VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

VIRGINIA STATE BAR, EX REL
THIRD DISTRICT COMMITTEE

Complainant

Case No. CL 09-2034-4

v.

TIMOTHY O'CONNOR JOHNSON

Respondent

MEMORANDUM ORDER

On the 14th day of July 2009, this matter came before a Three-Judge Court designated on the 29th day of May 2009, by Order of the Chief Justice of the Supreme Court of Virginia, pursuant to section 54.1-3935 of the Code of Virginia (1950 as amended), consisting of the Honorable Donald H. Kent, Retired Judge of the Eighteenth Judicial Circuit, the Honorable Jay T. Swett, Retired Judge of the Sixteenth Judicial Circuit, and the Honorable Randy I. Bellows, Judge of the Nineteenth Judicial Circuit and Chief Judge of the Three-Judge Court.

Harry M. Hirsch, Deputy Bar Counsel, appeared on behalf of the Virginia State Bar, and the Respondent, Timothy O'Connor Johnson, personally appeared and was represented by counsel, Michael L. Rigsby.

The matter came on the Respondent's appeal of a determination by the Third District Committee, issued on January 22, 2009, finding that the Virginia State Bar had proven by clear and convincing evidence that Mr. Johnson violated Rule 1.15 of the Rules of Professional Conduct and imposing a Public Admonishment Without Terms. As permitted by the Rules of the Supreme Court of Virginia, Part Six, Section IV,

Paragraph 13(H)(4)(a)(1)[1], the Respondent noted his appeal and demanded that the appeal be heard by a Three-Judge Court pursuant to Virginia Code section 54.1-3935. As required by the Rules of the Supreme Court and Virginia Code section 54.1-3935, the Virginia State Bar filed a Complaint in the Circuit Court for the City of Richmond and also sought issuance of a Rule to Show Cause against the Respondent. On May 8, 2009, the Honorable Margaret Spencer, a judge of the Circuit Court for the City of Richmond, issued a Rule to Show Cause to the Respondent, ordering that the Respondent appear before this Court on July 14, 2009 to show cause why the District Committee Determination should not be affirmed.

The record having been filed in the Circuit Court, and the matter having been fully briefed in accordance with the Rules of the Supreme Court, the Three-Judge Court convened in the Circuit Court for the City of Richmond on July 14, 2009. After ascertaining on the record that no member of the Court had any personal or financial interest that might affect, or reasonably be perceived to affect, his ability to be impartial, the Court heard oral argument, retired to deliberate, and then announced its decision.

A. Standard of Review

The Standard of Review in an appeal from a District Committee Determination to a Three-Judge Court is the same Standard of Review applicable in an appeal from a District Court Determination to the Disciplinary Board, to wit: "[i]n reviewing a District Committee Determination, the Board shall ascertain whether there is substantial evidence in the record upon which the District Committee could reasonably have found as it did." See Va. Sup. Ct. R., Pt. 6, § IV, ¶ 13-19(E). Upon its review of the record in its entirety,

[1] As of May 1, 2009, Paragraph 13 has been reformatted and this provision is now 13-17(A).

if the Board finds that the District Committee's Determination "is not supported by substantial evidence" or "is contrary to the law," the charge of misconduct is to be dismissed. See Va. Sup. Ct. R., Pt. 6, § IV, ¶ 13-19(G)(1).

B. Discussion

1. Background

The record indicates that the District Committee convened on December 12, 2008 and took testimony from the Respondent and Dr. Wayne S. Fusco, D.C., the chiropractor who filed the underlying complaint against the Respondent with the Virginia State Bar. The testimony of these witnesses, along with the exhibits admitted into evidence during the District Committee hearing, provide a substantial evidentiary basis for the factual findings made by the District Committee. Those factual findings appear in the District Committee Determination filed in the Clerk's Office of the Virginia State Bar on January 22, 2009 and appear at Exhibit A to the Rule to Show Cause. They are quoted here in full:

