

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

**IN THE MATTER OF
JOSEPH KELLY HALEY, III**

VS B Docket No. 07-033-1995

ORDER OF REVOCATION

This matter came on to be heard on April 24, 2009, before a panel of the Virginia State Bar Disciplinary Board (the "Board") composed of William E. Glover, 2nd Vice Chair, Sandra L. Havrilak, Russell W. Updike, Glenn M. Hodge and Stephen A. Wannall, lay member.

The Virginia State Bar ("VSB") was represented by Edward L. Davis, Bar Counsel. Joseph Kelly Haley, III (the "Respondent") appeared and was represented by Craig S. Cooley. Valarie L. Schmit May, Registered Professional Reporter of Chandler & Halasz, P. O. Box 9349, Richmond, Virginia 23227, (804) 730-1222, having been duly sworn by the Chair, reported the hearing and transcribed the proceedings.

The Chair inquired of the members of the panel whether any of them had any personal or financial interest or any bias which would preclude, or could be perceived to preclude, their hearing the matter fairly and impartially. Each member of the panel and the Chair answered the inquiry in the negative.

The matter came before the Board on a Subcommittee Determination (Certification) of the Third District Committee of the VSB and upon the Respondent's answer thereto.

Bar Counsel and counsel for the Respondent stated that they were prepared to proceed and waived the Chair's explanation of the hearing procedure. Bar Counsel and counsel for the Respondent presented opening statements.

VSB Exhibits 1 through 50 were admitted without objection. Stipulation of Fact between Bar Counsel and counsel for the Respondent were received. The Stipulation of Facts stipulate that the Findings of Fact set forth in the Certification and set forth herein under Findings of Facts are true and that these Findings of Facts support, by clear and convincing evidence, a finding of violations of the Rules of Professional Conduct enumerated in the Certification and set forth herein. Based on the Stipulation of Fact and VSB Exhibits, the Board finds:

I. FINDINGS OF FACT

1. During all times relevant hereto, the Respondent, Joseph Kelly Haley, III, was an attorney licensed to practice law in the Commonwealth of Virginia.
2. Mr. Haley was admitted to practice law in the Commonwealth of Virginia on October 1, 1992.
3. On June 3, 1993, the Circuit Court for the City of Richmond appointed Charles Slavin and Raymond Southworth to serve as guardians over the personal affairs of their cousin, Frances L. Epting, an incapacitated adult. Ms. Epting resided in a retirement home in Fredericksburg, Virginia. Mr. Southworth also resided in Virginia, and Mr. Slavin resided in the state of Maryland.
4. It being Mr. Southworth's desire to resign on January 30, 1995, the Court appointed Mr. Haley to serve as guardian ad litem for Ms. Epting for a proceeding on March 16, 1995.
5. On March 16, 1995, the Court allowed Mr. Southworth to resign as guardian and needing a Virginia resident to serve, appointed Mr. Haley to serve as guardian along with Mr. Slavin. The two agreed that Mr. Slavin would manage the guardianship checking account held at First Union Bank and Trust while Mr. Haley did the fiduciary accountings.

6. On September 14, 1995, the Court approved the final accounting for the period ending March 16, 1995, the last accounting for which Mr. Southworth was responsible.
7. Thereafter, Mr. Haley filed settlements of accounts for the periods July 16, 1998 through July 15, 1999, July 16, 1999 through July 15, 2000, and July 16, 2000 through July 15, 2001, but filed all of them late, and not in compliance with the formatting requirements provided by the Commissioner of Accounts.
8. The Commissioner of Accounts eventually approved the three accountings, but only after repeated requests for corrections by Mr. Haley, the issuing of a summons to compel the filing of the July 15, 2000 accounting, and the payment of costs associated with the summons.
9. On July 27, 2000, Mr. Slavin died, leaving Mr. Haley as the sole guardian of Ms. Epting. Mr. Slavin's daughter, Frances S. Lohosky, took over for Mr. Slavin in managing the fiduciary bank account. Ms. Lohosky would make the checks, and Mr. Haley would endorse them as guardian.
10. In accordance with Virginia Code Section 26-17.4, the accounting for the period ending July 15, 2002 became due on November 15, 2002. Mr. Haley, however, did not file the accounting.
11. On December 8, 2004, the Commissioner of Accounts issued a summons requiring Mr. Haley to file the settlement of accounts for that period within thirty days of the date of the summons.
12. Mr. Haley did not file the accounting by the summons deadline, but telephoned the Commissioner of Accounts on January 18, 2005 to say that he would file the accounting by February 1, 2005.
13. Mr. Haley still did not file the accounting as he said he would, and on March 17, 2005, called the Commissioner of Accounts again to say that he was entering a rehabilitation program.
14. No accounting having been filed, on July 7, 2005, the Circuit Court for the City of Richmond issued an Order directing Mr. Haley to appear before the Court on August 2, 2005 to show cause why the fines authorized under Virginia Code Section 26-18, or other procedures under said Section, should not be imposed upon him.
15. On August 1, 2005, Mr. Haley submitted an accounting for the period ending July 15, 2002, and on the motion of the Commissioner of Accounts, the Court continued the hearing previously scheduled for August 2, 2005.

