

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
MELISSA MARIE OGDEN

VSJ Docket No. 20-090-118047

MEMORANDUM ORDER OF REVOCATION

A panel of the Virginia State Bar Disciplinary Board (“Board”) heard this matter on May 21, 2021, by video conference.¹ The panel consisted of Yvonne S. Gibney, Chair; Robin J. Kegley; Jennifer D. Royer; Alexander N. Simon; and Martha J. Goodman, Lay Member. The Chair inquired of the members of the Board at the outset of the hearing whether any of them had any personal or financial interest or bias which would preclude him or her from fairly hearing these matters and serving on the panel. All members of the Board, including the Chair, responded in the negative.

Edward J. Dillon, Jr., Senior Assistant Bar Counsel (“Bar Counsel”) represented the Virginia State Bar (“VSB”). Respondent, Melissa Marie Ogden (“Respondent”), was present with her counsel, Steven D. McFadgen, Sr.

Beverly S. Lukowsky, Court Reporter of Chandler & Halasz, P.O. Box 9349, Richmond, Virginia 23227, (804) 730-1222, after being duly sworn by the Chair, reported this matter and transcribed the proceedings.

¹ On March 12, 2020, the Governor of Virginia declared a state of emergency regarding the novel coronavirus (COVID-19), pursuant to Executive Order 51. The state of emergency remains in effect, and will continue indefinitely, until it is revised or otherwise lifted by the Governor. In light of the Governor’s Executive Order 51, the Board convened the hearing via video conferencing using the Microsoft Teams platform which provided the opportunity for members of the public to observe. The hearing was recorded and otherwise complied with the Virginia Freedom of Information Act regarding electronic meetings, found in Virginia Code § 2.2-3708.2, as supplemented by § 4-0.01(g) of Virginia House Bill 29, Chapter 1283 (2020).

The Clerk of the Disciplinary System (“Clerk”) timely sent all legal notices of the date and place in the manner prescribed in Part Six, Section IV, Paragraph 13-18 of the *Rules of the Supreme Court of Virginia* (“*Rules*”).

This matter came before the Board on the Subcommittee Determination (Certification) of the Ninth District Subcommittee, pursuant to Part Six, § IV, ¶ 13-18 of the *Rules*. At the Prehearing Conference prior to the hearing VSB Exhibits 1 – 22 were admitted into evidence without objection. The parties also entered into the Amended Stipulations of Fact and Misconduct (“Stipulations”), filed on May 18, 2021. The Stipulations were admitted into evidence as Board Exhibit 1.

Because Respondent stipulated to the facts and misconduct, the Board heard argument and received evidence only concerning the sanction to be imposed. The VSB offered into evidence Respondent’s disciplinary record, which was admitted into evidence, without objection, as VSB Exhibit 23. The Board heard testimony from the following witnesses who were sworn under oath: Complainant James D. Fairchild, Esq. and Respondent Melissa Marie Ogden. The Board considered the stipulations, the testimony and the exhibits, heard arguments of counsel, and met in private to consider the appropriate sanction.

MISCONDUCT

I. Stipulated Findings of Fact

In the Stipulations the parties stipulated to the following facts:

1. Respondent Melissa Marie Ogden (“Respondent”) was licensed to practice law in the Commonwealth of Virginia in October 2011 and, at all relevant times, has been an attorney licensed to practice law in the Commonwealth of Virginia.

2. In or about 2012, Respondent joined the firm of Fairchild & Yoder PLLC (“F&Y”) on a part-time basis as its primary bookkeeper.

3. In or about 2012 or 2013, Respondent also became corporate counsel for Advanced Manufacturing Services in Lynchburg, Virginia.

4. In or about November 2018, after her hours at Advanced Manufacturing Services were reduced, Respondent became a full-time associate attorney at F&Y handling real estate matters and assisting with other cases.

5. In or about July 2019, Respondent handled a real estate closing (the “July 2019 Closing”) for Anthony and Laura Erskine, who were selling a residential property in Rustburg, Virginia to Ryan and Leslie Mau.

6. In connection with the July 2019 Closing, a payoff amount of approximately \$205,173.06 (the “Payoff Amount”) was to be made to the Erskines’ bank. The Payoff Amount was not received by the Erskines’ bank in July 2019 or anytime immediately thereafter. Respondent later told the VSB investigator that she had mailed a check for the Payoff Amount in July 2019 but did not realize that the check had not cleared.

