

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

**IN THE MATTER OF
BRUCE EDWARD DOWNING**

**VS B Docket No. 17-070-106921
VS B Docket No. 17-070-107873**

AGREED DISPOSITION MEMORANDUM ORDER

This matter came on to be heard on February 6, 2018 and April 23, 2018 by the Disciplinary Board of the Virginia State Bar (the "Board") via telephone conference upon the joint request of the parties for the Board to accept the Agreed Disposition signed by the parties and offered to the Board as provided by the *Rules of the Virginia Supreme Court*. The panel consisted of Sandra L. Havrilak, Second Vice Chair; Michael J. Sobey; Bretta M.Z. Lewis; T. Toney H. Pham; and Anderson W. Douthat, IV, Lay Member (the "Panel"). Edward L. Davis, Bar Counsel, represented the Virginia State Bar (the "Bar"), and Respondent, Bruce Edward Downing ("Respondent") appeared *pro se*.

Court reporter Jennifer Hairfield, Chandler & Halasz, P.O. Box 9349, Richmond, Virginia 23227, telephone (804) 730-1222, after being duly sworn, reported the hearing and transcribed the proceedings.

The Chair polled the members of the Panel to determine whether any of them were aware of any personal or financial interest or bias that would preclude any of them from fairly hearing the matter and serving on the panel, to which each member responded in the negative.

During the first hearing, the Board, with the concurrence of the parties, chose to continue the case to April 23, 2018, for further proceedings.

During the second telephone hearing, the Board considered the proposed Agreed Disposition, the Certification, and the arguments of the Bar and Respondent. The Board and the parties discussed certain modifications to the proposed Agreed Disposition, to which the Bar and Respondent expressed their concurrence; and, after due deliberation, the Board accepted the Agreed Disposition as modified.

I. FINDINGS OF FACT

The parties stipulated to the following facts:

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1. On November 25, 2014, Complainant's father (the father) qualified as administrator of the estate of Melvin Lee Marcy in the Circuit Court of Frederick County.
2. The father did not file the inventory, due on March 25, 2015, causing the Commissioner of Accounts to serve him with a summons, returnable on March 9, 2016, in the circuit court.
3. After he received the summons, the father paid Respondent an advance fee of \$3,000 on February 23, 2016 to help with the completion of the inventory and administration of the estate.
4. Respondent appeared with the father at the circuit court on March 9, 2016 and, according to the Commissioner of Accounts' memory, stated that someone would file the inventory on or before March 23, 2016. Respondent's billing statement also reflects that on March 9, 2016, he offered to file the inventory within 14 days. On this representation, the Commissioner obtained an order of dismissal of the proceeding, entered March 29, 2016.
5. Respondent, however, never completed the inventory.
6. Respondent acknowledged to the bar's investigator that he was not diligent in preparing the inventory. Nonetheless, the Commissioner of Accounts advised the bar that on March 31, 2016, the clerk waived the inventory and accounting on the basis that the estate was worth less than \$25,000.
7. Respondent also took possession of a box of silver goods that belonged to the estate and, on April 8, 2016, obtained an appraisal of \$1,765 from the Boscawen Gold and Silver

Shop (Boscawen) for inventory purposes. Unbeknownst to the father, on April 19, 2016, Respondent sold some of the silver there for \$1,000 cash.

8. Respondent avers that the father told him to sell the silver. The father, on the other hand, says that he did not know about this until he saw the silver goods at Boscawen later on. The father said that he asked Boscawen to hold the goods. On an unknown date, however Boscawen sold the goods.

9. Respondent did not communicate with Complainant or his father about the sale and became unresponsive to them. Respondent did not deposit the proceeds from the sale of the silver into an attorney trust account or an estate account. As of the time of the bar's investigation, Respondent could not account for the \$1,000 that he received from the sale of the estate's silver goods.

