

VIRGINIA: BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD
IN THE MATTER OF
WARREN WILSON McLAIN VSB Docket Nos. 15-051-100650
16-051-104021

MEMORANDUM ORDER

This matter came on to be heard on March 25, 2016, before a panel of the Virginia State Bar Disciplinary Board consisting of Whitney G. Saunders, Chair, Pleasant S. Brodnax, III, Samuel R. Walker, Stephen A. Wannall, Lay Member, and Tyler E. Williams, III. The Virginia State Bar was represented by Kathleen Maureen Uston, Assistant Bar Counsel. The Respondent, Warren Wilson McLain, appeared in person *pro se*.

The Chair polled the members of the Board panel to ascertain whether any member was conscious of any personal or financial interest or bias which would preclude any of them from fairly hearing this matter and serving on the panel, to which inquiry each member responded in the negative. Jennifer L. Hairfield, court reporter, Chandler & Halasz; P.O. Box 9349; Richmond, Virginia 23227 (804) 730-1222, after being duly sworn, reported the hearing and transcribed the proceedings.

The matter under Docket no. 15-051-100650 is before the Disciplinary Board (the "Board") upon the Subcommittee Determination (Certification) of the Fifth District Subcommittee, Section 1, and the matter under Docket no. 16-051-104021 is before the Board upon the Subcommittee

Determination (Certification) of the Fifth District Subcommittee, Section 1. Those Certifications were duly served upon the Respondent on August 21, 2015 and December 17, 2015, respectively, in accordance with Paragraph 13-18.A of Part 6, Section IV of the Rules of the Supreme Court of Virginia. Respondent did not file an answer or answer and demand.

Bar Counsel moved for admission of VSB Exhibits nos. 1 through 4, inclusive, in Docket no. 15-051-100650 which motion was granted without objection. Bar Counsel moved for admission of the Memorandum Report of Investigation as VSB Exhibit 5 in Docket no. 15-051-100650 which motion was granted without objection. Finally, Bar Counsel moved for admission of VSB Exhibits nos. 1 through 4, inclusive, in Docket no. 16-051-104021 which motion was granted without objection.

The Respondent stipulated to the Findings of Fact and the misconduct alleged in the Certifications filed herein. Thereupon, the Board went into recess and, after due deliberation, the Board makes the following findings of fact on the basis of clear and convincing evidence, based upon the Exhibits and the parties' stipulations:

Docket no. 15-051-100650

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

2. On or around September 19, 2014, the Virginia State Bar received notice from BB&T Bank (hereinafter, "BB&T") that an item presented for payment on Respondent's IOLTA, account #0000250778147, was "force paid" creating an overdraft on that account in the amount of \$475.86 (hereinafter the "NSF"). The NSF from BB&T disclosed that the presented item was in the amount of \$500.00 and posted to Respondent's IOLTA on September 9, 2014. The NSF further disclosed that on September 11, 2014, a deposit in the amount of \$500.00 was made to cover the overdraft.

3. In his response to the bar dated October 7, 2014, Respondent stated that the NSF resulted from the fact that a check from a client was dishonored, against which he had already withdrawn funds. Respondent stated that he had taken the steps necessary to rectify the matter and that he would, ". . . check [his] balance daily from now on."

4. During the course of the investigation of this case, it was discovered that Respondent's client never reimbursed Respondent for the dishonored check, and that Respondent wrote a check against the dishonored funds without first confirming that the funds were available.

5. The investigation also revealed that Respondent did not maintain trust account records as required under Rule of Professional Conduct ("RPC") 1.15, including appropriate cash receipts and disbursements journals and client subsidiary ledgers. Respondent also did not perform the monthly and quarterly reconciliations of his IOLTA required under RPC 1.15.

6. The investigation also revealed the fact that Respondent's operating account was closed by BB&T Bank due to multiple overdrafts and it appears from a review of bank records that Respondent paid various personal vendors, including Verizon and Cox Communications, directly from his IOLTA, all without maintaining the trust account records and ledgers required under RPC 1.15, or maintaining a current account balance.

Docket no. 15-051-104021

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

2. On or around September 22, 2015, the Virginia State Bar received notice from BB&T Bank that an item presented for payment on Respondent's IOLTA, Account #0000250778147, was presented against insufficient funds creating an

overdraft on that account (hereinafter the ``NSF``). The NSF from BB&T disclosed that the presented item was in the amount of \$1, 147.54, and posted to Respondent's IOLTA on September 11, 2015.

3. During his interview with Virginia State Bar Investigator David W. Jackson, Respondent stated that the debit from his IOLTA in the amount of \$1,147.54, which is the charge that caused the NSF, was a payment made to Northwestern Mutual Insurance Company to pay the premium on a life insurance policy he is required to maintain for his ex-wife's benefit.

