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MAR 19 2012

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF STAFFORD

VS BAR OFFICE

VIRGINIA STATE BAR, EX REL
SIXTH DISTRICT SUBCOMMITTEE

v.

Case No. CL11001157-00

CLIVE ALLEN O'LEARY

MEMORANDUM ORDER
(ONE YEAR SUSPENSION WITH TERMS)

This cause came on for hearing on January 30, 2012 before a duly appointed Three-Judge Court consisting of the Honorable Marc Jacobson, the Honorable Paul F. Sheridan, and the Honorable H. Thomas Padrick, Jr., 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 Court, Part Six, § IV, Paragraph 13.

Clive Allen O'Leary ("Respondent") appeared in person with his attorney, Michael L. Rigsby. Deputy Bar Counsel Kathryn R. Montgomery appeared on behalf of the Virginia State Bar. Upon the evidence presented and arguments of counsel, the Court finds that the Virginia State Bar has proved 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.

VSB Docket Number 10-060-080220
(The Foshee Complaint)

2. In or about February 2009, L. Preston Foshee retained Respondent to represent him in a pending civil matter.
3. Mr. Foshee paid Respondent a total of \$4445.52 with the following payments:

3-12-12

CO
KM
MR

CDS

3/15/12
JK

- \$3500 paid by personal check dated February 6, 2009
 - \$450 paid by personal check dated April 21, 2009
 - \$300.06 by payroll check dated May 29, 2009
 - \$195.46 by payroll check dated June 5, 2009
4. Respondent failed to provide Mr. Foshee with reasonable communication during the course of the representation.
 5. In or about early July 2009, Mr. Foshee terminated the representation and soon thereafter, requested a refund of the fees paid. Respondent did not provide a refund.
 6. On or about July 8, 2009, Mr. Foshee filed a bar complaint.
 7. On or about July 26, 2009, Respondent responded to the bar complaint and stated that Mr. Foshee had paid him a total of \$2,000.00. Respondent later admitted to the bar's investigator that Mr. Foshee paid him a total of \$4445.52.
 8. Respondent told the bar's investigator that he did not owe Mr. Foshee a refund.
 9. Respondent produced to the bar a hand-written itemization of his time spent on Mr. Foshee's case that indicated Respondent had earned \$3660 in fees against the \$4445.52 Mr. Foshee paid. Nevertheless, Respondent insisted that he did not owe Mr. Foshee a refund.
 10. Respondent has not given Mr. Foshee a refund or an itemized bill of his services.
 11. Respondent told the bar's investigator that he deposited Mr. Foshee's fees in his trust account.
 12. Respondent did not deposit any of Mr. Foshee's fees into his trust account.
 13. Respondent has no trust account records relating to his representation of Mr. Foshee.
 14. Respondent told the bar's investigator that he had moved offices on or about late January, 2010 and during the move, he lost many of his records relating to his representation of Mr. Foshee, including the trust account records.
 15. On or about November 17, 2010, the bar issued a subpoena to Respondent for the client file and trust account records relating to Respondent's representation of Mr. Foshee. On or about December 8, 2010, Respondent responded that he did not have any trust account records because they were inadvertently destroyed during an office move on January 30, 2010.
 16. Respondent's trust account has had no activity since May 2009, with a constant balance of \$109.25 since that time to at least April 29, 2011.

VSB Docket No. 11-060-084890
(The Brown Complaint)

17. On or about December 27, 2006, Margo Brown hired Respondent to represent her in a divorce and property settlement.
18. On or about December 27, 2006 Respondent and Ms. Brown entered into a fee agreement that provided as follows: "If I initially quoted you a flat fee, the entire fee will have been earned at the time of the initiation of your case, notwithstanding the amount of time I expend in resolving the matter." The fee agreement specified a fixed fee of \$3,000.
19. On or about December 27, 2006, Ms. Brown paid Respondent \$1500.
20. On or about February 2, 2007, Ms. Brown paid Respondent \$750.
21. Ms. Brown paid Respondent an additional \$750 at another time.
22. Respondent told the bar's investigator that Ms. Brown may have paid him an additional \$300 or \$500 over the initial \$1500 deposit. Respondent denies that Ms. Brown paid him the entire flat fee of \$3000. Other than the initial fee agreement, Respondent has no records of the amounts paid to him by Ms. Brown.
23. Respondent did not deposit any of the fees paid to him by Ms. Brown into his trust account.
24. Respondent failed to act with reasonable diligence and promptness in his representation of Ms. Brown. Ms. Brown did not obtain a divorce or property settlement.
25. From in or about the spring of 2007 to February 2010, Ms. Brown and Respondent did not communicate. Respondent did not return Ms. Brown's calls or answer her letters, and he was absent when she visited his office.
26. In or about February 2010, Ms. Brown sent Respondent a certified letter, after which they met at his office on or about March 2, 2010. During this meeting, Respondent told her that he would provide her with a refund if she could produce proof of any payments she had made to him in excess of the amount he had earned on an hourly basis.
27. In or about August 2010, Ms. Brown sent Respondent another certified letter terminating the representation and seeking a refund of unearned fees. Respondent did not answer her letter.
28. On or about August 13, 2010, Ms. Brown filed a bar complaint against Respondent.
29. On or about November 5, 2010, the bar issued a subpoena to Respondent for all billing and trust account records relating to Respondent's representation of Ms. Brown. On or

about November 23, 2010, Respondent responded with a copy of his fee agreement with Ms. Brown and a copy of his time sheets. Respondent did not produce any trust account records.

