

**VIRGINIA:**

**BEFORE THE THIRD DISTRICT COMMITTEE, SECTION III,  
OF THE VIRGINIA STATE BAR**

**IN THE MATTER OF  
DAVID ALBERT POWERS, III**

AUG 23 2012

**VSB Docket No. 11-033-085455**

**DISTRICT COMMITTEE DETERMINATION  
(PUBLIC ADMONITION WITH TERMS)**

On August 15, 2012, a hearing in this matter was held before a duly convened Third District Committee, Section III, panel consisting of Margaret E. McDermid (lay member), Dr. Stephen J. Leibovic (lay member), Yvonne S. Wellford, Esquire, Dennis R. Kiker, Esquire, Collin J. Hite, Esquire, and Michael S. Huberman, Esquire, Chair, presiding.

The Respondent, David Albert Powers, III, Esquire, appeared in person with his counsel, David L. Hauck, Esquire. The Virginia State Bar appeared through its Bar Counsel, Edward L. Davis.

The matter proceeded upon the Charge of Misconduct, dated March 28, 2012, setting forth allegations that the Respondent violated Rules of Professional Conduct 1.5 (e), *Fees*, 1.15 (c) (3) and 1.15 (e) (1) (iii), *Safekeeping Property*.

The Chair polled each member of the hearing panel as to whether they had any personal or financial interest that might affect or reasonably be perceived to affect their ability to be impartial. Upon receiving answers in the negative, and upon the Chair affirming that he had no such interest, the Chair advised the parties of the hearing procedures.

The Committee received Virginia State Bar Exhibits 1-4 without objection. The parties then jointly moved the panel to dismiss the alleged violation of Rule 1.5 (e) for lack of clear and convincing evidence, and to accept the Respondent's stipulation to violations of Rules 1.15 (c) and 1.15 (e) (1) (iii). Upon due deliberation, it was the decision of the Committee to grant the motion. Accordingly the Committee dismisses the alleged violation of Rule of Professional Conduct 1.5 (e) and finds that the Respondent, David Albert Powers, III, violated Rules of Professional Conduct 1.15 (c) (3) and 1.15 (3) (1) (iii).

The Committee then received without objection the Respondent's prior disciplinary record consisting of a Dismissal with Terms, a Public Reprimand with Terms, and a Private Reprimand with Terms. The committee also received the testimony of the Respondent. The Committee received Respondent's Exhibits 1 and 2 without objection, and counsel argued an appropriate sanction.

Upon due deliberation, having considered all of the evidence, the stipulations of the parties and the Respondent's prior disciplinary record, a majority of the Committee determined an appropriate sanction to be a Public Admonition with Terms.

Pursuant to Part 6, Section IV, Paragraph 13-16.X of the Rules of the Virginia Supreme Court, the Third District Committee, Section III, of the Virginia State Bar hereby serves upon the Respondent the following Public Admonition with Terms:

**I. FINDINGS OF FACT**

1. At all times relevant hereto, the Respondent, David Albert Powers, III, has been an attorney licensed to practice law in the Commonwealth of Virginia.
2. Between 2004 and 2005, Mr. Powers represented a client on robbery, burglary and firearms charges in the Powhatan Circuit Court. The client was found

guilty of all three charges and, on May 26, 2005, sentenced to eight years in the penitentiary.

3. The client and his father (the complainants) wanted to appeal. Mr. Powers informed them that he was not comfortable handling the appeal, but agreed to note the appeal for a fee pending the hiring of appellate counsel, and asked the complainants to pay him \$6,000 that he would in turn pay to the attorney that they hired.
4. Mr. Powers noted the appeal and ordered the transcript.
5. In May and June 2005, the complainants paid Mr. Powers a total of \$6,650 in three checks (\$650 + \$3,000 + \$3,000).
6. The complainants consulted with several attorneys recommended by Mr. Powers before selecting one that they could afford.
7. In June 2005, Mr. Powers paid the appellate attorney \$4,000 from the client's funds in two payments. He also paid for the transcript and the Court of Appeals filing fee, and \$1000 to his law firm, all from the client's funds.
8. The appellate attorney filed a petition for appeal at the Court of Appeals where it was denied by a single judge. The appellate attorney passed away before he could do any further work on the appeal.
9. The complainants wanted a refund, but were unable to obtain one from the appellate attorney's former office, and Mr. Powers was unable to help with a refund.
10. In March 2006, the complainants paid Mr. Powers another \$750 to petition for a three-judge review, and eventually hired another attorney to complete the appeal.
11. Unable to obtain a refund from the appellate attorney's office, and upset that Mr. Powers could not explain the disposition of their fees, the complainants submitted a complaint to the Virginia State Bar on September 28, 2010.
12. In response to the complaint, Mr. Powers furnished copies of some cancelled checks, and had a ledger prepared to respond to the complaint.
13. One of the escrow account checks, made payable to the appellate attorney in the amount of \$1,000, bore the annotation "PASTERNAK - RES" which has no known connection to the client's matter, and Mr. Powers could offer no explanation for it.
14. The ledger also indicates that \$39 of the complainant's funds remained in escrow although Mr. Powers had ceased work on the case four years earlier.