4. During the course of his interview with Investigator Jackson, Respondent admitted that he does not keep records of the time he spends on client matters in order to determine what he is owed by his clients and when. Respondent stated that he does not keep contemporaneous time records since he claimed to, ``just know how much time [he] spent`` on a client's case. Further, Respondent explained that he reviews his client subsidiary ledger cards to determine how much money he has on deposit for his clients, and relies upon that information when making withdrawals from his IOLTA.

5. However, it appears that Respondent does not keep his client subsidiary ledger cards current or up to date. Upon being asked if the client subsidiary ledger cards for Respondent's hourly civil clients would reflect the current balance or funds that Respondent was holding for those clients in trust, Respondent acknowledged that they would not since he would need to first review the file and update the client subsidiary ledger card.

6. The investigation conducted in this case also revealed that Respondent does not maintain other trust account records as required under Rule of Professional Conduct (``RPC``) 1.15, including appropriate cash receipts and disbursements journals. Specifically, while Respondent apparently records deposits and disbursements in his check register, he does not maintain a running balance therein. Further, it does not appear that Respondent regularly maintains an identification of the client matter, the date of the transaction, the name of the payor or payee, and the manner in which trust funds were received, disbursed, or transferred from the IOLTA account in his cash receipts and disbursements journal.

7. Although Respondent advised Investigator Jackson that he does perform monthly reconciliations of his trust account, he described those reconciliations as including his making checkmarks in his check register to indicate that a check has cleared. This method falls short of the monthly reconciliations required under the RPC 1.15 since there is no reconciliation of the total balance reflected

on the client subsidiary ledger cards against the bank statements. There also does not appear to be a running balance maintained in Respondent's client cash receipts and disbursements journal that is then reconciled against the monthly bank statements. It also does not appear that Respondent performs the required quarterly reconciliations of his IOLTA as required by RPC 1.15.

8. The investigation in this matter also revealed the fact that Respondent is apparently paying personal expenses directly out of his IOLTA. Respondent acknowledged that his IOLTA is the only bank account that he currently has since his operating account was closed by BB&T due to excessive overdrafts. A review of his bank statement and other records shows that Respondent paid various vendors, including Verizon and Cox Communications, for personal expenses directly from his IOLTA, all without maintaining the trust account records and ledgers required under RPC 1.15, or maintaining a current account balance.

9. Finally, although Respondent asserted that the balance in his IOLTA never dropped below \$00.00 in the instant matter, an analysis of the account confirms that the balance did drop below \$00.00 following the Northwestern Mutual Insurance Company Premium debit. Review of Respondent's IOLTA records further reveals that on at least two occasions, the account balance dropped below the amount which Respondent stated he had on deposit for his two hourly clients.

The Board then stated that it had determined that the Respondent's conduct as stipulated to above constituted violations of the following provisions of the Rules of Professional Conduct by clear and convincing evidence:

Docket no. 15-051-100650

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:

(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; 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.

(c) Record-Keeping Requirements. A lawyer shall, at a minimum, maintain the following books and records demonstrating compliance with this Rule:

(1) Cash receipts and disbursements journals for each trust account, including entries for receipts, disbursements, and transfers, and also including, at a minimum: an identification of the client matter; the date of the transaction; the name of the payor or payee; and the manner in which trust funds were received, disbursed, or transferred from an account.

(2) A subsidiary ledger containing a separate entry for each client, other person, or entity from whom money has been received in trust.

The ledger should clearly identify:

(i) the client or matter, including the date of the transaction and the payor or payee and the means or methods

by which trust funds were received, disbursed or transferred; and

(ii) any unexpended balance.

(3) In the case of funds or property held by a lawyer as a fiduciary, the required books and records shall include an annual summary of all receipts and disbursements and changes in assets comparable in detail to an accounting that would be required of a court supervised fiduciary in the same or similar capacity; including all source documents sufficient to substantiate the annual summary.

(4) All records subject to this Rule shall be preserved for at least five calendar years after termination of the representation or fiduciary responsibility.

(d) Required Trust Accounting Procedures. In addition to the requirements set forth in Rule 1.15 (a) through (c), the following minimum trust accounting procedures are applicable to all trust accounts.

(1) Insufficient Fund Reporting. All accounts are subject to the requirements governing insufficient fund check reporting as set forth in the Virginia State Bar Approved Financial Institution Agreement.

(2) Deposits. All trust funds received shall be deposited intact. Mixed trust and non-trust funds shall be deposited intact into the trust fund and the non-trust portion shall be withdrawn upon the clearing of the mixed fund deposit instrument. All such deposits should include a detailed deposit slip or record that sufficiently identifies each item.

(3) Reconciliations.

(i) At least quarterly a reconciliation shall be made that reflects the trust account balance for each client, person or other entity.

(ii) A monthly reconciliation shall be made of the cash balance that is derived from the cash receipts journal, cash disbursements journal, the trust account checkbook balance and the trust account bank statement balance.

(iii) At least quarterly, a reconciliation shall be made that reconciles the cash balance from (d)(3)(ii) above and the subsidiary ledger balance from (d)(3)(i).