16. In accordance with Virginia Code Section 26-17.4, the accounting for the period ending July 15, 2003 became due on November 13, 2003, but Mr. Haley did not file the accounting until nearly two years later, September 5, 2005.
17. The Commissioner of Accounts never approved Mr. Haley's accountings for those periods ending July 15, 2002, and July 15, 2003.
18. Specifically, by letter, dated April 19, 2006, Alexandra L. Palentino, Legal Assistant to the Commissioner of Accounts, advised Mr. Haley that she had to redraft his accountings in order to reconcile them. With that letter, she enclosed the redrafted accountings for Mr. Haley's signature.
19. The letter advised Mr. Haley further that the accountings for the periods July 4, 2003 through July 3, 2004 and July 4, 2004, through July 3, 2005 were also past due.
20. Finally, Ms. Palentino submitted invoices for the review and redrafting of the two delinquent accountings and asked Mr. Haley to pay them.
21. Mr. Haley, however, never paid the invoices, never endorsed or submitted the redrafted accountings prepared by Ms. Palentino, and never submitted the other accountings that were past due.
22. By letter dated May 18, 2006, Ms. Palentino advised Mr. Haley that she had not received the signed accounts for the periods ending July 3, 2002 and July 3, 2003, and had not received the accounts for the periods ending July 3, 2004 and July 3, 2005.
23. On June 7, 2006, the Commissioner of Accounts finally received from Mr. Haley the signed, redrafted accountings for the periods ending July 3, 2002 and July 3, 2003.
24. By letter dated July 13, 2006, the Commissioner of Accounts advised Mr. Haley that she had reviewed the two accountings ending on July 15, 2002 and July 15, 2003, and that they appeared to be in order except for the fees paid to Mr. Haley for legal services and his commission as Guardian.
25. Specifically, Mr. Haley's accounting for the period ending July 15, 2002, indicated that on November 15, 2001, Mr. Haley received \$1,425 in legal fees related to pleadings for a new guardian, when Mr. Haley remained guardian of record. The accountings also reflected another \$900 in legal fees for preparation of estate planning documents for Frances Epting. The same accounting reflected that these fees were in addition to the \$900 Conservator's commission that he received.

26. Secondly, the accounting ending on July 15, 2003, reflected total fees of \$2,700 paid to Mr. Haley when the current fee schedule for guardianships would have provided for a fee of \$1,634.13.
27. The Commissioner of Accounts asked Mr. Haley for an explanation of the apparent excessive fees in both accountings.
28. The Commissioner of Accounts also submitted invoices for the fees assessed against him for failing to timely file the accountings, as well as the fees for the two pending accounts.
29. In the same letter of July 13, 2006, the Commissioner of Accounts reiterated that the accounts for the periods ending July 15, 2004 and July 15, 2005 were past due, and that, "It is imperative that the accounts be filed with my office promptly to avoid further penalties."
30. Mr. Haley, however, did not file the other accountings as directed, did not pay the invoices, and did not provide explanations for his fees that were to the satisfaction of the Commissioner of Accounts.
31. Specifically, by letter dated August 1, 2006, Mr. Haley responded to the Commissioner of Accounts, stating that he charged a fee for substituting a new guardian because he had planned on substituting Frances S. Lohosky, Mr. Slavin's daughter and a member of Ms. Epting's family, as guardian in his stead. He said further that he planned to do so because he was primarily a criminal defense attorney, but changed his mind out of concern for the "mental instability" that he purportedly observed in her. (Ms. Lohosky is a school teacher with no history of mental problems.)
32. Otherwise, Mr. Haley offered the Commissioner of Accounts no explanation for the other fees and commissions about which she inquired.
33. Accordingly, by letter dated October 2, 2006, the Commissioner of Accounts informed Mr. Haley that she would defer any further approval and/or disapproval of fees paid to him during the periods ending July 15, 2002 and July 15, 2003, until she received from him the accounts for the periods ending July 15, 2004, July 15, 2005 and July 15, 2006.
34. The letter further asked Mr. Haley to file the accounts for those periods (ending in 2004, 2005 and 2006) within thirty days and offered the services of her legal assistant, Ms. Palentino, in the event he had difficulty preparing the accountings.
35. Mr. Haley, however, did not file the accountings as directed, and on November 8, 2006, the Commissioner of Accounts issued a summons requiring Mr. Haley to file the accounting for the period beginning July 16, 2003 and ending on July 15, 2004, within thirty days of the date of the summons.

