VIRGINIA:

IN THE CIRCUIT COURT FOR STAFFORD COUNTY

VIRGINIA STATE BAR EX REL
SIXTH DISTRICT COMMITTEE

Complainant

Case No. CL06000275-00

v.

ALVIN LEWIS LOWERY, JR.

Respondent

MEMORANDUM OPINION AND ORDER

On the 5th day of May, 2006, this matter came before a three judge court on April 20, 2006 by designation 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 Frank A. Hoss, Jr., Retired Judge of the Thirty-first Judicial Circuit, the Honorable Paul F. Sheridan, Retired Judge of the Seventeenth Judicial Circuit, and the Honorable Randy I. Bellows, Judge of the Nineteenth Judicial Circuit, designated Chief Judge.

Richard E. Slaney, Assistant Bar Counsel, appeared on behalf of the Virginia State Bar, and Michael L. Rigsby appeared on behalf of Alvin Lewis Lowery, Jr. (hereafter "Respondent"). The Respondent was present throughout the proceeding.

WHEREUPON, a hearing was conducted upon the Rule to Show Cause entered on March 24, 2006 by the Honorable H. Harrison Braxton, Judge of the Stafford County Circuit Court, which directed the Respondent to appear before the Court on May 5, 2006

to show cause why his license to practice law should not be suspended, revoked or otherwise sanctioned in accordance with the Rules of Court, Part Six, Section IV, Paragraph 13. In that hearing, both the Bar and Respondent's counsel presented witnesses and exhibits in support of their position. After hearing the Bar's evidence, the Respondent moved to strike the Bar's case in its entirety. After due deliberation, the Court granted in part and denied in part the Respondent's motion to strike, as explained below. The Respondent then presented evidence regarding the remaining matters before the Court. The Court deliberated and found by clear and convincing evidence that the Respondent did engage in misconduct, as explained below, and imposed the sanction herein described.

A. Findings of Fact

The Three-Judge Court finds by clear and convincing evidence the following:

1. At all times material to this proceeding, the Respondent was an attorney licensed to practice law in the Commonwealth of Virginia.
2. On April 17, 2001, Malcolm Macleay and Sarah Elizabeth Macleay, husband and wife, entered into a Property Settlement Agreement (hereafter "PSA"). That Property Settlement Agreement was affirmed, ratified and incorporated into a Final Decree of Divorce, signed by a Circuit Court Judge, on June 28, 2002. Mr. Macleay was represented by the Respondent. Ms. Macleay was represented by Gregory M. Wade.
3. The pertinent portion of the PSA reads as follows:

> Prior to the marriage, the husband acquired property known as 1406 Littlepage Street, Fredericksburg, Virginia (hereafter "the property"). The Wife shall enjoy the right to remain resident in the property, and shall enjoy exclusive use and possession thereof, until the child of the parties

> reaches the age of nineteen, graduates from high school, or is no longer resident in the property, or until the wife remarries, whichever comes first. At that time, the parties agree that the property shall then be sold, and the proceeds, after any and all costs relating to the property have been paid and any and all indebtedness relating the property has been satisfied, shall be divided equally between the parties.

(Emphasis Added).

4. On or about January 7, 2004, Mr. Macleay sold the house and received as proceeds $62,064.79. The Respondent did not represent Mr. Macleay at the settlement and was not otherwise involved in the sale of the house. Approximately a week later, Mr. Macleay delivered to the Respondent a check for $31,032.40, representing one half of the total proceeds he had received. On or about January 15, 2004, the Respondent caused Mr. Macleay's check to be deposited in the Respondent's trust account. At the time that Mr. Macleay delivered the check for $31,032.40 to the Respondent, he also gave the Respondent a statement listing a number of deductions, which he characterized as "Indebtedness to the property," which he believed should reduce the money ultimately paid to Ms. Macleay pursuant to the PSA. Those deductions included rent charges, forfeited security deposits, and mortgage payments made by Mr. Macleay. After subtracting these deductions from the $31,032.40 check, this left a total of $19,332.42 which Mr. Macleay believed should be paid to Ms. Macleay.

5. On January 23, 2004, the Respondent wrote Mr. Wade and Ms. Catherine Saller (an attorney retained by Ms. Macleay in connection with another matter) in order to describe his client's plans for distributing the proceeds of the house sale. The Respondent identified each of the deductions his client believed should be taken from the $31,032.40 corpus, and offered immediately to release the balance of $19,332.42.

6. That same day, Mr. Wade wrote the Respondent and disputed "each and every" deduction which the Respondent proposed to make. Mr. Wade further asserted that the deductions were "blatantly contrary to the court order and are in contempt of that court order." He demanded that the Respondent immediately forward to him an amount equal to the proposed deductions and that if he did not do so Mr. Wade would file a Rule to Show Cause with the Alexandria Circuit Court. He also insisted on immediate payment of the amount that was not in dispute.

