

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF CHESTERFIELD

VIRGINIA STATE BAR EX REL.
SECOND DISTRICT COMMITTEE

Complainant

JAN 24 2013

Case No. CL 12-3100
(VSB DOCKET NO. 11-022-088213)

v.

ERNEST WAYNE POWELL

Respondent

MEMORANDUM ORDER

This cause came to be heard via teleconference hearing on November 29, 2012 by a duly convened, three-judge court consisting of the Honorable Jane Marum Roush, the Honorable W. Allan Sharrett, and the Honorable William N. Alexander, II, Chief Judge Designate. The Virginia State Bar appeared by its Assistant Bar Counsel Paul D. Georgiadis. The Respondent, Ernest Wayne Powell, was present and was represented by counsel Michael L. Rigsby, who also was present.

This matter came before the Court pursuant to Respondent's August 13, 2012 Answer and Demand that the proceedings certified to the Disciplinary Board by the Second District Committee-Section II, be terminated and that this matter proceed before a three judge circuit court panel pursuant to §54.1-3935 of the Code of Virginia. On October 19, 2012, the Circuit Court for the County of Chesterfield issued a Rule to Show Cause against the Respondent, returnable on December 3-4, 2012.

By order entered on October 24, 2012, the Supreme Court of Virginia appointed the members of this three judge panel, the Honorable Jane Marum Roush, the Honorable W. Allan Sharrett, and the Honorable William N. Alexander, II, Chief Judge Designate.

Pursuant to §54.1-3935 (B) of the Code of Virginia and Pt. 6, §IV, ¶13-6 H, the parties tendered an Agreed Disposition to the Court.

Upon review of the tendered Agreed Disposition and upon consideration of the arguments of counsel, the Court

ACCEPTS the tendered Agreed Disposition and thereby makes the following findings of fact and findings of misconduct and imposes the sanction of Public Reprimand without Terms

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CHESTERFIELD CIRCUIT COURT
2012 DEC 17 AM 11:36
JANE MARUM ROUSH
JUDGE
ERNEST W. POWELL
TESTIMONY
CLERK

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VIRGINIA STATE BAR

I. FINDINGS OF FACT

1. At all times relevant, Respondent was licensed to practice law in the Commonwealth of Virginia.
2. Respondent was counsel for six employees in their worker's compensation claims against Christian Broadcasting Network, Inc., and their subsequent tort suits against Baker Roofing Company, and Hentz Engineering, Inc. The worker's compensation cases included Lilibeth Taylor v. Christian Broadcasting Network, Inc., VWC File No. 237-15-03 and Cheryl Bond v. Christian Broadcasting Network, Inc., VWC File No. 241-30-60. Respondent entered an appearance in the Taylor case on or about November 18, 2008 and became sole counsel of record on or about March 24, 2009. In the worker's compensation cases, Respondent alleged that the claimants "suffered the onset of occupational diseases which arose out of, and in the course of their employment for the Christian Broadcasting Network (hereinafter "CBN") resulting from chemicals used in a membrane roof replacement project on the building in which they worked..." The claimants sought indemnity and medical benefits from CBN.
3. Thereafter, Respondent filed six civil suits for the claimants. The defendants included the engineering consultant for the roofing job, Hentz Engineering, Inc., ("Hentz") and the roofing company, Baker Roofing Company, ("Baker"). The six civil suits were Cheryl Bond v. Baker Roofing Co., et al. (CL 09-4116)(filed 6/25/09); Lilibeth Taylor v. Baker Roofing Co., et al. (CL 09-4117)(filed 6/25/09); Denise Black v. Baker Roofing Co., et al (CL 09-4208)(filed 6/29/09); Joan Sidwell v. Baker Roofing Co., et al. (CL 09-4209)(filed 6/30/09); Monique Thomas v. Baker Roofing Co., et al. (CL 09-3735)(filed 6/5/09); and Lori Provost v. Baker Roofing Company, et al. (CL 10-4075). Respondent pled general negligence claims and punitive damage claims against Baker and Hentz. While a number of other corporate defendants were named in products liability and other counts, Respondent ultimately non-suited these other corporate defendants without service being issued upon them. Respondent with-held service of process of the complaints against Baker and Hentz until May, 7, 2010, when he requested that process be issued for the six civil suits pending against Baker and Hentz. The six civil suits ultimately were consolidated into one action on December 28, 2010.

4. While the civil suits were pending as filed but not served against Baker and Hentz, Respondent took depositions of management and other employees of Baker and Hentz.
5. On or about October 9, 2009, Respondent issued a witness subpoena to Baker President William Hitchings. Hitchings had his Safety Director Pinkie Wood handle the matter. At all times Respondent advised that the matter concerned a worker's compensation claim or claims arising from the CBN roofing project. At no time did Respondent reveal that he had filed pending civil suits against Baker arising from the CBN roofing project for the same claimants. Accordingly, Wood identified several employees for Respondent to depose as fact witnesses. Believing that her company and its employees were solely fact witnesses and faced no liability, Wood failed to request counsel to prepare the employees and to handle and review any document requests from Respondent with regard to the Worker's Compensation Claims.
6. On October 26, 2009, Respondent took the deposition of Baker Safety Director Pinkie Wood. In the course of the deposition, Respondent demanded Baker's file on the CBN roofing job and advised her of her obligation to produce it *in toto*:

