

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF)
DALE EUGENE DUNCAN)

Respondent)

VSB DOCKET NOS.: 11-042-088367
11-042-085659

MEMORANDUM ORDER OF SUSPENSION

THIS MATTER came on to be heard on September 28, 2012 before a panel of the Virginia State Bar Disciplinary Board consisting of Paul M. Black, Acting Chair, presiding, Michael S. Mulkey, J. Casey Forrester, R. Lucas Hobbs, and Stephen A. Wannall, lay member. The Virginia State Bar was represented by Kathleen Uston, Assistant Bar Counsel. The Respondent, Dale Eugene Duncan, appeared in person and represented himself. The Chair polled the members of the Board as to whether any of them had any personal or financial interest or bias which would preclude any of them from fairly hearing this matter and serving on the panel, and each member responded that there were no such conflicts. The court reporter for the proceeding, Tracy Stroh of Chandler & Halasz, Post Office Box 9349, Richmond, Virginia 23227, telephone: (804) 730-1222, after duly being sworn, reported the hearing and transcribed the proceedings.

This matter came before the Board on the Subcommittee Determination for Certification by a Subcommittee of the Fourth District Committee, Section II, of the Virginia State Bar.

I. FINDINGS OF FACT

The exhibits of the Virginia State Bar, Exhibits 1-14, were admitted without objection. The Board makes the following findings of fact on the basis of clear and convincing evidence:

1. At all times relevant hereto, Dale Eugene Duncan, Esquire, [hereinafter "the Respondent"], has been an attorney licensed to practice law in the Commonwealth of Virginia.¹

As to VSB Docket No. 11-042-088367:

2. On or around December 23, 2009, Respondent's license to practice law in the Commonwealth of Virginia was suspended for a period of two (2) years following a finding by the Circuit Court for the City of Alexandria that he had committed ethical misconduct in the course of his employment as Lender's Counsel to First Mount Vernon Industrial Loan Association (hereinafter "FMV"). Specifically, Respondent was found to have violated Rules of Professional Conduct 8.4(a), 8.4(b), and 8.4(c).

3. On or around June 24, 2011, at a time when Respondent's license to practice law was under suspension, the Virginia State Bar received a complaint that Respondent was still reporting to work each day at FMV, was answering legal questions pertaining to loans made by FMV, and was otherwise continuing to practice law and act as Lender's Counsel for FMV.

¹ As discussed below, the Respondent's license was suspended for disciplinary reasons on December 23, 2009 for a period of two (2) years. In addition, the Respondent's license was administratively suspended on March 30, 2011 for failure to pay assessed costs associated with a disciplinary hearing, and the Respondent's license remains suspended as of the date of this hearing.

4. On August 2, 2011, a copy of this complaint was sent to Respondent together with a demand that he provide a written response thereto within twenty-one (21) days as required by applicable rules. By letter dated August 22, 2011, received by the Virginia State Bar on August 26, 2011, Respondent denied that he had participated in any activity that would constitute the unauthorized practice of law.

5. In his response, Respondent made reference to a deposition given by an employee of FMV, Ms. Kathleen Neary, wherein Ms. Neary stated under oath that, when she had "questions on anything on a legal matter," she would consult Respondent, whose license to practice law she knew to be suspended at the time. Respondent denied that Ms. Neary's deposition testimony amounted to proof of his unauthorized practice of law and stated affirmatively that, "When it comes to obtaining a legal response or obtaining legal advice to any issue, FMV goes to outside counsel."

6. In his response, Respondent also stated that Ms. Neary, "was repeatedly asked what I did at First Mount Vernon Industrial Loan Association." Respondent admitted that he would, in fact, answer questions about specific loans made by FMV, "Not based upon me acting as 'Counsel' but rather based on my knowledge of the loan in question."

7. On August 1, 2011, this matter was referred for further investigation.² In the course of that investigation, Virginia State Bar Investigator David W. Jackson met with Respondent at his office, located within the offices of FMV, on November 4, 2011.

² Pursuant to applicable rules, and in light of Respondent's misconduct suspension, this matter was referred directly to the District Committee for further investigation.

8. During the course of Investigator Jackson's interview with Respondent, he inquired as to the nature of Respondent's duties with FMV. Respondent stated that he acts as a "super processor" but denied that he performed any legal work. When Investigator Jackson asked what duties Respondent performed as a "super processor," Respondent stated that he was "just a citizen on the street at this time" and as such, he did "not believe [he had] any obligation to answer any of these questions." Investigator Jackson asked Respondent what his primary duties and responsibilities were with FMV, but he refused to answer this question.

9. During the course of Investigator Jackson's interview with Respondent, he was asked to whom he reports at FMV. Respondent refused to provide this information, stating that "it is none of the Virginia State Bar's business."

10. Respondent advised Investigator Jackson that both he and FMV rely "totally on outside counsel" to handle any legal matters that arise. Investigator Jackson asked Respondent to identify this "outside counsel" but Respondent stated that he "knew who it was but [he did] not think it was any of the Virginia State Bar's business."

11. During the course of Investigator Jackson's interview, he also inquired of Respondent as to whether or not he maintained an office within FMV, and inquired as to whether or not Respondent was paying rent to FMV to lease space there. Respondent refused to answer these questions as well, stating that it was "none of the Virginia State Bar's business."

12. During the course of Investigator Jackson's interview, he also inquired of Respondent if he was being paid by FMV during the period of his suspension.

Respondent stated that he is paid on a "loose" "piecemeal basis" but he refused to provide any additional information stating that, since he is not receiving legal fees, the Virginia State Bar did not have a need to inquire into his compensation. Respondent went on to state that he did not believe the Virginia state Bar had a "license to mandate how one can earn any money when they were on suspension," adding, "[M]aybe they would be happier if I bagged fucking groceries."

