

VIRGINIA: IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY

VIRGINIA STATE BAR, ex rel.
SEVENTH DISTRICT COMMITTEE

received

v.

CASE NO. CL06-00507
JAN 8 2007

WALTER F. GREEN, IV
VSB Docket Nos. 02-070-3523
05-070-0206
05-070-2448
05-070-2450
05-070-3011
05-070-3625

VSB CLERK'S OFFICE

MEMORANDUM ORDER

This cause came on for hearing on September 14, 2006, and continued on November 14, 2006, before a duly appointed Three-Judge Court consisting of the HONORABLE THOMAS A. FORTKORT, retired, the HONORABLE DIANE McQ. STRICKLAND, retired, and the HONORABLE CLEO E. POWELL, Chief Judge Designate; upon the Rule to Show Cause of this Court; pursuant to Va. Code §§54.1-3935 and 8.01-261(17) and Rules of the Supreme Court, Part Six, §IV, Paragraph 13.

The Virginia State Bar was represented by ALFRED L. CARR, Assistant Bar Counsel, SETH M. GUGGENHEIM, Assistant Bar Counsel. The Respondent, WALTER F. GREEN, IV appeared, *pro se*.

Plea in Bar for Lack of Jurisdiction

Respondent argues that the Virginia State Bar was required to schedule his hearing no more than 120 days from his March 28, 2006 demand, pursuant to Part Six, §IV, Paragraph 13(H)(1)(a)(2)(b) of the Rules of the Supreme Court of Virginia, and that, therefore, this Court lacks jurisdiction. Specifically the rule states:

After the Respondent has been served with the Charge of Misconduct, the Respondent shall, within 21 days after service of the Charge of Misconduct, file an answer to the Charge of Misconduct and a demand with the Clerk of the Disciplinary System that the proceedings before the District Committee be terminated and that further proceedings be conducted pursuant to Va. Code § 54.1-3935; and simultaneously provide available dates for a hearing to be scheduled not less than 30 nor more than 120 days from the demand.

Respondent argues that the rule places a duty on the Bar to hold the hearing within the rule's 30 to 120 day time frame. As such, for the hearing to fall within the mandated time limit, Respondent argues it must have been held by July 26, 2006, 120 days from the March 28, 2006 demand. The hearing was in fact held on September 14, 2006, and continued on November 14, 2006.

This Court holds that the rule does not require the Bar to hold a hearing within the time frame as stated in Part Six, §IV, Paragraph 13(H)(1)(a)(2)(b) of the Rules of the Supreme Court. As the rule is designed to protect the public, who then come to lawyers for their services, the rule only imposes a duty on the

Respondent to submit available dates within the four-month window of time, and does not impose a duty on the Bar. As such, this Court holds that it does have jurisdiction.

Plea in Bar for Violation of the Statute of Limitations

Respondent argues that the Virginia State Bar is subject to a statute of limitations because it is an agency of the Commonwealth. He further argues that because the Virginia State Bar is not specifically exempted from the bar of the statute of limitations, the applicable statute of limitations is then Virginia Code Section 8.01-248, which states: “Every personal action accruing on or after July 1, 1995, for which no limitation is otherwise prescribed, shall be brought within two years after the right to bring such action has accrued.” Va. Code § 8.01-248 (2006).

This Court holds that the statute of limitations does not run against the Commonwealth, or its agencies, and therefore, does not run against the Virginia State Bar. *See Delon Hampton & Assoc. v. Wash. Metro. Area Transit Auth.*, 943 F.2d 355 (4th Cir. 1991).

Plea in Bar for Failure to Possess a Valid Complaint

Respondent argues that in order to proceed against an attorney, the Bar must receive a complaint and Bar Counsel must determine that the conduct questioned or alleged presents an issue under the Disciplinary Rules. Respondent is not aware

of any written complaint received by the Bar that alleges misconduct in regards to Docket No. 05-070-2448 (Ron Haynes) and Docket No. 05-070-2450 (Ron Haynes), and, therefore, asks that they be dismissed. Respondent bases his argument solely on the definition of “complaint” as found in Part Six, Section IV, Paragraph 13(A) of the Rules of the Supreme Court, which states: “any written communication to the Bar alleging Misconduct or from which allegations of Misconduct reasonably may be inferred.”

This Court holds that the Rules of the Supreme Court provide that the Bar can proceed on a basis other than a complaint.

Plea in Bar for Res Judicata

Respondent argues that the doctrine of Res Judicata precludes further litigation of Docket No. 05-070-0206 (Frank James), because all issues were litigated on March 4, 2005, and judgment was entered in Respondent’s favor.