36. On November 8, 2006, Frances L. Epting died.
37. On November 14, 2006, the summons was served on Mr. Haley by posted service; however, Mr. Haley did not file the accounting as directed. (Mr. Haley acknowledged to Virginia State Bar investigator Cam Moffatt that he received the summons, but said that he did not respond because he was in the process of closing his office, the building having been sold.)
38. Accordingly, on January 5, 2007, the Circuit Court for the City of Richmond issued an Order requiring Mr. Haley to appear before the Court on February 6, 2007, to show cause why the fines authorized by Virginia Code Section 26-18 or other procedures under the statute should not be imposed upon him.
39. By letter dated January 2, 2007, Mr. Haley advised the Commissioner of Accounts that he would have the accounting "done" by January 8; however, his letter did not arrive until after the show cause order had been issued.
40. Regardless, Mr. Haley did not file the accounting and having been admitted to Chippenham Hospital in Richmond, Virginia, did not appear for the show cause proceeding on February 6, 2007.
41. According to the Court's Order, entered March 9, 2007, the Commissioner of Accounts informed the Court at the hearing on February 6, 2007, that Mr. Haley had failed to file the annual accounts for the periods ending July 15, 2004, July 15, 2005, and July 15, 2006, and a final account for the period ending November 8, 2006, the date of death of Frances Epting. She informed the Court further that the annual accounts for the periods ending July 15, 2002, and July 15, 2003, were still pending in her office due to questions with regard to certain expenditures.
42. The Court appointed Michelle C. Harmon as Curator of the Estate of Frances L. Epting, and ordered Mr. Haley to turn over to her any and all funds under his control as guardian; that as a result of the death of the ward, Francis L. Epting, his duties as guardian ceased as of November 8, 2006, and that he not pay or expend any further funds from the guardianship. Finally, the Court ordered Mr. Haley to file with the Commissioner of Accounts within sixty days the accounts for the periods ending July 15, 2004, July 15, 2005, July 15, 2006 and November 8, 2006. The Court continued the matter to May 1, 2007, to determine whether any of Mr. Haley's bond as guardian should be forfeited.
43. Mr. Haley did not file any of the accountings as directed. He did, however, on May 30, 2007, file accountings for the periods 07/07/2003 through 07/02/2004, and 07/03/2004 through 07/05, 2005, with a cover letter dated May 28, 2007.
44. In his May 28, 2007, cover letter to the Commissioner of Accounts, Mr. Haley said that, "At times I was working on accountings and paying myself for the

work; at other times I was advancing myself money for work on the accountings because I was almost destitute and approaching hopelessness,” and, “Sometimes I actually did the work for her, and at other times I advanced myself the money, only failing to do the work.”