He stated that he believed that the proceeds had been deposited in the trust account, as is his usual practice. He first became aware that the proceeds were not deposited when this matter was raised in August 2016. The original proceeds were misplaced. The proceeds were replaced, and paid to the client when his retainer was refunded, and accrued legal fees were waived by the Respondent.

In August 2016, prior to being informed of the filing of the bar complaint, the Respondent called the father and asked to meet with him to try to resolve his claims, and to deal with the issues of filing the inventory. The father never returned his call. The respondent's memory was that he had been paid by check. In August 2016, he met with Jamon White of Boscawen, and asked for a copy of the check for the silver that was sold. Jamon said he would check his records. Jamon reported that his records indicated that payment was by cash, not check. The Respondent asked Jamon to check again, and Jamon confirmed that no check was issued. It was then that the Respondent realized that the cash had not been deposited in the estate trust account.

10. On August 19, 2016, the Complainant, Roland William Riddell, submitted a complaint to the Virginia State Bar, a copy of which the bar furnished to Respondent on September 9, 2016, at his address of record, requesting a response.

11. Although he received the complaint, Respondent did not respond. He explained to the bar's investigator that he and froze when he received the complaint.

12. Respondent's invoice reflects that he earned a total of \$1,050 in legal fees between March 3 and March 9, 2016. Respondent, however, did not withdraw any of the fees or costs from the \$3,000 advance in his trust account, according to his invoice. The only disbursement shown is the \$90 appraisal fee, withdrawn on April 11, 2016, according to Respondent's

ledger.

13. As of May 5, 2017, the date of the Report of Investigation, Respondent had not returned any of the advanced fee to the father, although he did not complete the work that he was hired to do. (Since that time, Respondent has waived the \$1,050 legal fees and returned the \$3,000 retainer and the \$1,000 silver proceeds to the client, which was not ordered or required by the Board.

The Respondent stated that he called the client when he was informed that the proceeds were not deposited. After his initial meeting with the bar investigator, the Respondent wrote the client, requesting a meeting and apologizing for his failure to respond. The Respondent called and wrote the client again while this matter was being investigated, requesting that they meet, so that he could deliver the remaining silver pieces and the client's documents in the file, to the client in person. The Respondent stated that the client never responded to the phone messages, or the letters, including the one with the check for the refunded retainer and the sales proceeds of the silver.

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14. On October 28, 2013, Respondent was appointed executor of the estate of Delores L. Taylor in the Frederick County Circuit Court. Respondent timely filed the inventory and first accounting, both of which were approved. The second accounting became due in July 2016. Respondent did not file the second accounting, eventually resulting in a report to the circuit court and a show-cause proceeding scheduled for January 4, 2017.

15. On December 6, 2016, the Commissioner of Accounts reported the Respondent's conduct to the Virginia State Bar, which on December 13, 2016, sent a copy to Respondent at his address of record, requesting a response. Although he received the Commissioner of Accounts' bar complaint, Respondent did not respond. Respondent appeared in court on January 4, 2017, filed the second accounting on March 7, 2017, and the court dismissed the show cause on March 8, 2017.

16. Mitigating factors recognized by the American Bar Association Standards for imposing lawyer sanctions include:

- Respondent's lack of a prior disciplinary record in nearly 42 years of practice.
- Respondent's cooperation with the Virginia State Bar during its investigation of these matters and his cooperative attitude toward these proceedings.
- Respondent's payment of restitution, waiver of all legal fees and refund of all advanced legal fees to the father in the referenced matter.

II. NATURE OF MISCONDUCT

Such conduct by Respondent constitutes misconduct in violation of the following provisions of the *Virginia Rules of Professional Conduct*:

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RULE 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

RULE 1.3 Diligence

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

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.

(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

RULE 1.15 Safekeeping Property

(a) Depositing Funds.

