

VIRGINIA:

BEFORE THE THIRD DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

IN THE MATTER OF
DAVID O'NEIL PRINCE

VS B Docket No. 08-032-074356

SUBCOMMITTEE DETERMINATION
(PUBLIC ADMONITION WITH TERMS)

On July 23, 2010, a meeting in this matter was held before a duly convened Third District Subcommittee consisting of John B. Wake, Jr., Lay Member; Michelle C. Harman, Esq.; and Tony H. Pham, Esq., Chair, presiding.

Pursuant to Part 6, Section IV, Paragraph 13-15.B.4.a. of the Rules of the Virginia Supreme Court, the Third District Subcommittee 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, Respondent David O'Neil Prince [Prince], has been an attorney licensed to practice law in the Commonwealth of Virginia.
2. On or about February 28, 1995, Complainant Joan Eastman [Eastman] was injured in a slip and fall accident while at work as a phlebotomist.
3. Eastman sought and was awarded benefits by the Virginia Workers Compensation Commission [Commission] which she received starting August 8, 1995. In 1998, the Court of Appeals dismissed Eastman's appeal of the decision of the Commission that certain physical and cognitive problems were not causally related to the compensable injury and that as to her work-related injuries, Eastman was deemed capable of returning to her pre-injury employment. The benefit award was terminated effective March 4, 1997.
4. Prince met with Eastman and her pastor, Ms. West, who was in attendance whenever Eastman met with Prince. Prince had informed Eastman that he would undertake the case before the Commission but he would not handle the case for the amount of attorney's fees which the Commission would award him. Instead, he required a \$1,500.00 retainer.
5. In May of 2003, Eastman paid Prince \$1,500.00 for representation in the case before the Commission. She received a receipt for the payment.

6. By letter to the Commission dated May 24, 2003, Prince noted his representation of Eastman regarding a claim which Eastman had previously filed *pro se* with the Commission.

7. In her claim, Eastman sought certain medical treatment, compensation and reconsideration of the 1998 Commission decision on the basis of alleged misrepresentation of fact by her attending physician regarding his administration of an injection in Eastman's neck. It was Eastman's position that the injection had been administered without her consent and it was the cause of her cognitive dysfunction [claim].

8. In June of 2004, Prince filed a motion to reinstate in the Commission seeking to get Eastman's case back on the Commission's docket. The motion was based, *inter alia*, upon the attending physician's injection which allegedly was the sole cause of Eastman's cognitive dysfunction.

9. Subsequently, Prince was also paid \$5,000.00 by a BB&T bank check number 75594830, dated June 10, 2004, for his representation of Eastman.

10. Upon reviewing Eastman's file from a prior attorney, Prince advised Eastman that she also had a malpractice case against her attending physician and she agreed also to pursue a malpractice case.

11. According to Prince, he sought a supporting medical opinion from two doctors. Neither doctor supported Eastman's contention concerning the injection.

12. Prince wrote a memo to file dated August 23, 2004, concerning his conversation that date with Dr. Hansen, one of the two doctors, after his review of Eastman's medical records. In the memo Prince wrote that Dr. Hansen could not connect the shot with the problems Eastman now claims to suffer; that the doctor described the injection as benign and one his clinic had given to patients all the time over the past 15 years without a problem; that it was practically impossible for the injection to get into the brain because of how it is protected; and the doctor thought it unlikely Prince would find an expert to support the theory that the injection caused Eastman's mental problems.

13. On August 24, 2004, Prince filed a motion for judgment in the City of Richmond Circuit Court on behalf of Eastman against, *inter alia*, the attending physician [court case]. In the court case, Prince alleged that the injection was the cause of Eastman's cognitive dysfunction, that the attending physician had falsely reported to the Commission that Eastman was able to return to work despite her resulting disability, and that the attending physician's alleged false statement caused Eastman to lose her worker's compensation benefits.

14. Prince did not pursue the court case further. According to Prince, Eastman told him not to pursue it further but instead to work on the claim.

