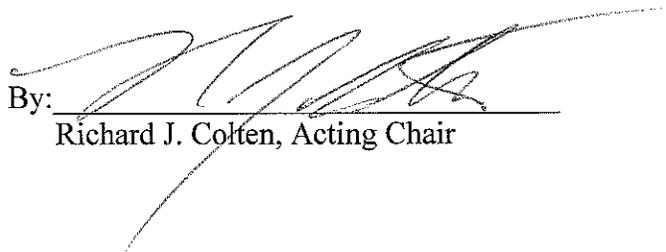
It is further ORDERED that if the Respondent is not handling any client matters on the effective date of suspension, he shall submit an Affidavit to that effect to the Clerk of the Disciplinary System of the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board, unless the Respondent makes a timely request for a hearing before a three-judge court.

It is further ORDERED that pursuant to Part Six, §IV, ¶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 mail an attested copy of this order by certified mail to Respondent, Dale Eugene Duncan, at his address of record with the Virginia State Bar, being 8360 Greensboro Drive, #207, McLean, Virginia 22304; and shall hand-deliver a copy to Kathleen Maureen Uston, Assistant Bar Counsel, at 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

ENTERED this 7th day of March, 2014.

VIRGINIA STATE BAR DISCIPLINARY BOARD

By: 

Richard J. Colten, Acting Chair

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