45. Mr. Haley closed the letter by stating, “I am sorry for what I have done. The State Bar will discipline me. I am the cause of my own suffering. While I am not responsible for my disease, I am responsible for my recovery. I only wish I recovered sooner, so I had not betrayed anyone’s trust. (I will repay the bondsman on surety.)”
46. As a result of Mr. Haley’s failure to furnish the accountings as ordered, the Commissioner of Accounts issued a subpoena for the bank records relating to Frances Epting’s accounts for the period of July 15, 2003 through April 2007.
47. Assistant Alexandra Palentino used the records to assemble accountings for the periods of July 4, 2003 through July 2, 2004; July 3, 2004 through July 5, 2005; July 6, 2005 through July 5, 2006 and July 6, 2006 through January 31, 2007.
48. The accounting for the period 2003-2004 reflects that Mr. Haley received \$535 in legal fees during that time.
49. The accounting for the period 2004-2005 reflects that Mr. Haley received \$1,500 in legal fees during that time.
50. The accounting for the period 2005-2006 reflects that Mr. Haley wrote checks to himself or made counter withdrawals to himself from Ms. Epting’s accounts totaling \$7,751.
51. The accounting for the period 2006 through January 31, 2007, reflects that Mr. Haley made cash withdrawals to himself from Ms. Haley’s accounts totaling \$16,613.15.
52. During an interview with Virginia State Bar Investigator Cam Moffatt on April 27, 2007, Mr. Haley said that he did not file the required accountings because “I hate doing them.” He said that he took on the guardianship of Frances Epting “as a favor to the court.” He said further that he would have the secretary for a lawyer friend prepare the accountings. When asked why he had not had someone else prepare them before, he said because he was in the middle of alcoholism and had avoided doing things.
53. Mr. Haley acknowledged to Investigator Moffatt that he had written the checks to himself and made the cash withdrawals to himself totaling \$7,751 during the 2005-2006 accounting period. He said that he began making cash withdrawals to himself when the checks ran out.

54. He said further that the \$7,751 was probably not “reasonable fees” during the period. When asked if he had earned the fees or thought that he earned the fees, Mr. Haley had no response.
55. Mr. Haley also acknowledged to Investigator Moffatt that for the period 2006 through January 31, 2007, he had made 89 cash withdrawals from Frances Epting’s accounts totaling \$16,613.15. He explained further that he was “advancing myself money” for work he anticipated doing, but that considering the balance of Epting’s estate at that time, he went well over what could be considered reasonable fees. He said that he used the money to pay his bills.
56. The bank account in question, account number 60167506, held at Union Bank and Trust, was a Guardianship account for the benefit of Ms. Epting in the names of Mr. Kelly and “C M Slavin,” although Mr. Slavin died in 2000.
57. Mr. Haley explained further to Investigator Moffatt that previously, Ms. Lohosky would make the checks and he would endorse them, but that in August 2005, he received new checks from the bank and began making the checks himself and endorsing them.
58. On August 16, 2006, Mr. Haley transferred all of the funds from Ms. Epting’s other financial account held at Franklin Federal Savings & Loan, account number 030834946, totaling \$21,518.97 (Twenty-One Thousand, Five Hundred Eighteen Dollars and Ninety-Seven Cents), into the Guardianship account at Union Bank and Trust.
59. Mr. Haley acknowledged that he continued to make cash withdrawals to himself (34 in all) after the death of Frances Haley (and after his duties as her guardian ceased, according to the court’s subsequent order), and stated that some of the withdrawals were for work he had done, but that he could not recall specifically what he was working on.
60. Mr. Haley said that he was in the “grips of alcoholism at that time.”
61. Mr. Haley’s final withdrawal from the Guardianship account, a cash withdrawal on January 29, 2007, in the amount of \$47.15 (Forty-Seven Dollars and Fifteen Cents) to himself, reduced the balance in the Guardianship account to zero, closing it out, and leaving Ms. Epting’s estate with only \$1,840.19 (One Thousand Eight Hundred Forty Dollars and Nineteen Cents) in assets on hand, consisting of jewelry, coins, and uncashed checks.
62. To account for his time as guardian, Mr. Haley offered to provide his docket book to Ms. Moffatt, but failed to do so after repeated requests to furnish the book and promises that he would do so.