15. According to Eastman and West, Eastman never told Prince to stop pursuing the court case.

16. Prince's motion to reinstate the claim was denied by a deputy commissioner. Prince appealed that decision to the Commission and the denial was vacated and remanded. Upon proceeding before the deputy commissioner on remand, the fraud allegation was found untenable, the employer was responsible for medical care and treatment related to the original compensable injury as long as necessary but that responsibility did not extend to care and treatment for Eastman's cognitive disability and the motion to reinstate on the docket was denied.

17. In the March 26, 2007, opinion on remand of the deputy commissioner, Prince was awarded a \$500.00 attorney's fee to be paid by Eastman.

18. On July 31, 2007, the opinion on remand was affirmed by the Commission.

19. By letter dated October 4, 2007, Eastman responded to a letter from Prince in which he indicated little basis to appeal further. Eastman stated that Prince had dropped the court case. She asked for a \$5,000.00 refund because no expert witness was ever used and a refund of any other unused cash because she needed to pay off the loans used to pay Prince.

20. Prince wrote to Eastman on November 19, 2007, stating, *inter alia*, that he had focused on the part of the case Eastman had requested and the funds paid to him had been expended during the "long running course of this litigation."

21. By letter dated November 29, 2007, to Prince from Eastman and her daughter, it was stated, *inter alia*, that on the day before, Prince had requested until December 7, 2007, to make copies of records and to consider the return of the \$5,000.00; that Eastman and her daughter were expecting the return of all records by December 14, 2007 and the return of all escrow funds less \$500.00 by the same date; that Eastman wanted to end the relationship.

22. In December of 2007, Eastman, her daughter and West met with Prince. Eastman asked for a refund of \$4,000.00. Prince said he was not sure he had the funds and would get back to her.

23. In January of 2008, Prince called Eastman and offered to pay \$2,000.00 in monthly installments of \$500.00 each until paid.

24. By letter dated January 28, 2008, Eastman wrote Prince offering for Prince to pay either a \$3,000.00 lump sum payment by February 18, 2008, or \$4,000.00 in \$500.00 monthly installments until paid. She also stated she wanted to see either a cancelled check or a receipt as evidence of having paid \$500.00 to Dr. Hansen for reviewing Eastman's medical records.

25. Prince did not respond to the letter and Eastman submitted to the bar a complaint dated March 5, 2008.

26. Prince responded to the bar complaint indicating, *inter alia*, that the \$5,000.00 retainer was drawn down for attorney's fees, an expert witness and copying expenses. Prince did not mention the \$1,500.00 payment.

27. The court case was stricken from the Richmond Circuit Court's docket in June of 2008.

28. On August 11, 2008, a facsimile transmission was sent to Prince by Terri Bishop from Management Care Innovations, LLC, resending an offer of \$32,000.00 for settlement of the claim.

29. On August 11, 2008, Prince sent a letter to Eastman with the fax, asking Eastman to advise how she wished to proceed.

30. On August 14, 2008, Prince sent a letter to Bishop indicating the following:

This is notice to you of my inchoate claim for attorney's fees [sic] this matter, pursuant to §65.2-714 of the Code of Virginia, 1950, as amended.

31. Virginia Code §65.2-714 states, *inter alia*, that the fees of attorneys for services in worker's compensation cases are subject to the approval and award of the Commission.

32. Prince charged and received a total of \$6,500.00 in representing Eastman in the court case and the claim. He has not refunded to Eastman any portion of those funds. He has not provided to Eastman or the bar any breakdown of how the funds were applied between the court case and the claim, except as indicated hereinafter regarding an escrow ledger.

33. During the bar investigation of this matter, Prince was interviewed by Bar Investigator Cam Moffat on December 22, 2008. In the interview, Prince stated, *inter alia*, he told Eastman he would not take the worker's compensation claim for what the Commission would award him and he would need a \$1,500.00 retainer, which he was paid. Prince stated that the funds paid to him by Eastman were deposited into his escrow account.

34. In the bar interview, Prince also told Moffatt that when the carrier made a settlement offer in 2008, he communicated it to Eastman. Prince did not know whether Eastman accepted the offer because he no longer represented her at the time. Prince stated he did not file a motion to withdraw in the claim.

35. The funds Prince received in attorney's fees for representation of Eastman before the Commission which were over and above \$500.00 amounted to illegal and unreasonable fees.

