

VIRGINIA:
BEFORE THE THIRD DISTRICT, SECTION TWO, SUBCOMMITTEE
OF THE
VIRGINIA STATE BAR

IN THE MATTERS OF
ALLAN W. SMITH

VSB DOCKET NOS. 04-032-3788 [Pomfrey]
 05-032-1050 [David]

SUBCOMMITTEE DETERMINATION
(PUBLIC REPRIMAND WITH TERMS)

On August 18, 2006, a meeting in this matter was held before a duly convened Third District, Section Two, Subcommittee consisting of Coral C. Gills, Lay Member; Michelle C. Harman, Esq.; and Martin D. Wegbreit, Esq., Secretary and Acting Chair, presiding.

Pursuant to Part 6, Section IV, Paragraph 13.G.1.d.(3) of the Rules of the Supreme Court, the Third District, Section Two, Subcommittee of the Virginia State Bar hereby serves upon the Respondent the following Public Reprimand with Terms:

1. At all times relevant hereto, the Respondent Allan W. Smith [Smith] has been an attorney licensed to practice law in the Commonwealth of Virginia.

VSB Docket No. 04-032-3788 [Pomfrey]:

I. STIPULATIONS OF FACT

2. Complainants Russ and Lynne Pomfrey [Pomfreys] bought the subject property from Lowery in a transaction which closed on June 17, 2003. Smith represented the Pomfreys in the transaction [Pomfrey purchase].

3. Smith performed the title search for the Pomfrey purchase. In doing so, he found three judgments of record which he failed to report to Stewart Title & Guaranty Company [Stewart Title] when he certified title in anticipation of the issuance of a title commitment. Therefore, the commitment issued by Stewart Title did not reflect the existence of the three judgment liens.

4. At the point in time of the Pomfrey purchase and going forward at least into 2005, Smith had no support staff. Until January of 2003, Smith used the services of an individual who died that month. Thereafter, Smith personally performed all work related to real estate transactions. Smith formed a title agency, Pegasus Title Insurance Agency [Pegasus], which was not licensed by the Virginia State Corporation Commission until March of 2004. Until Pegasus was properly licensed, Smith dealt directly with Stewart Title.

5. The Pomfreys entered into a contract to sell the subject property at closing scheduled for November 22, 2003 [Pomfrey sale].

6. The purchaser's attorney in the Pomfrey sale, Chisholm, found the three outstanding judgment liens, which totaled approximately \$22,893.00. Chisholm proceeded to attempt to communicate with Smith about the judgments and a survey. His efforts were unsuccessful.

7. The Pomfreys had no knowledge of the existence of the three judgment liens until it was revealed during the Pomfrey sale.

8. Smith had not purchased the title policies for which the Pomfreys had paid as a part of the Pomfrey purchase. Once Stewart Title had become aware of the existence of the three judgment liens, the title company refused to issue said policies.

9. The HUD-1 settlement statement for the Pomfrey purchase showed a charge of \$966.00 payable to Stewart Title for both lender's and owner's title insurance coverage. However, the statement of charges from Stewart Title for the Pomfrey purchase totaled \$816.00. According to Smith's disbursement summary for the Pomfrey purchase, Smith paid \$150.00 to Dale Holcomb to record documents for the transaction. At the time of the bar investigation in 2005, Smith's file in the Pomfrey purchase contained an original \$643.00 check for Stewart Title which had never been disbursed by Smith in the Pomfrey purchase.

10. It was Smith's practice to enter in HUD-1 settlement statements a fee amount for Dale Holcomb's recordation services as part of the total amounts shown for title insurance instead of accurately reflecting Holcomb's fee as a separate charge incurred by Smith but not billed by Stewart Title. This constituted a misrepresentation of Holcomb's fee and the title insurance charges.

11. Cathy Wright from Stewart Title sent Smith a list, dated August 11, 2004, of outstanding invoices for 35 title commitments which she had issued and for which applications for title policies had not been submitted by Smith. The Pomfrey purchase was shown on Wright's list.

12. Bar investigator Cam Moffatt determined when settlement had occurred with respect to each matter shown on Wright's list as well as when a title policy was issued and the amount withheld at settlement for the title charges [Moffatt's list]. Moffatt's list shows that during the time period of 2003-2005, Smith did not timely submit to Stewart Title applications for title policies or timely disburse funds to Stewart Title which had been paid to Smith as trust funds in the corresponding real estate transactions for said title policies and associated Stewart Title charges.

13. In or about November of 2003, the Pomfreys hired Cary Ralston, Esq. [Ralston] to represent them with regard to the sale of the subject property and the problem of the three outstanding judgment liens remaining from the Pomfrey purchase.

14. The Pomfrey sale of the subject property ultimately closed on December 1, 2003, after an indemnity agreement was entered into which required, *inter alia*, the holding in escrow of \$40,000.00 pending resolution of the three judgment liens. Smith was not a party to the indemnity agreement.

15. Ralston sent letters to Smith regarding the costs incurred by the Pomfreys as a result of the problem of the three judgment liens. In said letters, Ralston asked Smith to reimburse the Pomfreys for sums which they deemed they were entitled to from Smith. Smith did not answer Ralston's letters.