63. By letter dated June 21, 2006, Mr. Haley told Frances S. Lohoski that he had “finally finished four accountings,” although he had not done so.
64. When asked by Investigator Moffatt why he had misrepresented to Ms. Lohoski that he had prepared the accountings when he had not, Mr. Haley had no response.
65. The show-cause hearing previously continued to May 1, 2007, was continued again to June 25, 2007, “to provide additional time for the former Guardian, J. Kelly Haley to provide the Commissioner of Accounts office with additional documentation and to file his annual accounts through the current period,” according to the Court’s Order.
66. On June 25, 2007, Mr. Haley having not filed accounts for the periods ending July 5, 2006 or thereafter, the show-cause matter came to be heard in the Richmond Circuit Court. Mr. Haley did not appear.
67. The Commissioner of Accounts also reported to the Court that based upon information from the subpoenaed records, she determined that Mr. Haley, as Guardian, improperly expended funds under his control. The Commissioner of Accounts also shared with the Court Mr. Haley’s letter of May 28, 2007, indicating that, “I will repay the bondsman on the surety.”
68. Based upon the findings of the Commissioner of Accounts’ office, the Court ordered that the bond of Mr. Haley be forfeited in the sum of Thirty-Eight Thousand Three Hundred Ninety-Nine Dollars and Ninety Cents (\$38,399.90). From these funds, it ordered that \$2,500 be paid to the Commissioner of Accounts for fees due that had been assessed against Mr. Haley personally for summons, show cause hearings, subpoenas duces tecum and process of service costs.
69. Finally, the Court ordered the remainder of the bond (\$35,899.90) to be paid to Michelle C. Harmon, Curator, and ordered that the bonding company, pursuant to Virginia Code Section 49-27, upon payment of the sums, recover judgment against Mr. Haley in the sum of \$38,399.90.

The Certification asserts such conduct by Joseph Kelly Haley, III constitutes misconduct in violation of the following provisions of the 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

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

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; 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.

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:
 - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

- (d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law;

II. Disposition

Upon consideration of the foregoing, following deliberation in closed session, the Board reconvened in open session, and the Chair announced that based on the Stipulation of Facts and VSB Exhibits, the VSB had proved by clear and convincing evidence a violation of Rule 1.1, Rule 1.3(a), Rule 1.15 (c)(3)(4), Rule 1.16 (a)(2), Rule 3.4 (d) and Rule 8.4(b)(c) of the Rules of Professional Conduct as charged in the Certification.

III. Sanction

The Board called for evidence in aggravation or in mitigation of the misconduct found. Bar Counsel presented the VSB's certification that the Respondent had no disciplinary record.

Counsel for the Respondent presented testimony from R. Shawn Majette, C. David Wood Whaley, and John H. Cobb, all attorneys practicing in the Commonwealth of Virginia, who testified as to their views of the Respondent as an attorney and person. Counsel for the Respondent also presented testimony of John Shinholser, a counselor for a substance abuse recovery program regarding Respondent's actions to address his problem of alcoholism.

Bar Counsel and counsel for the Respondent presented argument.

Following deliberation in closed session, the Board reconvened in open session. The Chair announced the Board's decision that the Respondent's license to practice law in the Commonwealth of Virginia should be revoked.

In reaching this decision, the Board considered the Respondent's substance abuse history and his repeated efforts to address his substance abuse problem. However, even the pending Bar compliant filed in 2007 was insufficient to motivate the Respondent to

maintain sobriety as he has had a relapse in the past year which he had not disclosed to his employer who was aware of his substance abuse history.

The Board also considered the repeated misappropriation of funds from the account of the incompetent for whom the Respondent served as guardian and the magnitude of the misappropriation which continued even after the propriety on respondent's expenditures was called in question. The Respondent misappropriated all the funds in his ward's account and has made no effort to repay the bond company for the forfeiture. The Board concluded that revocation was the appropriate sanction for the Respondent's misconduct.

Accordingly, and it is ORDERED that the Respondent's license to practice law in the Commonwealth of Virginia is revoked, effective April 24, 2009.

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

It is further ORDERED that the Clerk of the Disciplinary System shall mail an attested copy of this order to the Respondent Joseph Kelly Haley, III at his address of record with the Virginia State Bar, The Marshall Building, 2nd Floor, 105 Marshall Street, Petersburg, VA 23803, by certified mail, return receipt requested, by regular mail to Respondent's counsel at 3000 Idlewood Avenue, P.O. Box 7268, Richmond, VA 23221 and shall deliver by hand to Edward L. Davis, Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

Enter this Order this 21st day of May, 2009.

VIRGINIA STATE BAR DISCIPLINARY BOARD

By: 

William E. Glover, 2nd Vice Chair

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