36. On information and belief, Prince never sought approval by the Commission for fees he had already received for the claim over and above \$500.00.

37. The Virginia State Bar served Prince with a June 26, 2008 subpoena *duces tecum* returnable July 17, 2008, seeking his files and trust account records pertaining to his

representation of Eastman “in a worker’s compensation case and a potential medical malpractice case.”

38. Prince responded to the subpoena *duces tecum* by letter dated July 17, 2008, enclosing only a copy of an escrow subsidiary ledger for Ms. Eastman. The ledger was incomplete.

39. The escrow subsidiary ledger showed one credit deposit of \$5,000.00 followed by eleven debits. Payee entries for seven debits showed “For Cash.” Payee entries for two debits showed “Clerk, Richmond Circuit Court.” One payee entry was for Dr. Hansen for the amount of \$500.00 and the final payee entry was “Kinko’s Copies.” The total of the debits equaled \$5,000.00. The escrow subsidiary ledger indicated that debits were either denoted as “workman’s comp,” “miscellaneous” or “personal injury.”

40. The total debits in the escrow subsidiary ledger denoted as “workman’s comp” total \$4,089.00. Debits denoted as “miscellaneous” total \$373.68. Debits denoted as “personal injury” total \$537.32. A running total was not reflected in the ledger. The ledger had no deposit entry for the \$1,500.00 payment.

41. During the interview of Prince by Moffatt, Prince also told Moffatt that the payee entries of “For Cash” in the escrow subsidiary ledger were payments to himself for earned fees.

42. On information and belief the escrow subsidiary ledger payee entries of “For Cash” were payments of fees to Prince for his representation of Eastman in both the court case and the claim.

43. Prince failed to produce to the bar in response to the subpoena *duces tecum* cash receipts and disbursements journals or equivalents and deposit slips pertaining to both the \$1,500 and \$5,000 payments; and Prince failed to produce a subsidiary ledger pertaining to the \$1,500.00 payment.

44. The incomplete escrow subsidiary ledger, the failure to produce any records pertaining to the \$1,500.00 payment and the failure to produce cash receipts and disbursements journals for the Eastman representation reflect that the purpose of all receipts and disbursements of escrow funds in the escrow subsidiary ledger were not fully explained and not supported by adequate records, and, with respect to the \$1,500.00, were totally missing.

45. During the bar investigation of this matter, Prince’s escrow account bank statements were reviewed for a thirty-six month period from January 2004 through December 2006. The bank statements reflect that monthly interest was earned on the escrow account and credited to a business savings account in a total amount of \$346.16.

46. The interest earned on the escrow account by Prince constituted, *inter alia*, unreasonable fees.

47. Prince failed to pursue the court case after filing a motion for judgment and failed to withdraw from the court case with leave of court.

48. Prince failed to refund to Eastman any of the \$6,500.00 in funds which she paid to him for the court case and the claim.

49. In the claim, Prince attempted to obtain additional unreasonable attorney's fees claim by asserting an "inchoate claim" pursuant to Virginia Code §65.2-714, against an offer of settlement at a time when, by his admission, Prince did no longer represented Eastman.

II. NATURE OF MISCONDUCT

Such conduct by David O'Neil Prince constitutes misconduct in violation of the following provisions of the Rules of Professional Conduct:

RULE 1.3 Diligence

- (a) A lawyer shall act with reasonable diligence and promptness in representing a client.
- (c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

RULE 1.5 Fees

- (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
 - (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services;
 - (4) the amount involved and the results obtained;
 - (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client;
 - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
 - (8) whether the fee is fixed or contingent.

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.
- (d) Funds, securities or other properties held by a lawyer or law firm as a fiduciary shall be maintained in separate fiduciary accounts, and the lawyer or law firm shall not commingle the assets of such fiduciary accounts in a common account (including a book-entry custody account), except in the following cases:
- (2) funds, securities, or other properties may be maintained in a common account:
 - (iii) where (a) a computerized or manual accounting system is established with record-keeping, accounting, clerical and administrative procedures to compute and credit or charge to each fiduciary interest its pro-rata share of common account income, expenses, receipts and disbursements and investment activities (requiring monthly balancing and reconciliation of such common accounts), (b) the fiduciary at all times shows upon its records the interests of each separate fiduciary interest in each fund, security or other property held in the common account, the totals of which assets reconcile with the totals of the common account, (c) all the assets comprising the common account are titled or held in the name of the common account, and (d) no funds or property of the lawyer or law firm or funds or property held by the lawyer or the law firm other than as a fiduciary are held in the common account.