This Court holds that the doctrine of Res Judicata does not apply to a Bar proceeding when a previous civil proceeding has been held.

Certification of Complaints

Docket No. 02-070-3523 (Peter Schwartz)

1. Peter Schwartz was an associate for Respondent from January of 2000 to May of 2002.
2. Due to irreconcilable differences, Schwartz departed from the firm on May 7, 2002.
3. Upon the departure, some of the clients chose to continue to be represented by Schwartz.
4. Schwartz alleges that those clients paid advance fees to Respondent's firm in excess of \$30,000, but that only \$5,675.00 was in the firm's trust account, although all the cases were still open.
5. When Schwartz asked Respondent about the fees, the Respondent claimed the fees were flat fees which he deposited directly into the firm's operating account upon receipt, and that they could not be refunded.
6. Schwartz removed the \$5,675.00 in advance fees from the trust account that could be traced to those clients who followed Schwartz when he left the firm.
7. Respondent filed a warrant in debt against Schwartz for the return of the \$5,675.00.

8. Schwartz's clients then executed letters demanding the Respondent account for and return their advance fees.
9. Respondent did not comply with the requests, but did non-suit the warrant in debt on the day of the hearing.

Docket No. 05-070-0206 (Frank James)

1. On or about October 3, 2003, Frank James hired Respondent to represent him in a custody and visitation matter.
2. James paid Respondent an advance fee (stated as being \$4000 in one part of the bar's complaint, \$5000 in another part of the bar's complaint).
3. Respondent deposited the advance fee into his operating account, and not into his trust account.
4. James later reconciled with his wife.
5. James informed Respondent that he was terminating Respondent's services and demanded a full refund of the advanced fees paid to Respondent, alleging that Respondent had not performed any legal work on his behalf.
6. In a letter dated July 9, 2004, Respondent informed James that due to the flat fee retainer agreement, James was not entitled to a refund, and, furthermore, that he could not be terminated at that time because there was a return date at the end of July of 2004, and that representation had to continue until at least that date.

7. James alleges that Respondent did not explain to him the flat fee or advance fee arrangement.
8. In a letter dated October 8, 2004, Assistant Bar Counsel Linda Berry directed Respondent to respond to James' request for an accounting of the advance fees paid.
9. Respondent then mailed James an hourly breakdown of fees.
10. James alleges that the hourly breakdown contains false information.

Docket No. 05-070-2448 (Ron Haynes)

1. Respondent represented Haynes on two felony charges and a civil forfeiture.
2. Haynes plead guilty and was sentenced on June 7, 2002.
3. Respondent then filed an appeal on the guilty plea, in the wrong court.
4. The appeal was dismissed.
5. Respondent did not inform Haynes that the appeal had been dismissed.
6. Respondent's ledger card reflects a flat fee payment of \$6,000.00 on April 6, 2001.
7. Respondent paid himself the \$6,000.00 before little, if any, work had been done.

Docket No. 05-070-2450 (Ron Haynes)

1. Respondent represented Haynes on a number of criminal charges on October 8, 2002.

2. Haynes was found guilty, and Haynes then retained Respondent to appeal his convictions.
3. Respondent did not timely file the Notice of Appeal.
4. Respondent did not inform Haynes that the appeal was dismissed for failure to timely file.
5. Respondent's ledger card reflects a flat fee payment of \$7,500.00 on March 6, 2002, to handle the Circuit Court case, and a flat fee payment of \$15,000.00 on October 15, 2002, to handle the appeal.
6. Respondent paid himself both the \$7,500.00 and \$15,000.00 amounts before little, if any, work was done.

Docket No. 05-070-3011 (Michael Foltz)

1. Michael Foltz was sentenced to a lengthy period of incarceration.
2. Foltz's mother, Linda Cubbage, hired Respondent to represent Foltz in filing a *habeas corpus* petition.
3. Respondent was paid \$2,500.00 in advance fees.
4. It is then alleged that Respondent did not perform any legal work on Foltz's behalf after accepting the fees.
5. Foltz demanded a refund by letter.
6. Respondent did not respond to the demand.

7. Respondent states that he had never spoken to Foltz or his mother, nor had Respondent agreed to file a habeas corpus petition, despite his ledger card reflecting the payment from Cubbage.
8. Respondent believes Schwartz, who was an associate of Respondent's at that time, must have been who Cubbage hired, though neither Cubbage nor Schwartz agree with Respondent's belief.