> 1. At all times relevant hereto the Respondent, Timothy O'Connor Johnson [Johnson], has been an attorney licensed to practice law in the Commonwealth of Virginia.
>
> 2. On or about November 19, 2004, Johnson's client [Client] entered into a contingent fee agreement with Johnson's law firm, Hundley & Johnson, P.C. for representation in a personal injury case arising out of an automobile accident which had occurred on November 13, 2004 [case]. Johnson represented Client in the case.
>
> 3. On or about December 31, 2004, Client executed a document entitled, "Assignment of Proceeds, Contractual Lien and Authorization" [assignment agreement] in which, *inter alia*, Client directs his attorney to pay any settlement proceeds to Cox Clinic of Chiropractic, P.C. [Cox], to the extent of all amounts owed to Cox by Client, out of any funds his attorney receives in the case.

4. By letter dated March 21, 2005, from Ms. Goodwin at Cox, Johnson was informed that the Client was released from care, and sent an itemized billing, office notes and a copy of the assignment agreement.

5. According to Johnson, his law practice consists primarily of personal injury cases. It is his practice to ask his clients whether they have executed an agreement with the medical care provider for the full payment of the provider's fees, similar to the assignment agreement.

6. The case was settled for $9,000.00. Said sum was paid by check dated July 19, 2005, payable to Johnson and Client, by Client's insurance company based upon his uninsured motorist coverage.

7. By facsimile transmission dated July 25, 2005, to Dr. Wayne Fusco, Complainant [Fusco] at Cox, Johnson asked Cox to reduce its bill of $1,882.00 by $500.00, to the amount of $1,382.00.

8. By facsimile transmission dated July 26, 2005, Cox responded by indicating that it was not the practice of Cox to reduce its bills.

9. On August 1, 2005, the $9,000.00 settlement proceeds check was deposited to the Wachovia Bank trust account of Johnson's law firm.

10. On August 1, 2005, Client signed a document entitled, "Settlement Agreement", which was dated July 25, 2005. The Settlement Agreement reflected a balance payable to Cox of $1,541.98 and the notation that said amount was $340.02 less than the full amount owed of $1,882.00. The Settlement Agreement reflects that the notation was initialed.

11. On August 1, 2005, Client also executed a release in favor of the insurance company, which Johnson sent to the insurance company by cover letter of the same date.

12. On August 5, 2005, a Wachovia Bank trust account firm check was disbursed in the amount of $2,659.98, payable to Johnson with the notation that it was the legal fee in the Client's case. Said check was then deposited on the same date into an account at People's Bank of Virginia.

13. By letter dated September 29, 2005, Johnson sent to Cox a Wachovia Bank trust account firm check in the amount of $1,541.98, which was $340.02 less than the full amount due to Cox. In the letter Johnson indicated that he had reduced his fee by the same amount and asked Cox to accept the reduced amount as full and final payment of the amount owed by the Client. Johnson also stated the following:

> Should you not be willing to accept this check in full and final payment of your bill, please mail it back to me at which time I will distribute the proceeds of the check directly to [Client] and you can contact him directly to discuss payment of your bill.

14. Fusco responded with a letter dated October 5, 2005, refusing the reduction, enclosing a copy of the assignment agreement, indicating that the reduced amount check would not be returned to Johnson and stating that a bar complaint would be filed if the amount of the reduction was not received within ten days.

15. Fusco filed a bar complaint. Within days Johnson filed a complaint against Fusco with the Virginia Department of Health Professions alleging, *inter alia*, that Client directed him to pay Fusco the reduced amount check and had Johnson done otherwise, he would have been in violation of ethical duties owed to Client. The Board of Medicine determined that it would not initiate disciplinary proceedings in the matter.

16. Johnson never paid Cox the sum of $340.02. According to Johnson, when Cox negotiated check no. 10705, that constituted acceptance of the check in full and final payment of the amount due Cox by the client, notwithstanding Cox's October 5, 2005 letter.