(iv) Reconciliations must be approved by a lawyer in the law firm.

(4) The purpose of all receipts and disbursements of trust funds reported in the trust journals and ledgers shall be fully explained and supported by adequate records.

Docket no. 15-051-104021

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:

(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; 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.

(c) Record-Keeping Requirements. A lawyer shall, at a minimum, maintain the following books and records demonstrating compliance with this Rule:

(1) Cash receipts and disbursements journals for each trust account, including entries for receipts, disbursements, and transfers, and also including, at a minimum: an identification of the client matter; the date of the transaction; the name of the payor or payee; and the manner in which trust funds were received, disbursed, or transferred from an account.

(2) A subsidiary ledger containing a separate entry for each client, other person, or entity from whom money has been received in trust.

The ledger should clearly identify:

(i) the client or matter, including the date of the transaction and the payor or payee and the means or methods by which trust funds were received, disbursed or transferred; and

(ii) any unexpended balance.

(3) In the case of funds or property held by a lawyer as a fiduciary, the required books and records shall include an annual summary of all receipts and disbursements and changes in assets comparable in detail to an accounting that would be required of a court supervised fiduciary in the same or similar capacity; including all source documents sufficient to substantiate the annual summary.

(4) All records subject to this Rule shall be preserved for at least five calendar years after termination of the representation or fiduciary responsibility.

(d) Required Trust Accounting Procedures. In addition to the requirements set forth in Rule 1.15 (a) through (c), the following minimum trust accounting procedures are applicable to all trust accounts.

(2) Deposits. All trust funds received shall be deposited intact. Mixed trust and non-trust funds shall be deposited intact into the trust fund and the non-trust portion shall be withdrawn upon the clearing of the mixed fund deposit instrument. All such deposits should include a detailed deposit slip or record that sufficiently identifies each item.

(3) Reconciliations.

(i) At least quarterly a reconciliation shall be made that reflects the trust account balance for each client, person or other entity.

(ii) A monthly reconciliation shall be made of the cash balance that is derived from the cash receipts journal, cash disbursements journal, the trust account checkbook balance and the trust account bank statement balance.

(iii) At least quarterly, a reconciliation shall be made that reconciles the cash balance from (d)(3)(ii) above and the subsidiary ledger balance from (d)(3)(i).

(iv) Reconciliations must be approved by a lawyer in the law firm.

(4) The purpose of all receipts and disbursements of trust funds reported in the trust journals and ledgers shall be fully explained and supported by adequate records.

Unified Sanction.

Thereafter, the Board then received further evidence of aggravation and mitigation from the Bar and Respondent, including Respondent's prior disciplinary record. The Board recessed, and, after due deliberation, the Board reconvened to announce the sanction to be imposed. The Chair announced that, giving due consideration to the misconduct found, the mitigating factors present, the lack of aggravating factors in this case, the lack of injury to any client or the public, and the absence of prior disciplinary record, and it otherwise appearing proper to do so, imposed the sanction of Public Reprimand with Terms, to-wit:

1. For a period of five (5) years following entry of this Order, the Respondent hereby authorizes a Virginia State Bar Investigator to conduct unannounced personal inspections of Respondent's trust account books, records and bank records to ensure Respondent's compliance with all of the provisions of Rule 1.15 of the Rules of Professional Conduct, and

Respondent shall fully cooperate with the Virginia State Bar Investigator in such inspections.

2. Within 15 days of the date of this Order, the Respondent shall confirm in writing that he has reviewed the requirements of Rule 1.15 of the Rules of Professional Conduct.

3. Within 30 days of the date of this Order, the Respondent shall submit to Bar Counsel a Plan of Action, outlining those steps necessary to bring his trust account or accounts into compliance with the requirements of Rule 1.15 of the Rules of Professional Conduct.

4. Within 90 days of the date of this Order, the Respondent shall provide written certification to Bar Counsel of his completion of the above Plan of Action and that his trust account or accounts are, in fact, in compliance with the requirements of Rule 1.15 of the Rules of Professional Conduct.

5. Should Respondent fail or refuse to comply with the terms of this Order, the Board imposes the alternative discipline of Suspension for a period of six (6) months.

6. It is further ORDERED that, pursuant to Part 6, §IV, ¶13-9 (E)(1) of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess costs against the Respondent.

7. It is further ORDERED that the Clerk of the Disciplinary System shall send a certified copy of this Order by

Certified Mail Return Receipt Requested, to Respondent at his last address of record with the Virginia State Bar, to-wit: 10623 Jones Street, Suite 101-A; Fairfax, Virginia 22030, and a copy by regular mail to Kathleen Maureen Uston, Assistant Bar Counsel, 1111 East Main Street, Suite 700; Richmond, Virginia 23219.

ENTERED this 20 day of April, 2016.

VIRGINIA STATE BAR DISCIPLINARY BOARD

by Whitney G. Saunders
Whitney G. Saunders, Chair