15. The ledger does not reflect the \$750 deposit for the three-judge review in March 2006 although it reflects the equivalent \$750 disbursement to the firm in June 2006, suggesting that there were additional client funds for which there had been no accounting
16. Mr. Powers explained that his law partner maintained the law firm's trust account while Mr. Powers maintained client ledgers for his cases. He acknowledged, however, that he did not maintain a client ledger for this appeal.
17. Mr. Powers acknowledged that the accounting ledger was prepared years later in 2010 to respond to the bar complaint. During the ensuing investigation, Mr. Powers indicated his belief that the \$650 initial payment may have been for the transcript (the transcript cost \$836) although he was not sure.
18. The client understood that the \$650 paid in the beginning was to note the appeal. Mr. Powers' ledger, however, indicates that his law firm received \$1,000 at that time.
19. At the disciplinary hearing, Mr. Powers testified that he thought that the \$650 was for a post-trial motion in the Powhatan Circuit Court, and that it was not related to the appeal. Annotations on the check reflect that the \$650 was for a Powhatan matter as opposed to the appeal (as indicated on another check paid the same day) indicating that this may be true. Mr. Powers also explained that he spent some of his client's funds on courier fees over the years.
20. Without a contemporaneous client ledger, however, Mr. Powers was unable to account for the receipt or disbursement of the client funds that he received for the appeal.
21. Removal of the \$650 payment still results in \$100 of client funds being owed to the client, there being no courier fees or other disbursements reflected on the ledger.

## **II. NATURE OF MISCONDUCT**

Such conduct by David Albert Powers, III constitutes misconduct in violation of the following provisions of the Rules of Professional Conduct:

### **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

## **RULE 1.15 Safekeeping Property**

- (e) Record-Keeping Requirements, Required Books and Records. As a minimum requirement every lawyer engaged in the private practice of law in Virginia, hereinafter called "lawyer," shall maintain or cause to be maintained, on a current basis, books and records which establish compliance with Rule 1.15(a) and (c). Whether a lawyer or law firm maintains computerized records or a manual accounting system, such system must produce the records and information required by this Rule.
  - (1) In the case of funds held in an escrow account subject to this Rule, the required books and records include:
    - (iii) subsidiary ledger. A subsidiary ledger containing a separate account for each client and for every other person or entity from whom money has been received in escrow shall be maintained. The ledger account shall by separate columns or otherwise clearly identify escrow funds disbursed, and escrow funds balance on hand. The ledger account for a client or a separate subsidiary ledger account for a client shall clearly indicate all fees paid from trust accounts;

### **III. PUBLIC ADMONITION WITH TERMS**

Accordingly, it is the decision of the Third District Committee to offer the Respondent an opportunity to comply with certain terms and conditions, compliance with which will be a predicate for the disposition of a Public Admonition with Terms of this complaint. The terms and conditions are:

1. Mr. Powers shall arrange for the services of an independent auditor or certified public accountant to conduct an audit of his current open files. The cost of such audit shall be borne completely by Mr. Powers. Mr. Powers shall engage such services by September 14, 2012. The auditor or CPA shall review the financial files and subsidiary ledgers for Mr. Powers' open files, and verify all accounts and ledgers reconcile, as well as confirm subsidiary ledgers exist in

each file. The auditor or CPA shall report back to Bar Counsel as soon as practicable, but no later than December 3, 2012.

2. Mr. Powers shall take an additional five (5) hours of Continuing Legal Education (CLE) in law practice management in 2012 and again in 2013.
3. Mr. Powers shall refund \$100 (one hundred dollars) to Toby K. Hawley no later than September 14, 2012, by certified or cashier's check.

If the terms and conditions are not met by the specified dates, as an alternative disposition the Virginia State Bar shall schedule a hearing before the District Committee at which time the Respondent will be required to show cause why this District Committee should not impose additional sanctions for failure to comply with any of the terms, pursuant to Part Six, Section IV, Paragraph 13-16.BB of the Rules of Court. Any Proceeding initiated due to failure to comply with terms will be considered a new matter, and an administrative fee and costs will be assessed pursuant to Paragraph 13-9.E of the Rules of Court.

Pursuant to Paragraph 13-9.E of the Rules of Court, the Clerk of the Disciplinary System shall assess costs.

The court reporter who transcribed these proceedings is Teresa L. McLean, Chandler & Halasz, P.O. Box 9349, Richmond, Virginia 23227, tel. (804) 730-1222.

THIRD DISTRICT COMMITTEE  
OF THE VIRGINIA STATE BAR

By: \_\_\_\_\_



Michael S. Huberman, Chair

CERTIFICATE OF MAILING

I certify that on the 23<sup>rd</sup> day of August, 2012, a true and complete copy of the District Committee Determination (Public Admonition With Terms) was sent by certified mail to David Albert Powers, III, Respondent, at P.O. Box 116, Chesterfield, VA 23832-0116, Respondent's last address of record with the Virginia State Bar, and by first class mail, postage prepaid to David L. Hauck, Esquire, Respondent's Counsel, at Duane, Hauck and Gnapp, P.C., 10 East Franklin Street, Richmond, Virginia 23219-2106.



Edward L. Davis, Bar Counsel