(1) All funds received or held by a lawyer or law firm on behalf of a client or a third party, or held by a lawyer as a fiduciary, other than reimbursement of advances for costs and expenses shall be deposited in one or more identifiable trust accounts; all other property held on behalf of a client should be placed in a safe deposit box or other place of safekeeping as soon as practicable.

(3) No funds belonging to the lawyer or law firm shall be deposited or maintained therein except as follows:

(i) funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution or to maintain a required minimum balance to avoid the imposition of service fees, provided the funds deposited are no more than necessary to do so; or

(ii) funds in which two or more persons (one of whom may be the lawyer) claim an interest shall be held in the trust account until the dispute is resolved and there is an accounting and severance of their interests. Any portion finally determined to belong to the lawyer or law firm shall be withdrawn promptly from the trust account.

(b) Specific Duties. A lawyer shall:

(1) promptly notify a client of the receipt of the client's funds, securities, or other properties;

(2) identify and label securities and properties of a client, or those held by a lawyer as a fiduciary, promptly upon receipt;

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accountings to the client regarding them;

(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 that such person is entitled to receive; and

(5) not disburse funds or use property of a client or third party without their consent or convert funds or property of a client or third party, except as directed by a tribunal.

RULE 1.16 Declining Or Terminating Representation

(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 8.1 Bar Admission And Disciplinary Matters

(b) fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6; or

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RULE 1.3 Diligence

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

RULE 8.1 Bar Admission And Disciplinary Matters

(c) fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6; or

III. DISPOSITION

Having considered all the evidence before it, the Board unanimously determined to accept the Agreed Disposition as modified; and, it is ORDERED, that Respondent receive a Public Admonition, effective April 23, 2018.

In reaching this decision, the Board considered the facts set forth in the Certification, including the fact that Respondent admitted to the facts alleged. Respondent also fully cooperated with the hearing process and demonstrated a willingness to do what the Bar asked him to do. Prior to the second hearing, Respondent voluntarily agreed to implement a tickler system and follow all other recommendations of the Bar. The Board finds that, in order to prove that he was sorry for what occurred and fully rectify this matter, Respondent was willing to admit to all of the allegations in the Certification.

The Board also considered the *ABA Annotated Standards for Imposing Lawyer Sanctions*¹ in reaching its decision and finds that those standards support the acceptance of the modified Agreed Disposition in this matter. In nearly forty-two (42) years of practice, Respondent has no prior disciplinary record. Additionally, Respondent was remorseful for his actions, fully cooperated with the Bar during its investigation of these matters and throughout these proceedings; and, Respondent has paid restitution and waived all legal fees with respect to VSB Docket Number

¹ ABA, *Annotated Standards for Imposing Lawyer Sanctions* (2015).

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It is further ORDERED that costs shall be assessed by the Clerk of the Disciplinary System pursuant to the *Rules of the Virginia Supreme Court*, Part 6, §IV, 13-9.E.

It is further ORDERED that the Clerk of the Disciplinary System shall mail a copy teste of this Order by certified mail, return receipt requested, to Bruce Edward Downing at his last address of record with the Virginia State Bar, Post Office Box 809, Winchester, Virginia 22604, with a copy to Edward L. Davis, Bar Counsel, Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, Virginia 23219-0026.

ENTERED: July 10, 2018

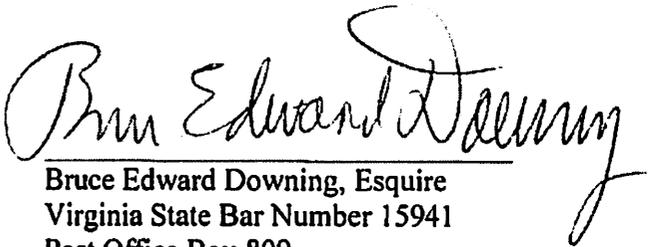
VIRGINIA STATE BAR DISCIPLINARY BOARD

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Sandra L. Havrilak, Esquire, 2nd Vice Chair

AGREED:



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