16. The judgment debtor paid off the three judgments and the liens were released of record in or about March of 2004. On March 18, 2004, the Pomfreys received the \$40,000.00 which had been escrowed for the Pomfrey sale.

17. The Pomfreys submitted a bar complaint to the Virginia State Bar on June 30, 2004.

18. In the Pomfrey purchase, Smith failed to represent the Pomfreys diligently, failed to communicate and failed to disburse trust funds.

II. NATURE OF MISCONDUCT

It is agreed that such conduct by Allan W. Smith constitutes misconduct in violation of the following provisions of the Virginia Rules of Professional Conduct:

RULE 1.3 Diligence

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

- (b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.
- (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 1.4 Communication

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

RULE 1.15 Safekeeping Property

- (c) A lawyer shall:
 - (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.

Eff. Mar. 25, 2003

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyers fitness to practice law;

VSB Docket No. 05-032-1050 [David]:

I. STIPULATIONS OF FACT

19. In or about 2003, Complainant Lesley David [David] contacted Smith for representation in the purchase of real estate [property] by David and her husband [Transaction]. Smith had represented David and her husband in a prior real estate transaction.

20. Since Smith had not requested the payoff of an existing deed of trust on the property prior to closing, David contacted the lender to determine the payoff amount for the existing deed of trust.

21. The Transaction closed on June 16, 2003.

22. On or about October 30, 2003, David received a letter from Hurley and Koort, P.L.C. addressed to BB&T indicating that a certificate of satisfaction for a deed of trust had not been recorded [letter]. Enclosed with the letter was a certificate and affidavit of satisfaction to be completed for recordation regarding a \$10,000.00 deed of trust note from the seller in the Transaction on the property. This was the first indication that David had of the existence of another deed of trust on the property.

23. Upon receiving the letter, David called Smith who indicated he would contact Hurley and Koort. In the same telephone call, David asked Smith if he had purchased the title insurance on the property. Smith told David that the policy had not been issued and the delay was caused by the title company which had a backlog.

24. Thereafter, David called Smith every couple of weeks to check on the status of the matter, but he did not return her calls. After several months, David filed a bar complaint on September 24, 2004, with the Virginia State Bar.

25. After the bar complaint was filed, Smith provided David with a copy of the title policy on the property. As of her April 8, 2005 interview with bar investigator Cam Moffatt, David did not know whether a certificate of satisfaction had been recorded for the \$10,000.00 deed of trust note.

26. At the point in time of the Transaction and going forward at least into 2005, Smith had no support staff. Until January of 2003, Smith used the services of an individual who died that month. Thereafter, Smith personally performed all work related to real estate transactions. Smith formed a title agency, Pegasus Title Insurance Agency [Pegasus], which was not licensed by the Virginia State Corporation Commission until March of 2004. Until Pegasus was properly licensed, Smith dealt directly with Stewart Title Guaranty Company [Stewart Title].

27. Smith performed the title search on the Transaction and missed the \$10,000.00 deed of trust which had been recorded in the Chesterfield County Circuit Court on November 19, 1999. Since Smith had not reported the existence of this lien, it did not appear in the title binder or the HUD-1 settlement statement for the Transaction.

28. The HUD-1 settlement statement for the Transaction showed a charge of \$1,009.00 payable to Stewart Title for both lender's and owner's title insurance coverage. However, the statement of charges from Stewart Title for the transaction totaled \$859.00. The difference between the charges billed by Stewart Title and the amount included on the HUD-1 settlement statement for title insurance was \$150.00. According to Smith, this amount was a fee for the services of Dale Holcomb to record documents for the Transaction.

29. It was Smith's practice to enter in HUD-1 settlement statements a fee amount for Dale Holcomb's recordation services as part of the total charges shown for title insurance instead of accurately reflecting Holcomb's fee as a separate charge incurred by Smith but not billed by Stewart Title. This constituted a misrepresentation of Holcomb's fee and the title insurance charges.

30. Cathy Wright from Stewart Title sent Smith a list, dated August 11, 2004, of outstanding invoices for 35 title commitments which she had issued and for which applications for title policies had not been submitted by Smith. David's Transaction was shown on Wright's list.

31. Bar investigator Moffatt determined when settlement had occurred with respect to each matter shown on Wright's list as well as when a title policy was issued and the amount withheld at settlement for the title charges [Moffatt's list]. Moffatt's list shows that during the time period of 2003-2005, Smith did not timely submit to Stewart Title applications for title policies or timely disburse funds to Stewart Title which had been paid to Smith as trust funds in the corresponding real estate transactions for said title policies and associated Stewart Title charges.

32. During the bar investigation of this matter, bar investigator Moffatt interviewed Smith on two occasions, April 12, 2005 and October 4, 2005. During the April 12, 2005 interview, Smith indicated that he had not made application for David's title policy until August of 2004 because Pegasus was not yet authorized to process the application and Stewart Title wanted him to wait until Pegasus was fully licensed so that Pegasus would get the premium instead of Stewart Title. As of the April interview, Smith had submitted applications for only twelve of the thirty-five commitments listed by Cathy Wright. As of the October interview, Smith still had not submitted applications for ten of the commitments.