For purposes of this Rule, the term "fiduciary" includes only personal representative, trustee, receiver, guardian, committee, custodian and attorney-in-fact.

- (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:
 - (i) a cash receipts journal or journals listing all funds received, the sources of the receipts and the date of receipts. Checkbook entries of receipts and deposits, if adequately detailed and bound, may constitute a journal for this purpose. If separate cash receipts journals are not maintained for escrow and non-escrow funds, then the consolidated cash receipts journal shall contain separate columns for escrow and non-escrow receipts;
 - (ii) a cash disbursements journal listing and identifying all disbursements from the escrow account. Checkbook entries of disbursements, if adequately detailed and bound, may constitute a journal for this purpose. If separate disbursements journals are not maintained for escrow and non-escrow disbursements then the consolidated disbursements journal shall contain separate columns for escrow and non-escrow disbursements;
 - (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;
 - (v) the records required under this paragraph shall be preserved for at least five full calendar years following the termination of the fiduciary relationship.
- (f) Required Escrow Accounting Procedures. The following minimum escrow accounting procedures are applicable to all escrow accounts subject to Rule 1.15(a) and (c) by lawyers practicing in Virginia.
 - (2) Deposits. All receipts of escrow money shall be deposited intact and a retained duplicate deposit slip or other such record shall be sufficiently detailed to show the identity of each item;
 - (6) Receipts and disbursements explained. The purpose of all receipts and disbursements of escrow funds reported in the escrow journals and subsidiary ledgers shall be fully explained and supported by adequate records.

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:
 - (1) the representation will result in violation of the Rules of Professional Conduct or other law;
- (c) In any court proceeding, counsel of record shall not withdraw except by leave of court after compliance with notice requirements pursuant to applicable rules of court. In any other matter, a lawyer shall continue representation notwithstanding good cause for terminating the representation, when ordered to do so by a tribunal.
- (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal or **deliberately wrongful act** that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law; [emphasis added]

III. PUBLIC ADMONITION WITH TERMS

Accordingly, it is the decision of the subcommittee 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:

Term 1: No later than August 31, 2010, the Respondent shall refund to Joan Eastman the amount of \$4,089.00 and provide evidence of same to the Virginia State Bar.

Term 2: No later than July 30, 2010, the Respondent shall take and complete the 5.5 hour Virginia CLE seminar entitled, "Intro to a Successful Workers' Comp Practice," without receiving any mandatory continuing legal education credit; and by said date, Respondent shall

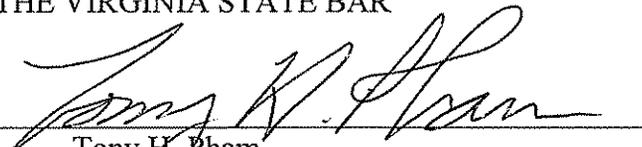
provide to the Virginia State Bar evidence of having taken and completed the seminar no later than said date without receiving any mandatory continuing legal education credit.

Upon satisfactory proof that such terms and conditions have been met, this matter shall be closed. If the terms and conditions are not met by the specified dates, the district committee shall impose a Certification pursuant to Part Six, Section IV, Paragraph 13-15.F. of the Rules of Court.

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

THIRD DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

By


Tony H. Pham
Chair

CERTIFICATE OF MAILING

I certify that on August 2, 2010, I caused to be mailed by Certified Mail, Return Receipt Requested, a true and complete copy of the Subcommittee Determination (Public Admonition With Terms) to David O'Neil Prince, Respondent, at Suite 504, 411 East Franklin Street, Richmond, VA 23219, Respondent's last address of record with the Virginia State Bar, and by first class mail, postage prepaid to Leonard W. Lambert, Esq., Respondent's Counsel, at 321 North 23rd Street, Richmond, VA 23223-7140.