17. According to Johnson, Client told him the amount of money which he wished to receive out of the case and that Johnson should reduce the payment to Cox accordingly. Pursuant to Client's instructions, Johnson reduced not only his own fee but also the payment to Cox by the same $340.02 amount in order to pay Client the sum of $3,000.00. Johnson believed that if he had not reduced the amount of money paid to Cox, Client would have had a legitimate complaint against him.

18. Johnson disbursed all of the settlement proceeds, including $3,000.00 to Client. Had Johnson disbursed to Cox the full amount to which it was due, $1,882.00, Johnson would have had to reduce the amount paid to Client by $340.02 or reduce his legal fee by another $340.02.

19. Prior to Johnson's disbursement of the settlement proceeds, he knew that Client has previously agreed in the assignment agreement to disburse to Cox out of any settlement proceeds all funds due and owing to Cox.

20. Johnson knew or should have known prior to disbursement that Client had requested of Johnson that he receive the sum of $3,000.00 out

of the settlement proceeds and, under the circumstances, this request contradicted Client's assignment agreement.

21. When Cox refused to reduce its fees by $340.02, Johnson was faced with the fact that both Cox and Client expected to receive the same $340.02 out of the settlement proceeds.

22. Johnson incorrectly chose to disregard Client's assignment agreement and Cox's demand for full payment and disbursed the $340.02 to Client as part of Client's settlement proceeds. Johnson failed to either hold the sum of $340.02 in the law firm's trust account or, alternatively, interplead the funds into court, pending resolution of the fact that both Client and Cox wanted to receive the same $340.02. See Virginia Legal Ethics Opinion 1747, a Standing Committee on Legal Ethics Opinion issued June 26, 2000.

2. The Misconduct Finding

The critical question before the panel is whether there is substantial evidence in the record to support the District Committee's conclusion that the factual findings described above constitute misconduct in violation of the Rules of Professional Conduct. Specifically, the District Committee found that the Respondent's conduct violated Rule 1.15, which reads in pertinent part as follows:

> 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.

Va. Sup. Ct. R., pt. 6, § 11, R. 1.15(c)(4).

a. Position of Respondent

Respondent's counsel makes the following arguments in support of his position that the Respondent did not commit misconduct:

First, Respondent argues that he owed no duty to Cox Clinic to pay its bill out of the proceeds of the settlement. In support of that position, Respondent notes that, while his client executed the Assignment Agreement with Cox Clinic, the Respondent never executed the Assignment Agreement. Respondent argues:

> The Agreement between Mr. Richards and Cox Clinic imposed no duty on Mr. Johnson to pay the full quantum of Cox Clinic's claim or to act in derogation of his client's direction. No lien was in issue with the Cox Clinic claim and no court order, attachment or garnishment affected the funds in Mr. Johnson's possession. Moreover, Mr. Johnson did not sign or otherwise accept responsibility under the Agreement. The Third District Committee cited no law imposing a duty on Mr. Johnson. . . . Accordingly, the Third District Committee erred in finding that Mr. Johnson owed an ethical duty to Cox Clinic.

(Opening Br. of Appellant 7-8 (citations omitted).)

Second, Respondent argues that when Cox Clinic negotiated the partial payment check from the Respondent, any duty that the Respondent may have owed to Cox Clinic was extinguished. Respondent notes that the check he sent to Cox Clinic was accompanied by the following statement: "[s]hould you not be willing to accept this check in full and final payment of your bill, please mail it back to me at which time I will distribute the proceeds of the check directly to [Client] and you can contact him directly to discuss payment of your bill." He argues that when Cox cashed the check, it "constituted offer and acceptance . . . [and] therefore Cox Clinic received the funds it was entitled to receive from Mr. Johnson," Id. at 8 (citing Va. Code Ann. § 8.3A-311 (Supp. 2009)).

b. Position of the Virginia State Bar

Bar Counsel makes the following argument in support of its position that there is substantial evidence in the record upon which the District Committee could reasonably have found the Respondent to have committed misconduct:

First, Bar Counsel argues that the Respondent did in fact have a duty to disburse escrow funds "'to the client or another as requested by such person the funds ... in the possession of [Mr. Johnson] which such person is entitled to receive.'" (Resp. Br. of Appellee 10 (quoting Va. Sup. Ct. R., pt. 6, § II, R. 1.15(c)(4)).) He "failed to adhere to this duty when he unilaterally assumed to arbitrate the dispute between Cox and the Client over entitlement to $340.02 by disbursing the $340.02 pursuant to his independent determination of entitlement to the funds. He failed to preserve the $340.02 until the issue of entitlement was properly determined." Id. Bar Counsel argues that the Respondent, faced with the competing demands of his client and Cox, had an obligation either to retain the sum of $340.02 in his firm's trust account or, alternatively, interplead the funds into court. Id.

Second, Bar Counsel argues that the issue decided by the Third District Committee, and the principal issue now on appeal to the Three-Judge Court, is not whether Cox Clinic was entitled to the $340.02 in dispute. Rather, the issue is the Respondent's "fail[ure] to preserve the $340.02 pending resolution of the entitlement issue by either holding the funds in trust or interpleading them into court." Id. at 11.

Third, Bar Counsel argues that Respondent's reliance on an "offer and acceptance" theory misses the basis upon which the Third District Committee found misconduct.

> ... Mr. Johnson, when faced with conflicting claims of entitlement to the $340.02, failed to preserve the funds in question in order that the funds

> would be available to pay the correct recipient once the entitlement issue was resolved. The Committee determined that by disbursing $340.02 to the Client when the issue of entitlement had not yet been determined, Mr. Johnson decided the issue himself. It is not proper for an attorney to decide the legal issue of entitlement to trust funds when faced with a dispute over entitlement to the funds.

Id. at 12. In essence, argues Bar Counsel, the Respondent improperly sought to unilaterally arbitrate the dispute between his client and Cox Clinic.

Finally, Bar Counsel argues that the Respondent's obligation to safekeep the funds until the entitlement decision was resolved is independent of whether the Respondent personally executed the agreement. This "totally ignores his admitted knowledge of both the agreement and the obligation which his Client agreed to therein, as well as the reliance of Cox upon that agreement in the provision of medical services to the Client." Id. at 15.

c. Analysis

At the outset, it is important to note that the conduct at issue in this matter is not the Respondent's efforts to reduce or compromise the claims of Cox Clinic. It is entirely proper and appropriate for plaintiff's counsel in a personal injury matter to attempt to reduce or compromise the outstanding financial obligations arising out of an accident. The starting point for this analysis, therefore, is not the Respondent's attempt to persuade Cox Clinic to reduce its bill but the ultimate action which the Respondent took when Cox Clinic refused to reduce its bill.

We conclude that the Third District Committee properly concluded that Respondent committed misconduct when, on September 29, 2005, the Respondent sent Cox Clinic a trust account firm check in the amount of $1,541.98, which was $340.02 less than the amount billed by Cox Clinic.

Virginia Legal Ethics Opinion 1747 ("LEO 1747"); entitled Attorney Breaching Contract to Pay Medical Bills Out of Settlement Proceeds, addresses a situation almost exactly on point.[2] The facts of LEO 1747 are described as follows:

> You have presented a hypothetical situation in which a personal injury client [Client] sought medical treatment from Medical Group for injuries sustained in an automobile accident. Client did not have any health insurance coverage nor the means to pay for medical treatment. Client entered into an agreement with Medical Group authorizing Lawyer to pay directly to Medical Group sums due and owing for medical services rendered, and to withhold such sums from any settlement, judgment, or verdict as may be necessary to adequately protect Medical Group. Client also agreed to give a lien on his case to Medical Group against any and all proceeds of any settlement, judgment, or verdict which may be paid to Lawyer or Client as a result of the injuries for which he had been treated. Furthermore, Client agreed to be directly and fully responsible to Medical Group for all medical bills submitted for services rendered, and also agreed that payment was not contingent on any settlement, judgment, or verdict by which he might eventually recover such fee. Lawyer signed his name below language in the Agreement which stated that he agreed to observe all terms of the Agreement between Client and Medical Group and that he specifically agreed to withhold such sums from any settlement, judgment, or verdict as might be necessary to protect Medical Group. Medical Group provided treatment to client, deferred collection on Client's unpaid account, and cooperated with Lawyer by providing Lawyer with copies of medical bills and reports which Lawyer submitted to the tortfeasor's insurance carrier. In negotiating a settlement with the insurance carrier, Lawyer asserted that Medical Group's services and the fees charged were reasonable and necessary for the treatment of Client's accident-related injuries. Lawyer subsequently received a settlement on Client's personal injury claim. Although Lawyer had received bills from Medical Group, he did not pay any of the settlement proceeds to Medical Group. Instead, Lawyer paid Medical Group's portion directly to Client who said he was having financial difficulties and that he preferred to pay Medical Group directly. Ultimately, Client did not pay any portion of the proceeds to Medical Group as payment of their bill.

