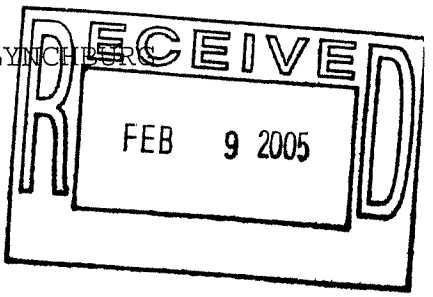
VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG



VIRGINIA STATE BAR EX REL
NINTH DISTRICT COMMITTEE

Complainant

v. Case No. CL04024761

CARY POWELL MOSELEY

THIS CAUSE came on to be heard on the 26th day of January, 2005, for a hearing in this matter, before a Three Judge Court empaneled on December 28, 2004, by designation of the Chief Justice of the Supreme Court of Virginia, pursuant to Section 54.1-3935 of the 1950 Code of Virginia, as amended, consisting of the Honorable Kenneth M. Covington, and the Honorable Herman A. Whisenant, Jr., retired Judges of the Twenty-First and Thirty-First Judicial Circuits, respectively, and by the Honorable Colin R. Gibb, Judge of the Twenty-Seventh Judicial Circuit, designated Chief Judge.

Ms. Kathryn A. Ramey, Assistant Bar Counsel, appeared on behalf of the Virginia State Bar, and respondent appeared in person and by counsel, Michael L. Rigsby.

WHEREUPON, a hearing was conducted upon the Rule to Show Cause issued against the Respondent, Cary Powell Moseley, which Rule directed him to appear and to show cause why his license to practice law in the Commonwealth of Virginia should not be suspended or revoked by reason

of allegations of ethical misconduct set forth in the Certification issued by a subcommittee of the Ninth District Committee of the Virginia State Bar.

The Complainant presented evidence in open court and the Respondent presented his evidence.

Following closing arguments by the parties, the Three-Judge Court retired to deliberate, and thereafter returned and announced that it had found, unanimously, and by clear and convincing evidence, the following:

1. At all times material to this Certification, the Respondent was an attorney licensed to practice law in the Commonwealth of Virginia.

2. On or about August 28, 2002 Complainant Barbara Wilborn ("Complainant") retained Respondent to represent her and her husband in a breach of warranty case against Clayton Manufactured Homes ("Clayton") involving their mobile home. Complainant paid Respondent $100 initial consultation fee and signed an hourly fee agreement that required a $1000 retainer, which Complainant paid, and provided for a billable rate of $250 per hour. Respondent gave Complainant a copy of the fee agreement to take home.

3. Respondent sent Complainant a bill dated November 7, 2002 in the amount of $2550.00 in fees and $48.40 in costs. Respondent applied the $1000 retainer Complainant had previously paid, leaving the balance due as $1,598.40. Complainant did not immediately pay

Respondent's bill.

4. Throughout the first part of November, 2002, Respondent engaged in settlement negotiations with Clayton. On November 11, 2002, Clayton made a written offer to Respondent to settle the case on terms nearly identical to what Respondent finally accepted. The November 11, 2002 offer was for a lump sum payment to Complainant and her husband of $10,000, payment of $1000 in attorney's fees and buy back of Complainant's mobile home. On or about November 20, 2002, Respondent e-mailed Stephanie Fagan of Clayton Homes advising they had reached a settlement and that the matter would be wrapped up soon.

5. On or about November 23, 2002, Complainant met with Respondent at his office to sign a settlement agreement/release. At or about this time, Respondent told Complainant not to worry about paying the November 7, 2002 bill, as he would deduct his fee from the settlement proceeds. At no time did Complainant agree to pay Respondent a contingency fee.

6. Respondent failed to explain the settlement with Clayton to Complainant. Respondent presented Complainant with the settlement papers/release, styled "CM Homes, Inc, GENERAL RELEASE FOR CANCELLATION/REPURCHASE." The release did not contain the terms of the settlement agreement, but instead had blanks where the amount of consideration and terms of the settlement should have

been specified. Respondent told Complainant to take the blank release home and sign it along with her husband. Complainant lost the release on the way home, and on or about December 2, 2002, Respondent sent her two more copies and instructed her to sign and return them to him. These releases were also blank. Complainant and her husband signed the blank releases and returned them to Respondent.

7. On or about November 23, 2002, during the same meeting, Respondent presented the settlement statement to Complainant. The statement indicated that the total recovery would be $63,000, $52,000 of which would be paid to lienholder as part of the buy back of the mobile home. The statement further provided that Respondent would be paid a 1/3 contingency fee from the total recovery of $63,000,or $21,000, less the $1,000 retainer already paid by the Complainant. Complainant signed the statement, although she had not agreed to pay Respondent a contingency fee. Complainant was under the impression that Respondent's fees were hourly, as specified in the hourly fee agreement she signed when she retained Respondent as counsel.

8. Respondent failed to explain terms of the settlement agreement to Complainant and failed to obtain her consent for the settlement. Under the terms of the agreement, Clayton would buy back the mobile home for $63,000, pay off the $52,000 lien, and remaining lump sum

of $11,000 would be paid to Complainant and her husband in exchange for their agreement to drop certain insurance claims and release possession of the mobile home. Respondent's fees were to be paid by the Complainant, presumably from the $11,000 lump sum. However, given that Respondent claimed a 1/3 contingency fee on the total recovery of $63,000, or $20,000 once Complainant's $1000 paid retainer was credited, the net effect of the settlement, as contemplated by Respondent, would be as follows: 1) Complainant and her husband would receive no cash from the settlement and the would be required to vacate their home without funds to obtain new housing, 2) they would pay Respondent $11,000 in attorney's fees, and 3) they would owe Respondent an additional $9,000 in attorney's fees.