7. Subsequent to the July 2019 Closing, F&Y hired Ms. Mau, who had experience in real estate matters, as a legal assistant.

8. In or about October 2019, Mr. Erskine contacted James D. Fairchild, a partner at F&Y, and informed Mr. Fairchild that the Payoff Amount had not been received by the Erskines’ bank.

9. Mr. Fairchild subsequently asked Respondent about the Payoff Amount. Respondent told Mr. Fairchild that the Payoff Amount had been made in July 2019.

10. Thereafter, in or about October 2019, Respondent, without informing Mr. Fairchild or Mr. Erskine, wired the Payoff Amount to the Erskines' bank.

11. Mr. Erskine continued to contact F&Y requesting information about the Payoff Amount that had supposedly been made in July 2019.

12. In response to those inquiries and to cover up the fact that the Payoff Amount was made in October 2019 instead of in July 2019, Respondent used software to create a fictional July 2019 bank statement for F&Y's real estate trust account at Atlantic Union Bank (the "Fabricated Bank Statement"). The Fabricated Bank Statement showed a \$205,173.06 wire transfer of the Payoff Amount on July 3, 2019.

13. On or about January 23, 2020, Respondent emailed the Fabricated Bank Statement to Mr. Fairchild and Mr. Erskine.

14. In late January 2020, after Mr. Fairchild told Respondent that he was going to contact the bank to confirm the information on the Fabricated Bank Statement, Respondent confessed to creating the Fabricated Bank Statement.

15. Mr. Fairchild later met with Mr. Erskine, explained the circumstances, and reimbursed the Erskines in the amount of \$2,248.58 to cover costs incurred by the Erskines as a result of the delay in making the Payoff Amount.

16. On or about January 29, 2020, Mr. Fairchild interviewed Respondent at F&Y in the presence of Ms. Mau and made an audio recording of the interview. Respondent was aware that the interview was being recorded. Audrey Kramer, an accountant whom Mr. Fairchild had contacted about auditing F&Y's accounts, arrived at F&Y during the course of the interview and witnessed a portion of the interview.

17. In the interview, Respondent admitted to creating the Fabricated Bank Statement and also confessed to taking approximately \$20,000 in funds from two F&Y accounts without authorization. More specifically, Respondent confessed to taking a little less than \$8,000 from the F&Y's real estate trust account, which ends in 7948, and to taking a little more than \$11,000 from the F&Y's tax account, which ends in 1204.

18. Respondent also stated in the interview that she was in the process of taking out a loan against her 401(k) to repay F&Y.

19. Judith Pearce, Respondent's mother, later brought cashier's checks totaling \$30,000 to F&Y to be deposited into F&Y's trust account until F&Y could determine the amount of money Respondent had taken from F&Y without authorization. Mr. Fairchild stated that Ms. Pearce later paid another \$15,000 to F&Y, which was placed into F&Y's real estate trust account.

20. Mr. Fairchild hired Ms. Kramer to conduct an audit of F&Y's accounts for the time period January 2017 to January 2020 (the "Audit") to determine how much money Respondent had embezzled from F&Y's accounts.

21. Ms. Kramer told the Virginia State Bar investigator that she determined that Respondent had embezzled between \$23,000 and \$44,000 from F&Y's accounts. The Audit revealed that Respondent paid herself approximately \$18,062.87 from F&Y's tax account between January 2019 and mid-January 2020 and approximately \$5,468 from F&Y's real estate trust account between September 2019 and late October 2019.

22. Respondent told the VSB investigator that she did not know how much money she embezzled from F&Y but indicated that she had taken the money from F&Y's real estate trust account and tax account between September 2019 and December 2019.

23. Respondent told Mr. Fairchild that she used the funds taken from F&Y to pay personal expenses.

24. The Audit also identified other questionable payments made by Respondent, including a \$15,000 payment made from F&Y's real estate trust account to Sarah Mayes.

25. Ms. Mayes is a former client of Respondent and/or F&Y, who alleged that Respondent had failed to properly register a trademark on her behalf (the "Trademark Registration Issue").

26. Without the knowledge or consent of Mr. Fairchild and/or F&Y, Respondent drafted a General Release and Settlement Agreement (the "Release") between Respondent, Ms. Mayes, and F&Y whereby F&Y and Respondent agreed to pay Ms. Mayes \$265,000 for an unconditional release from all claims and causes of action related to the Trademark Registration Issue.