33. A requirement of David's lender in the transaction was that the lender be the first lienholder on the property upon completion of the transaction. Until the 1999 deed of trust was released by recordation of a certificate of satisfaction on January 10, 2004, David's lender was not the first lienholder of record.

34. In the transaction, Smith failed to represent David and her husband diligently, failed to communicate and failed to disburse trust funds.

II. NATURE OF MISCONDUCT

It is agreed that such conduct by Allan W. Smith constitutes misconduct in violation of the following provisions of the Virginia Rules of Professional Conduct:

RULE 1.3 Diligence

- (a) A lawyer shall act with reasonable diligence and promptness in representing a client.
- (b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.
- (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 1.4 Communication

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Eff. Mar. 25, 2003

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It is professional misconduct for a lawyer to:

- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyers fitness to practice law;

III. PUBLIC REPRIMAND 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 Reprimand With Terms of these complaints.

The terms and conditions shall be met by the dates indicated below. The terms with which the Respondent must comply are as follows:

Term One: Outstanding Stewart Title Guaranty Company Invoices

Part I. **By September 29, 2006**, Smith shall determine all outstanding invoices, existing as of July 31, 2006, from Stewart Title Guaranty Company [Stewart Title] for title commitments which Stewart Title issued to Smith as an approved attorney and for which applications for title policies have not been submitted by Smith;

Part II. **By September 29, 2006**, Smith shall resolve all of said outstanding invoices by

- a. submitting to Stewart Title applications for title policies with title insurance premium payments or
- b. determining that an application cannot be submitted because transaction(s) never went to settlement, and
- c. making certain that all outstanding title insurance policies have been issued and all funds held in trust by Smith with respect to outstanding title insurance policies have been disbursed appropriately, whether to Stewart Title for premiums or to the payer of the funds as a refund because transaction(s) never went to settlement.

Part III. **By September 29, 2006**, Smith shall certify in writing to the Office of Bar Counsel that he has completed Term One.

Term Two: Outstanding Invoices for Other Title Companies

By September 29, 2006, Smith shall complete the requirements of Term One with respect to any similar outstanding invoices existing as of July 31, 2006, from other title insurance companies for which the other title insurance companies issued title commitments to Smith as an approved

attorney and for which applications for title policies have not been submitted by Smith, and so certify to the Office of Bar Counsel, all as described in Term One.

Term Three: Law Office Management Consultant

Part I. **By September 15, 2006**, Smith shall engage the services of a law office management consultant approved by the Virginia State Bar to review and make written recommendations concerning Smith's law practice policies, methods, systems and procedures. Smith shall institute and thereafter follow with consistency any and all recommendations made to him by the law office management consultant following the law office management consultant's evaluation of Smith's practice. Smith shall grant the law office management consultant access to his law practice from time to time, at the consultant's request, for purposes of ensuring that Smith has instituted and is complying with the law office management consultant's recommendations. The Virginia State Bar shall have access, by telephone conferences and/or written reports, to the law office management consultant's findings and recommendations, as well as the consultant's assessment of Smith's level of compliance with said recommendations. Smith shall be obligated to pay when due the consultant's fees and costs, including, but not limited to, the provision to the Bar of information concerning this matter.

Part II. **By December 15, 2006**, Smith shall be responsible for :

1. Ensuring that the law office management consultant has previously reported to the Office of Bar Counsel his or her findings and recommendations regarding Smith's law practice.
2. Certifying to the Office of Bar Counsel that Smith has fully complied with the law office management consultant's findings and

recommendations and provide written confirmation of same from the law office management consultant.

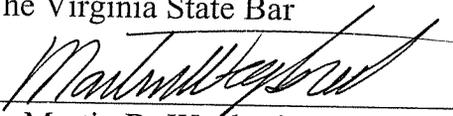
3. Any failure in the hiring of the law office management consultant, or the ability of said consultant to examine Smith's law practice and report to the Bar and to Smith findings and recommendations, and any failure of Smith to comply with said findings and recommendations, all by December 15, 2006, *inter alia*, shall constitute noncompliance with Term Three.

Upon satisfactory proof that such terms and conditions have been met, this matter shall be closed. If, however, the terms and conditions are not met by Allan W. Smith as stated herein, Allan W. Smith agrees that the Third District Committee, Section Two shall impose a Certification for Sanction Determination as an alternate sanction.

The Clerk of the Disciplinary System shall assess costs pursuant to Rules of Court, Part Six, Section IV, Paragraph 13.

Third District, Section Two, Subcommittee
Of The Virginia State Bar

By



Martin D. Wegbreit
Secretary and Acting Chair

CERTIFICATE OF SERVICE

I certify that I have this 23rd day of August, 2006, caused to be mailed by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a true and correct copy of the Subcommittee Determination (Public Reprimand with Terms) to Allan W. Smith, Esq., at 17 West Cary Street, Richmond, Virginia 23220, his last address of record with the Virginia State Bar.