30. Respondent's time sheets indicate \$1565 in total earned fees for his representation of Ms. Brown.
31. Respondent has not provided Ms. Brown with a refund. Respondent told the bar's investigator that he had earned all fees paid by Ms. Brown.
32. Respondent told the bar's investigator that all of his bookkeeping records from 2000 through January 2010 were lost in an office move.
33. Respondent told the bar's investigator that it would have been his practice to deposit the fees paid by Ms. Brown into his trust account. Respondent, however, did not deposit any of the fees paid by Ms. Brown into his trust account.

Upon the evidence presented and arguments of counsel, the Court finds that the Virginia State Bar has proved by clear and convincing evidence the following:

As to the bar complaint filed by Mr. Foshee (VSB Docket Number 10-060-080220), the Court finds violations of Rules 1.4(a), 1.5(a), 1.15(a), 1.15(e), 1.16(d), 8.1(a), and 8.4(c) of the Rules of Professional Conduct. The Court did not find a violation of Rule 1.3(a), which had been charged and prosecuted by the bar. Therefore, the Rule 1.3(a) charge as to Mr. Foshee's case is dismissed.

As to the bar complaint filed by Ms. Brown (VSB Docket Number 11-060-084890), the Court finds violations of Rules 1.3(a), 1.4(a), 1.5(a), 1.15(a), 1.15(e), 1.16(d), 8.1(a), and 8.4(c) of the Rules of Professional Conduct.

Evidence was presented and arguments by counsel were made on the issue of an appropriate sanction. The prior disciplinary record of Respondent was presented by the bar which included a Private Reprimand with Terms imposed in 2007, a Private Admonition imposed in 2007, and a Private Admonition imposed in 2010. The bar also presented relevant

provisions of the most recent *ABA Standards for Imposing Lawyer Sanctions*. Respondent testified on his own behalf.

Having considered the facts found in this case, the Respondent's prior disciplinary record, the *ABA Standards for Imposing Lawyer Sanctions*, and the Respondent's own testimony,

IT IS ORDERED that the Respondent's license to practice law in the Commonwealth of Virginia is SUSPENDED FOR ONE YEAR effective March 1, 2012.

IT IS FURTHER ORDERED that Respondent comply with the following terms:

1. Within six months of the date of this Order, Respondent shall refund \$2,000.00 to Preston Foshee and \$2500.00 to Margo Brown.
2. Respondent shall comply with all trust account requirements set forth in Rule 1.15 of the Rules of Professional Conduct and, for a period of one year following the termination of his one year suspension, shall be subject to periodic inspections of his trust account records by the Virginia State Bar.

Upon proof that the terms have been fulfilled as required, the case shall be closed. Upon the failure of Respondent to fulfill all of the terms imposed as required, the alternate sanction shall be a Two Year Suspension.

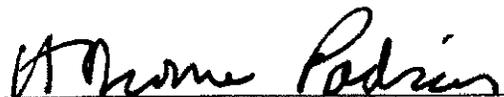
IT IS FURTHER ORDERED, pursuant to Rules of Court, Part Six, §IV, Paragraph 13-29, that Respondent shall forthwith give notice, by certified mail, of his Suspension to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his clients. 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. 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 13-9.E.

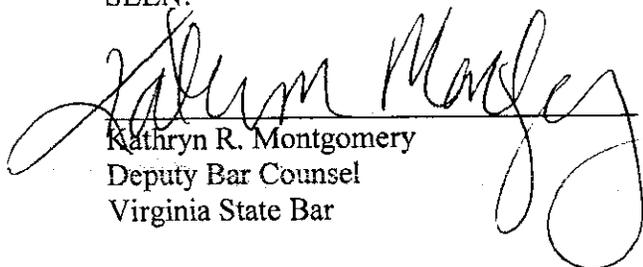
IT IS FURTHER ORDERED that certified copies of this order shall be mailed by the Clerk of the Circuit Court to the Respondent, to all counsel of record, and to the Clerk of the Disciplinary System, at 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

ENTERED: 3-12-2012



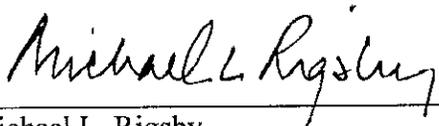
H. Thomas Padrick, Jr.
Chief Judge Designate

SEEN:



Kathryn R. Montgomery
Deputy Bar Counsel
Virginia State Bar

SEEN AND OBJECTED TO:



Michael L. Rigsby
Respondent's counsel

A COPY TESTE:
Barbara G. Decatur, CLERK
CIRCUIT COURT OF STAFFORD