7. On January 28, 2004, the Respondent caused a check to be issued for $19,332.42 from his law firm's trust account to Ms. Macleay. The next day, the Respondent wrote Mr. Wade and Ms. Saller again, and offered to pay an additional $10,000 to Ms. Macleay as a final settlement of all outstanding financial issues, including child support arrearages.[1]

8. On January 30, 2004, the Respondent withdrew $2,960.02 from the trust account for the payment of legal fees and costs.

9. On February 17, 2004, the Virginia State Bar received a complaint against the Respondent filed by Ms. Macleay in connection with the disposition of the house sale proceeds.

10. On February 19, 2004, the Respondent withdrew $100 from the trust account for the payment of Mr. Macleay's past due child support.

11. On February 20, 2004, Mr. Wade wrote the Respondent, rejecting the settlement offer and demanding that the Respondent pay to Ms. Macleay "all funds of hers that you are holding with interest at the judgment rate from the day of settlement ...." Mr. Wade also reiterated his view that it was improper of the Respondent to take

[1] At the time he made this offer, Mr. Macleay was alleged to owe $7,200 in past due child support.

possession of Ms. Macleay's half of the house settlement proceeds and place them in trust.

12. On February 24, 2004, the Respondent wrote Mr. Wade and reiterated his client's view that he was entitled to reimbursement of certain costs relating to the property.

13. Also on February 24, 2004, the Respondent withdrew $400 from the trust account for the payment of Mr. Macleay's past due child support.

14. On February 25, 2004, a deposit of $2,500 was made to the trust account.

15. On February 27, 2004 and March 9, 2004, a total of $815.87 was withdrawn from the trust account for the payment of the Respondent's legal fees and costs.

16. On March 26, 2004, Mr. Rigsby filed a response with the Virginia State Bar regarding the complaint made by Ms. Macleay.

17. On March 30, 2004, the Respondent withdrew $1400 from the trust account for the payment of legal fees and costs. On April 2, 2004, the Respondent withdrew $100 from the account for the payment of Mr. Macleay's past due child support. On April 30, 2004, the Respondent withdrew $2,100 from the trust account for the payment of legal fees and costs. On May 3, 2004, the Respondent withdrew $100 from the account for the payment of Mr. Macleay's past due child support. As of that date, the balance of funds remaining in the trust account was $6,224.11.

18. On May 3, 2004, the Respondent sent a letter to Mr. Wade and Ms. Saller, indicating that he was responding to a voice mail message from Ms. Saller's office indicating that Sarah Macleay wanted to know if the Respondent still had the house sale proceeds. The Respondent posed a series of questions suggesting that he was not sure

whether he should respond to the inquiry and expressing his confusion as to why Ms. Saller was asking him about the house sale proceeds, rather than Mr. Wade. Then he stated: "Based on the foregoing, I have discussed the inquiry with my client and received his authorization to advise that I do NOT have any proceeds from the house sale." (Emphasis in Original) At the time he wrote this letter, there was at least $3,724.11 in the Respondent's trust account derived from the proceeds of the house sale.

B. Allegations of Misconduct

This case arises out of a Direct Certification based on a determination made by a subcommittee of the Sixth District Disciplinary Committee. In that certification, the Respondent was charged with violations of Rule 1.15 and Rule 8.4 of the Disciplinary Rules of the Virginia Code of Professional Responsibility. Specifically, the Respondent was charged with violating the following provisions:

RULE 1.15 Safekeeping Property

(c) 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 promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(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.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honest, trustworthiness or fitness to practice law;

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

C. Discussion

Based on the arguments of counsel, it is apparent to the Court that the Bar's position is that the Respondent violated Rule 1.15(c)(1-4) by failing either to preserve (pending further litigation) or to turn over to Ms. Macleay the entire sum of $31,032.40, representing one-half of the proceeds of the house sale. In support of its position, the Bar relies principally on Rule 1.15(c)(4) and the Commentary to Rule 1.15. That Commentary states in part as follows:

> 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.

This Court concludes that the evidence fails to prove by clear and convincing evidence a violation of Rule 1.15(c)(1-4). First, as to Rule 1.15(c)(1-3), there is no support in the record to indicate a violation, particularly given the fact that Ms. Macleay

– unlike Mr. Macleay -- was never the Respondent's client. Rule 1.15(c)(4) presents a more difficult situation for the following reasons. An appropriate choice for the Respondent would have been to preserve the entire $31,032.40 in his trust account and present the matter to the Alexandria Circuit Court for final resolution.[2] This is particularly true once the Respondent was put on notice by Mr. Wade that he contested all deductions from the proceeds of the house sale. Instead, the Respondent began to draw his legal fees and to make Mr. Macleay's child support arrearage payments out of the house proceeds.