9. On or about December 17, 2002, Clayton sent Respondent the settlement check for $11,000 for full and final settlement of Complainant's claims against Clayton. Respondent did not release any part of the settlement funds to Complainant until just prior to the December 28th, 2004, hearing (at which time the entire sum was paid to the Complainant by the Respondent.)

10. On or about January 14, 2003, Respondent sent Complainant a memorandum advising that she and her husband would not net any money from the settlement with Clayton. He further advised that he would accept as full payment of his attorney's fees the cash lump sum of

$11,000, and that he would likely write off the balance of his fees ($9,000) out of consideration to Complainant.

11. On or about January 30, 2003, Respondent received for the first time the fully completed settlement agreement/release from Clayton. The blanks were filled in by Clayton and indicated the amount of consideration ($11,000) and terms of the settlement ("Seller, CM Homes, Inc., also agrees to payoff the loan referenced above when possession of the home is obtained. The payoff amount is approximately $53,000.00.")

12. On or about February 29, 2003, the Bar received Complainant's complaint, and on or about March 6, 2003, Complainant discharged Respondent by letter and demanded her file.

13. On or about March 11, 2003, Respondent sent Complainant an itemized hourly bill for his services from August 26, 2002 to March 5, 2003 totaling $14,375.00. The March 11, 2003 bill indicates Respondent's rate as $250 per hour, and contains substantially higher fees that what Respondent billed on November 7, 2002 for the same time period. Moreover, Respondent included improper charges for his time including preparing a fee agreement for which he already had a form, receiving and responding to Complainant's bar complaint, and copying Complainant's file himself at the rate of $250 per hour.

14. On or about March 11, 2003, Respondent answered the bar complaint. In his response, he said Complainant

was "absolutely correct" that his fee agreement with Complainant was hourly. He said that he had been under the mistaken impression that there was a contingency fee agreement because the majority of his cases are on a contingency fee basis. Respondent also said that his secretary must have given Complainant a copy of the wrong fee agreement to take home. Respondent enclosed copies of what he called "pertinent documents" from his file, which did not include a contingency fee agreement with Complainant.

15. On or about November 6, 2003, Virginia State Bar Investigator Clyde K. Venable interviewed Respondent in person. Also present was Respondent's counsel, Michael L. Rigsby, Esquire. During the interview, Respondent presented a copy of a fee agreement dated August 28, 2002. The fee agreement provides for a contingency fee and the third page contains Complainant's signature. The contingency fee agreement, like the hourly agreement Complainant signed, has three pages and contains the Complainant's signature on the third page.

16. Pursuant to a subpoena issued by the Bar, Respondent made available the original of Complainant's entire file. The file did not contain either the original or a copy of the hourly fee agreement. The file did not contain a contingency fee agreement with Complainant's original signature on the third page.

17. On or about May 12, 2004, VSB Investigator Clyde

K. Venable again interviewed Respondent in the presence of his counsel. During the interview, Respondent stated that he assumed the contingency fee agreement was signed by Complainant on August 28, 2002 and that he was not with Complainant when she signed the agreement. Respondent also said he had no recollection of discussing a contingency fee with Complainant.

18. The contingency fee agreement Respondent presented to the Bar on or about November 7, 2003 is not genuine. Complainant did not sign the contingency fee agreement. Instead, the third page of the hourly fee agreement, which contains Complainant's signature, was attached to the first two pages of a contingency fee agreement, creating what purports to be a complete contingency fee agreement signed by Complainant. The "August 28" was added after Complainant signed the hourly fee agreement.

UPON CONSIDERATION WHEREOF, the Three-Judge Court found by clear and convincing evidence that the Respondent has violated the following provisions of the revised Virginia Code of Professional Responsibility and Rules of Professional Conduct:

RULE 8.1 Bar Admissions And Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application, in connection with any certification required to be filed as a condition of maintaining or renewing a license to

practice law, in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact;

(d) obstruct a lawful investigation by an admissions or disciplinary authority.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(c) engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation

The court is further of the opinion that this is a matter of professional misconduct involving dishonesty, fraud, deceit and misrepresentation and any additional violations of the Code or rules by the Respondent are included within our finding of the Respondent's violation of Rule 8.4. Therefore, we would dismiss the remaining counts.

THEREAFTER, the Virginia State Bar and the Respondent presented argument regarding the sanction to be imposed upon the Respondent for the misconduct.

AFTER DUE CONSIDERATION of the evidence and the nature of the ethical misconduct committed by the Respondent the Three-Judge Court reached the unanimous decision that Respondent's license to practice law in the Commonwealth of Virginia should be suspended for a period of one (1) year effective March 1, 2005. In electing to suspend rather than to revoke the Respondent's license to

practice law in the Commonwealth of Virginia, the Three-Judge Court gave due consideration to the absence of any prior record of disciplinary matters for the thirteen (13) years the Respondent had been engaged in the practice of law.

ORDERED that the license of the Respondent, Cary Powell Moseley, to practice law in the Commonwealth of Virginia be, and the same hereby is, SUSPENDED for a period of one (1) year, effective March 1, 2005.

ENTERED this 4th day of February, 2005.

COLIN R. ~~GIBB~~,
Chief Judge of the
Three-Judge Court

A Copy, Teste:
Larry B. Palmer, Clerk
By:
Deputy Clerk