VSB Standing Comm. on Legal Ethics, Legal Ethics Op. 1747 (2000) ("Attorney

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[2] Ethics opinions are not controlling authority and are considered to be advisory only. (See Opening Br. of Appellant 5 n. 1 (citing Va. Sup. Ct. R., pt. 6, § IV, ¶ 10(c)(vii).)

Breaching Contract to Pay Medical Bills Out of Settlement Proceeds"). The question presented to the Legal Ethics Committee is whether the attorney's conduct, in paying the Client instead of the Medical Group, would be unethical. The Committee held that it would be unethical, relying specifically on Rule 1.15(c)(4), the same provision before the Three-Judge Court in the instant matter. The Committee reasoned as follows:

> The committee believes that the issue is not who is "entitled" to the funds in the attorney's possession, but rather what does Rule 1.15 (c)(4) require when both the client and a third party claim a right to those same funds? The committee's answer is that the attorney must take a course of action that will protect the interests of both the client and the third party. Thus it would be unethical for Lawyer to disburse the funds in question to the client when the client, by agreement or by law, is under a legal obligation to deliver those funds to another. *See* Alaska Bar Ass'n Ethics Op. 92-3 (1992) (lawyer may not follow client's instruction to disregard facially valid assignment or statutory lien in favor of third party; lawyer should advise client that he will withhold funds until dispute is resolved). The committee believes that a lawyer's obligations under Rule 1.15 (c)(4) do not extend to all general creditors of the client, but only those persons who have an interest in the settlement proceeds either by law or assignment.

Comment [3][3] to Rule 1.15 offers some guidance:

> > Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

If a third party has a valid statutory lien, contract or court order that grants an interest in the settlement proceeds, the lawyer may not ignore the third party's interests and deliver the funds in question to the client, even if the client directs the lawyer to do so. *See Aetna Casualty & Surety Co. v. Gilbreath*, 625 S.W.2d 269 (Tenn. 1981) (lawyer has duty to honor employer's statutory workers' compensation lien against settlement with

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[3] This is now Advisory Note 4 to Rule 1.15.

third party); California Formal Ethics Op. 1988-101 (lawyer whose client agreed to pay recovery proceeds to health care provider may not ignore agreement and disburse all funds to client upon client's instruction); Maryland Ethics Op. 94-19 (1993) (lawyer must disregard client's instruction not to pay creditor when client had valid assignment with creditor); Ohio Ethics Op. 95-12 (1995) (lawyer must disregard client's instruction not to pay physician when client had earlier agreed to pay medical bills from settlement proceeds); and South Carolina Ethics Op. 94-20 (1994) (if lawyer knows that client has executed valid doctor's lien he may not comply with client's instruction to disregard it; no principle of confidentiality or client loyalty permits lawyer to violate ethical obligations owed to third parties).

By the same token, a lawyer should not disburse the client's funds to a third party if the client contests such action. *See* Connecticut Informal Ethics Op. 95-20 (1995) (lawyer cannot pay money over to creditor over client's objection); Pennsylvania Bar Ass'n Ethics Op. 92-89 (1992) (lawyer, whose client was ordered to pay child support arrearage, cannot release funds from real estate sale without client consent).