13. At the conclusion of this interview, Respondent advised Investigator Jackson that he wanted to tell the Virginia State Bar "to go fuck themselves."

As to VSB Docket No. 11-042-085659:

14. On or around October 20, 2010, Bernard D. Clayton filed a complaint against Respondent with the Virginia State Bar arising out of a loan transaction in which Respondent acted as counsel for the lender, First Mount Vernon Industrial Loan Association (hereinafter "FMV").³ Mr. Clayton alleged that, prior to closing on the loan transaction, he believed that he was obtaining a refinance of a loan on his family farm.

15. In his complaint, Mr. Clayton alleged that Respondent charged him excessive fees, which Mr. Clayton was required to pay, and that, by operation of the documents prepared by Respondent for the loan closing, title to Mr. Clayton's farm was transferred from him to ProDev XLVI, LLC, a limited liability company created by Respondent of which FMV, Respondent's sole client, was 60% owner. Mr. Clayton stated that at no time did he authorize Respondent to divest title to his family farm from him to ProDev XLVI; at no time was he aware that the documents he was signing at

³ Respondent's license had not yet been suspended at the time of the Clayton transaction.

closing had the effect of transferring title to his family farm to ProDev XLVI; and at no time did he authorize or instruct Respondent to create the documents that divested him of title to his family farm and gave a 60% interest in that farm to Respondent's client, FMV. Mr. Clayton stated further that the documents Respondent prepared were presented to him for the first time at closing, and he was not given the time to even cursorily review them.

16. Respondent charged Mr. Clayton \$1,395.00 for "Loan Document Preparation" fee, \$1,425.00 for "Settlement Coordination Fee," and \$10,750.00 for "Ldr's Counsel/LLC Doc filing" fees.

17. On October 27, 2010, a copy of Mr. Clayton's complaint was forwarded to Respondent with a demand that he provide his written response thereto to the Virginia State Bar within twenty-one (21) days. On November 17, 2010, Respondent filed his response to the complaint.

18. On August 2, 2011, this matter was referred for further investigation, and Respondent was so notified by letter on that date.⁴ On August 3, 2011, and in furtherance of that investigation, a Subpoena *Duces Tecum* was issued, commanding Respondent to produce, "Copies of all files, records and reports which are in your possession, custody, or control, relating to the loan to Bernard Clayton."

19. Despite the fact that Respondent admitted in his response to the Virginia State Bar that he "did in fact represent First Mount Vernon I.L.A. (FMV) as lender's

⁴ As with VSB Docket No. 11-042-088367, this matter was referred directly to the District Committee for further investigation.

Counsel in two transactions involving ProDev XLVI/Bernard Clayton,” and that he “prepared instructions and documents based upon instructions from [FMV],” on August 4, 2011, Respondent advised the bar, in response to the duly issued Subpoena *Duces Tecum*, that, “I have NO files, records, or reports in my possession, custody or control as related to a loan to Bernard Clayton” (emphasis in the original).

20. Also in furtherance of the investigation of this case, Investigator Jackson met with Respondent on November 4, 2011.

21. Paragraphs 8-13 above are incorporated herein by reference.

II. NATURE OF MISCONDUCT

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

RULE 8.1 Bar Admission and Disciplinary Matters

An applicant for admission to the bar, or a lawyer already admitted to the bar, in connection with a bar admission application, any certification required to be filed as a condition of maintaining or renewing a license to practice law, or in connection with a disciplinary matter, shall not:

- (c) fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6; or
- (d) obstruct a lawful investigation by an admissions or disciplinary authority.

III. DISPOSITION

After review of the foregoing findings of fact, the exhibits presented by Bar Counsel on behalf of the Virginia State Bar, and the evidence from witnesses presented on behalf of the Bar and on behalf of the Respondent, the Board recessed to deliberate. The Board also considered certain legal authorities submitted by the parties. After due deliberation, the Board reconvened and stated its findings as follows:

1. The Board determined that, in VSB Docket No. 11-042-088367, the Bar did prove by clear and convincing evidence that the Respondent was in violation of Rule 8.1(c) and (d).

2. The Board determined that, in VSB Docket No. 11-042-085659, the Bar did prove by clear and convincing evidence that the Respondent was in violation of Rule 8.1(c) and (d).

Thereafter, the Board received further evidence of aggravation and mitigation from the Bar and the Respondent, including Respondent's prior disciplinary record. The Board recessed to determine what sanctions to impose upon its findings of misconduct by Respondent. After due deliberation, the Board reconvened to announce the sanction imposed. The Chair announced the sanction, by a majority vote, as a suspension of the Respondent's license for a period of two (2) years.

Accordingly, it is ORDERED that the license of the Respondent, Dale Eugene Duncan, be suspended as of September 28, 2012 for a period of two (2) years.

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 he is 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 14 days of the effective date of the suspension, and make such arrangements as are required herein within 45 days of the effective date of the suspension. The Respondent shall also furnish proof to the Bar within sixty (60) days of the effective date of the 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 the suspension, he shall submit an Affidavit to that effect to the Clerk of the Disciplinary System at 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 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 an attested copy of this Order by certified mail to Dale Eugene Duncan at his last address of record with the Virginia State Bar at 6019 Tower Court, Alexandria, Virginia 22304; and shall hand-deliver a copy to Kathleen Uston, Assistant Bar Counsel, at 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

ENTERED this 12TH day of October, 2012.

VIRGINIA STATE BAR DISCIPLINARY BOARD

By: 

Paul M. Black, Acting Chair