"We have a right to see everything that's there. It's one of those law things that we deal with. So, I mean, there are a couple of ways to do it. You can let me take it and copy it, send it back to you. You can get it copied and send it to Mr. Lynch and me...It's up to you. But we need to get it, and we should have had it before today." T-34

Wood responded, *"I have exactly what I was asked for, which was the contract change orders, MSDS. I gave you what you --all asked me for." T-34*

Respondent further advised, *"I am saying that ultimately we want everything pertaining to the job, to see what might be relevant to her case...either we're going to copy it, you know, today, or we'll copy it some other time." T-35*

Woods then agreed to copy the entire file and send counsel a copy: *Respondent advised, "I understand that you're the safety person...So you're in a very awkward position. I understand that...your boss said that you had all of the*

knowledge." T-38

7. On October 28, 2009, Respondent took the deposition of Hentz Engineering President Stephen E. Hentz. Hentz was unaware of the pending civil lawsuits against his company and understood he was present to answer discovery questions relative to the pending Worker's Compensation cases. Questions posed to Hentz by Respondent included the role and responsibility of Hentz under the contract to report worker complaints to CBN; whether the roofing job by Baker conformed to CSI standards; whose role it was to identify and report dangers of roofing adhesives; reliance on Baker Roofing to work with CBN to minimize inhalation issues; who controlled the job site; and whether there was a general liability policy in place for the project.

8. On February 26, 2010, Respondent took the deposition of Baye Diouf, Baker's site foreman for the CBN roofing job. Respondent represented to Diouf that "*...I represent four people, some of whom still work at CBN...But now their claim is against CBN...So, you're not in this case at all. In other words, you're not a defendant...You're not a defendant. You're simply a witness...I know you called my office. And I believe you were wondering why we wanted to talk to you; and that's just because your name came up that you were the foreman of the job. So my purpose here is just to get whatever information, whatever facts that you might know about this work. And again, you don't need a lawyer because you're not part of this lawsuit, except as a witness.*" T 4-5

Respondent then represented, "*And so the main thing is this is concerning CBN and my clients. And except for just the facts you know, It doesn't concern Baker Roofing.*" T-7
[Emphasis added]

9. On February 26, 2010, Respondent took the deposition of Culbert Carolino, an owner and vice-president of Hentz:

Powell: *Okay, I mean you're entitled to have a lawyer here. Like for Hentz Engineering, but really you're a fact witness, and that's the only reason I am asking you questions. You're not a party. In other words, Hentz is not a party in this lawsuit or this claim.*

A: *I understand*

Powell: *And you're not personally a party. No one is suing you or suing Hentz [emphasis added]. And you know something, I believe, based on what your boss has said and based on what the documents show me, which is that you visited this site. And so these incidents that led to this workers comp claim—the only reason I need to talk to you is because I believe you know something about it, at least you were there, to get more of a feel of what you do, you meaning what the firm does.*
T 6:9-25, 7: 1-2

10. As with the other depositions, Respondent's deposition questions to Carolino ranged far afield from the issues in the worker's compensation case and included a number of issues in the pending but undisclosed tort case.

II. NATURE OF MISCONDUCT

Such conduct by Ernest Wayne Powell constitutes misconduct in violation of the following provisions of the Rules of Professional Conduct:

RULE 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of fact or law; or

RULE 4.3 Dealing With Unrepresented Persons

- (a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
- (b) A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.

In addition to the aforementioned findings of facts and misconduct, the Court does consider as mitigating facts that said misconduct did not cause any actual prejudice to the civil defendants; that Respondent has practiced law for 32 years without any prior disciplinary record; and that Respondent has fully cooperated with the investigation of the Virginia State Bar.

Accordingly, the Court hereby ORDERS

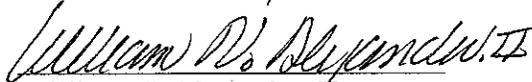
that Respondent be and is hereby issued this PUBLIC REPRIMAND for such misconduct.

The Clerk of the Disciplinary System shall comply with all requirements of Part 6, §IV, ¶13 of the Rules of Court, as amended (the "Rules"), including but not limited to assessing costs pursuant to ¶13-9E.1 of the Rules and complying with the public notice requirements of ¶13-9G of the Rules.

The Court Reporter who transcribed these proceedings is Angela N. Sidener, Chandler & Halasz Court Reporters, P.O. Box 9349, Richmond, VA 23227.

Let the Clerk of the Court send a copy *teste* to all counsel of record and to Barbara S. Lanier, Clerk of the Virginia State Bar Disciplinary Board, Virginia State Bar, 707 E. Main Street, Suite 1500, Richmond, VA 23219.

Entered 12/7/12



William N. Alexander, II
Chief Judge Designate

I ASK FOR THIS:



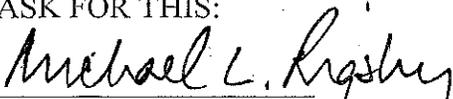
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A COPY TESTE:

JUDY L. WORTHINGTON, CLERK

BY 
DEPUTY CLERK

I ASK FOR THIS:



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