The committee opines that a lawyer who knows that his client has made a valid assignment of rights to the proceeds of a settlement or has allowed for the creation of a consensual lien on the settlement cannot disregard the third party assignee or lienholder's rights, notwithstanding a client's directive to do so. Rule 1.15 recognizes circumstances in which a lawyer may refuse to surrender property or funds to a client when a third party asserts what appears to be a valid claim to such property or funds. In your hypothetical, Lawyer is charged with notice of Client's assignment to Medical Group since Lawyer also signed the Agreement. The lawyer's ethical duty does not require Lawyer to make a legal determination as to who is entitled to the proceeds, only that Lawyer protect the interests of both the client and the third party who appear to have conflicting claims to the funds or property. It is the opinion of the committee that if a dispute arises concerning the rights of third parties to funds held by the attorney on behalf of a client, the attorney must segregate the amount in dispute until the dispute can be resolved. If the dispute cannot be resolved, the attorney may interplead the funds into court and request that the court determine the legal entitlement to the funds. *See* Alabama Bar Ethics Op. 90-48 (1990) (lawyer whose client executed assignment of proceeds to chiropractor but later instructed lawyer to disregard assignment should interplead the disputed funds into circuit court in order to establish the rights of the parties).

In conclusion, the committee opines that it was unethical for Lawyer to disburse funds to Client where Client had agreed to pay such funds to Medical Group out of the settlement proceeds and that Lawyer should

have withheld or interpleaded the disputed funds assuming Client would not authorize payment to Medical Group.

Id.

The sole difference between the instant case and the above-described Legal Ethics Opinion is that the Respondent in the instant case did not sign the authorization and assignment. In our view, that does not alter at all the Respondent's obligation to protect and preserve the funds he held in trust until the matter was resolved. While Respondent may not have been a party to the agreement, his client certainly was a party to the agreement and, in that agreement, his client explicitly "direct[ed]" the Respondent "to promptly pay [Cox] out of such funds" received by the attorney relating to the accident. (See Assignment of Proceeds, Contractual Lien, and Authorization.) When Cox refused to accept a reduced payment, Respondent did precisely what the Advisory Note states he should not do: he attempted unilaterally to arbitrate the dispute himself.

Respondent relies on a District of Columbia Court of Appeals opinion, In Re Samuel Bailey, Jr., 883 A.2d 106 (D.C. 2005), to suggest that a third party does not have a "just claim" against property being held by a lawyer unless the lawyer himself is a signatory to the contract between the third party and the client. We do not accept, however, that this opinion should be given the interpretation assigned to it by the Respondent. While it is certainly the case that a lawyer who signs a contract becomes a party to a contract, there are multiple ways in which a third party can establish a "just claim" to property, including through execution by the client of the very broad assignment and authorization at issue in the instant case.[4]

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[4] Significantly, the Court in Bailey was interpreting an authorization very different than the one at issue in the instant case. The authorization in Bailey did not require

In rendering its opinion, the Legal Ethics Committee and this Three-Judge Court also relies on the Supreme Court's decision is Pickus v. Virginia State Bar, 232 Va. 5, 348 S.E.2d 202 (1986). Although the fact pattern in Pickus was different and the matters at issue involved real estate settlements, the Supreme Court recognized that a lawyer's fiduciary duties under then Canon 9 extended to protecting funds owed to or claimed by third parties, and not simply the client.

In summary, the Respondent violated Rule 1.15(c)(4) when he sent the check to Cox Clinic for less than the full amount of Cox's bill. That he did so at the direction of his client does not insulate him from his obligation to safeguard funds he held in trust and which were subject to the assignment executed by his client and provided to Respondent.

Finally, we reject Respondent's assertion that Cox's negotiation of the check extinguished any obligation that Respondent had to safeguard the funds he held in trust. Respondent's ethical violation was complete when he sent the check to Cox for less than the amount billed with the admonition to Cox that it could either negotiate the reduced fee check in full settlement of its claims or return the check to the Respondent at which point the Respondent would pay the money due Cox directly to the client. Neither of these choices was consistent with the Assignment and Authorization executed by Cox and the client and provided to the Respondent.