Docket No. 05-070-3625 (Bonnie Zigler)

1. In August of 2004, Zigler hired Respondent to represent her elderly father in a divorce.
2. Respondent was paid a flat fee of \$5,000.00, which he placed into his operating account and then immediately removed before little, if any, work had been done.
3. Respondent did some work on the case over a four-month period, but not to Zigler's satisfaction.
4. In December of 2004, Zigler fired Respondent and hired Earl Burns, Esq. to handle her father's divorce.
5. Burns sent a letter to Respondent requesting an itemization of the work that Respondent had performed, and requested a refund of \$2,500.00.
6. Respondent provided neither an itemization nor a refund.

Facts Found

Upon the evidence presented and arguments of counsel, the Court finds by clear and convincing evidence the following facts:

1. Respondent has been an attorney licensed to practice law in the Commonwealth of Virginia at all times relevant hereto.
2. The complaint in Docket No. 02-070-3523 (Peter Schwartz) was certified by a subcommittee on November 19, 2003, and therefore the Virginia State Bar did not act promptly as required by Part Six, §IV, Paragraph 13(G)(4) of the Rules of the Supreme Court, thereby prejudicing the Respondent with the delay.
3. The complaints in Docket Nos. 05-070-2448 (Ron Haynes), 05-070-2450 (Ron Haynes), and 05-070-3625 (Bonnie Zigler) were certified on February 24, 2006, and not February 24, 2005, as erroneously stated in the Bar's complaint.

Violations Found

Upon the evidence presented and arguments of counsel, the Court finds that the Virginia State Bar has proved by clear and convincing evidence the facts necessary to find violations of the following provisions of the Virginia Rules of Professional Conduct.

Docket No. 05-070-2448 (Ron Haynes)

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.

Docket No. 05-070-2450 (Ron Haynes)

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

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

Docket No. 05-070-3011 (Michael Foltz)

RULE 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

RULE 1.4 Communication

(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect the settlement or resolution of the matter.

RULE 1.15 Safekeeping Property

(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.

Docket No. 05-070-3625 (Bonnie Zigler)

RULE 1.15 Safekeeping Property

(c) A lawyer shall:

(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.

RULE 8.4 Misconduct

(b) It is professional misconduct for a lawyer to commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law.

It is the finding of this Court that the Virginia State Bar failed to prove by the required evidentiary standard of clear and convincing evidence any of the remaining alleged violations of the Virginia Rules of Professional Conduct and said alleged violations are dismissed.

Evidence was presented and arguments by counsel were made on the issue of an appropriate sanction. The prior record of the Respondent was presented by the Bar. The Bar also presented relevant provisions of the most recent ABA Standards for Imposing Lawyer Sanctions. The Respondent presented one character witness, Gordon Poindexter.

Accordingly, IT IS ORDERED, that the Respondent's license to practice law in the Commonwealth of Virginia is SUSPENDED, effective January 1, 2007, for a period of SIX (6) MONTHS.

IT IS FURTHER ORDERED, pursuant to Rules of Court, Part Six, §IV, Paragraph 13(M), that the Respondent shall forthwith give notice, by certified mail, of his Suspension to all clients for whom he is currently handling matters and

to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his clients. The Respondent shall give 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 Virginia State Bar within 60 days of the effective date of the Suspension that such notices have been timely given and such arrangements made for the disposition of matters

IT IS FURTHER ORDERED that costs shall be assessed by the Clerk of the Disciplinary System pursuant to Rules of Court, Part Six, §IV, Paragraph 13(B)(8)(c).

IT IS FURTHER ORDERED that certified copies of this order shall be mailed by the Clerk of the Circuit Court to the counsel of record.

IT IS FURTHER ORDERED that the Clerk of the Circuit Court shall send a certified copy of this order to the Clerk of the Disciplinary System, at Suite 1500, 707 East Main Street, Richmond, Va 23219.

IT IS FURTHER ORDERED that upon the end of all proceedings in this matter, the Clerk of the Disciplinary System shall maintain the complete file of this matter in accordance with the file retention policies and requirements of the Bar.

ENTERED December 29 2006

Cecil Powell
, Chief Judge Designate

Thomas L. Hart
, Judge

Diane H. Hildner
, Judge

A TRUE COPY
ATTESTE: Diane E. Fulk
DEPUTY CLERK

I CERTIFY THAT THE DOCUMENT TO WHICH THIS AUTHENTICATION IS AFFIXED IS A TRUE COPY OF A RECORD IN THE ROCKINGHAM COUNTY CIRCUIT COURT CLERK'S OFFICE AND THAT I AM THE CUSTODIAN OF THAT RECORD.

1/5/07 Diane E. Fulk
DATE CLERK/DEPUTY CLERK