But this Court's sole function is to determine whether the Respondent violated the Disciplinary Rules and we cannot make that finding based on conduct that, while it may be unwise or inappropriate, is not in actual violation of a Disciplinary Rule. Here, the Disciplinary Rule is limited to requiring an attorney to turn over funds to another person which that person is "entitled to receive." The Bar never proved – indeed, never even attempted to prove – that Ms. Macleay was "entitled to receive" the entire $31,032.40, rather than the $19,332.42 which the Respondent actually paid to Ms. Macleay. Significantly, the PSA states that each party is entitled to half the proceeds of the house sale only after costs and indebtedness is satisfied. Mr. Macleay's position was that the costs and indebtedness amounted to $11,700 and that Ms. Macleay was only entitled to the remaining funds. Ms. Macleay's position was that there were no costs and indebtedness that should be deducted from the sum she was due. This Court lacks evidence to decide whose position is correct and that is precisely why the Bar's case fails. In order for the Court to find a violation of this Disciplinary Rule, it would have to

---

[2] The Respondent was under no obligation to wait for Mr. Wade to file a Rule to Show Cause. There were a variety of ways in which the Respondent could have brought the matter to the attention of the Circuit Court.

conclude that Ms. Macleay was "entitled to receive" the $31,032.40. On this record, the Court cannot make such a finding.

The Bar argues that even though Disciplinary Rule 1.15(c)(4) does not explicitly require preservation of funds in dispute, the Commentary suggests that there is such an obligation on the part of an attorney in possession of disputed funds. That may well be a fair reading of the Commentary but, as is made clear in the Preamble to the Rules, "Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules." For this Court to conclude that Disciplinary Rule 1.15(c)(4) required the Respondent to preserve or turn over not only funds which another person was "entitled to receive" but also funds that were "in dispute" would be to graft an additional requirement onto the Rule. This we cannot do.[3]

Upon this basis, the Court grants the Motion to Strike in connection with the alleged violations of Rule 1.15. As to the alleged violations of Rule 8.4, Bar counsel advised the Court that the Rule 8.4(b) assertion was predicated upon the alleged violations of Rule 1.15. Since the Rule 1.15 alleged violations have been struck, the alleged Rule 8.4(b) violation must be dismissed as well. The alleged violation of Rule 8.4(b), therefore, is hereby dismissed.

That leaves the Court with the alleged violation of Rule 8.4(c), which charges the Respondent with engaging in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on his fitness to practice law. Specifically, this charge arises out of the Respondent's representation in his May 3, 2004 letter to Mr.

---

[3] The parties rely on Legal Ethics Opinions, specifically Number 1471 and 1747, in support of their respective positions. These opinions indicate that it would be unethical for an attorney to disburse funds to a client when the client, "by agreement or by law, is under a legal obligation to deliver those funds to another." LEO 1747 Here, this Court could not conclude, on the record before it, that the Respondent was under a legal obligation to deliver the $31,032.40 to Ms. Macleay.

Wade that he had no house proceeds left when, in fact, he had at least $3,724.11 in house proceeds in his trust account. The Court finds that this statement was a misrepresentation which reflects adversely on the Respondent's fitness to practice law. Therefore, the Court finds by clear and convincing evidence that the Respondent violated Rule 8.4(c).[4]

D. Sanctions

The Court has considered each of sanctions available to it upon this finding of misconduct. The Court considers it significant that the Respondent has no prior disciplinary record. In addition, the Court heard from a number of character witnesses, who testified persuasively to the Respondent's good character, honesty, integrity and professionalism. After due deliberations, the Court determined that the most appropriate sanction to impose in this matter was an admonishment without terms.

WHEREFORE, the Three-Judge Court hereby imposes an admonishment without terms and, therefore, the Respondent is hereby admonished; and it is further

ORDERED that the terms and provisions of the Summary Order entered by this Court at the conclusion of the hearing conducted on May 5, 2006, be, and the same hereby is, merged herein; and it is further

ORDERED that pursuant to Part Six, Section IV, Paragraph 13(B)(8)(c) of the Rules of the Virginia Supreme Court, the Clerk of the Disciplinary System shall assess costs against the Respondent; and it is further

[4] The Court was not persuaded by the Respondent's explanation that when he stated "I do NOT have any proceeds from the house sale" all he meant was that he did not have house sale proceeds that belonged to Ms. Macleay.

ORDERED that four (4) copies of this Order be certified by the Clerk of this Court, 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 and Bar Counsel consistent with the rules and procedures governing the Virginia State Bar Disciplinary System.

AND THIS ORDER IS FINAL.

Entered, this 27 day of June, 2006.

Randy I. Bellows
Chief Judge of the Three-Judge Court

Frank A. Hoss, Jr.
Judge of the Three-Judge Court

Paul F. Sheridan
Judge of the Three-Judge Court