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payment out of settlement funds of the doctor's fees for medical services rendered. Here, the authorization signed by the client stated explicitly that "I hereby direct any . . . attorneys . . . which may elect, or be obligated, to pay proceeds to me for any reason [including those from any settlement], to pay directly to . . . Cox Clinic . . . in the amount of the full charges incurred by me. . . ." (See Assignment of Proceeds, Contractual Lien, and Authorization.) It also states that "[i]n the event that I retain one or more attorneys to represent me in this matter . . . I further direct . . . each attorney to provide immediate notice to the [Cox Clinic] Office regarding any funds received by the attorney relating to my accident . . . [and] to promptly pay the [Cox Clinic] Office out of such funds. . . ." Id.

Therefore, the Three-Judge Court affirms the District Committee Determination.

C. Sanction

Under the Rules of the Supreme Court, once the Three-Judge Court affirms the District Committee Determination, it "may impose the same or any lesser sanction as that imposed by the District Committee." See Va. Sup. Ct. R., pt. 6, § IV, ¶ 13-19(G)(2).

In considering the appropriate sanction, we note that the sanction imposed by the District Committee is a Public Admonition Without Terms.[5] The Three-Judge Court has determined that the appropriate sanction is a dismissal de minimus. The definition of a dismissal de minimus is "a finding that the Respondent has engaged in [m]isconduct that is clearly not of sufficient magnitude to warrant disciplinary action, and Respondent has taken reasonable precautions against a recurrence of same." See Id. at ¶ 13-1 (Definitions). In making this determination, we note that the Respondent has no prior disciplinary record, that the Respondent fully cooperated with the Bar in its investigation and, as Bar Counsel acknowledged before the Disciplinary Committee, there was no evidence of dishonesty on the part of the Respondent. (Tr. 78, Dec. 12, 2008.) Further, based on our review of the Respondent's testimony before the District Committee and on our own inquiries of the Respondent at the hearing on this matter, we do not expect this misconduct to recur. Therefore, we conclude that a dismissal de minimus is the appropriate sanction.

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[5] The District Committee, in announcing its sanction, noted that it was initially "leaning" towards a dismissal de minimus but "upon getting further input from respondent's counsel," its final determination was that the sanction should be an admonition without terms. (Tr. 104, Dec. 12, 2008) Respondent's counsel had argued that he wanted "to be in the position of being able to appeal this all the way to the Supreme Court . . . if that seems an appropriate thing for us to do," (Tr. 103, Dec. 12, 2008,) and expressed the concern that a dismissal de minimus would not be appealable. Id. at 97-98.

D. Conclusion

At the conclusion of the proceedings on July 14, 2009, the Three-Judge Court entered a Summary Order affirming the District Committee Determination and imposing the sanction of a dismissal de minimus. By this Memorandum Order, we confirm the Summary Order and hereby AFFIRM the District Committee Determination and impose the sanction of DISMISSAL DE MINIMUS. It is further ORDERED that pursuant to Rules of the Supreme Court of Virginia, Part 6, Section IV, Paragraph 13-9(E)(1), the Clerk of the Disciplinary System shall assess costs against the Respondent.

It is further ORDERED that four (4) copies of this ORDER be certified by the Clerk of the Circuit Court of the City of Richmond, and be thereafter mailed by said Clerk to the Clerk of the Disciplinary System of the Virginia State Bar at 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800, for further service upon the Respondent, his counsel, and Bar Counsel consistent with the rules and procedures governing the Virginia State Bar Disciplinary System.

THIS ORDER IS FINAL.

Entered this 11 day of August, 2009.

FOR THE THREE-JUDGE COURT

By: _____
RANDY I. BELLOWS
Circuit Court Judge and
Chief Judge of the Three-Judge Court

A Copy,
Teste: BEVILL M. DEAN, CLERK
BY: _____ D.C.