27. Respondent admitted to the VSB investigator that she signed the Release in her own name and signed Mr. Fairchild's name on the Release as "[o]wner" of F&Y without Mr. Fairchild's knowledge or consent.

28. By check dated December 20, 2019 and drawn on F&Y's real estate trust account, Respondent paid \$15,000 to Ms. Mayes.

29. Upon information and belief, no additional payments have been made to Ms. Mayes pursuant to the purported Release. However, Mr. Fairchild has since been contacted by multiple attorneys representing Ms. Mayes in regard to the Release and F&Y's purported obligations to Ms. Mayes under the Release.

30. In addition to the \$45,000 paid by Respondent's mother to F&Y, Respondent paid an additional \$10,000 to F&Y by cashier's check dated May 1, 2020, to cover damages incurred by F&Y as a result of her actions.

II. Stipulated Misconduct

The parties stipulated that the conduct set forth in the stipulated facts above constitutes misconduct in violation of the following provisions of the Rules of Professional Conduct:

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.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RULE 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of fact or law[.]

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 honesty, 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;

THE BOARD'S FINDINGS

Based upon the evidence presented, including the above stipulations, testimony, and the exhibits, the Board finds, by clear and convincing evidence, that Respondent's conduct constitutes misconduct in violation of Rules 1.4(a), 1.4(b), 4.1(a), 8.4(b), and 8.4(c).

By failing to inform the Erskines that she had not wired the Payoff Amount from the July 2019 Closing to the Erskine's bank until October of 2019 and by sending the Fabricated Bank Statement to Mr. Erskine, Respondent violated Rules 1.4(a) and 1.4(b).

By misrepresenting to Mr. Erskine that the Payoff Amount for the July 2019 Closing had been made in July 2019 when it was not made until October of 2019; by misrepresenting to Mr. Erskine that his bank had not received the Payoff Amount until October of 2019 because of a bank error; and by creating the Fabricated Bank Statement and sending it to Mr. Erskine, Respondent violated Rule 4.1(a).

By creating the Fabricated Bank Statement and sending it to Mr. Fairchild and Mr. Erskine; by preparing and entering into a Release on behalf of F&Y, without F&Y's knowledge or consent, in an attempt to cover up Respondent's alleged malpractice; by forging Mr. Fairchild's signature on the Release as "owner" of F&Y without Mr. Fairchild's knowledge or consent; by paying \$15,000 to Ms. Mayes from F&Y's real estate trust account without F&Y's knowledge or consent in an attempt to cover up Respondent's alleged malpractice; and by embezzling at least \$23,000 from F&Y's bank accounts, Respondent violated Rules 8.4(b) and 8.4(c).

SANCTION

In the sanction phase of the hearing, the Board heard argument and received evidence as to the appropriate sanction to be imposed based upon the findings of Rule violations recited above and any aggravating and mitigating factors. The VSB introduced Exhibit 23, a certification of

Respondent's disciplinary record in Virginia, which reflected no prior discipline. The witness testimony established the following facts:

Mr. Fairchild had placed trust in and had given tremendous responsibility to Respondent by entrusting her with F&Y's financial and tax transactions and by training her to take over the Forest office of F&Y so that he could focus on expanding F&Y's Roanoke office. Respondent repaid Mr. Fairchild's trust and confidence with deceptions that were calculated and self-serving. Until confronted by Mr. Fairchild with the Fabricated Bank Statement, Respondent did not confess to any of her deceitful conduct.

As a result of Respondent's dishonest actions Mr. Fairchild personally lost income and had to pay a \$20,000 tax debt. In addition, the firm lost its title agency, which brought in a minimum of \$50,000 in income to the firm. Respondent's actions also caused the firm's legal assistant to quit. Mr. Fairchild fears the firm will not survive the bad reviews and damaged reputation in the community.

Respondent's testimony acknowledged her "poor choices," but explained that she had experienced personal and emotional difficulties in her marriage, including spousal abuse, although she provided no details, and that she became desperate. She and her parents have repaid the money she embezzled from the firm and she will continue to do what she can to repair the damage that she caused to Mr. Fairchild and his firm.

THE BOARD'S FINDINGS

At the conclusion of the evidence in the sanction phase of this proceeding, the Board recessed to deliberate. During its deliberation to determine the appropriate sanction to impose, the Board was guided by Standard 5.1(b) of the Annotated Standards for Imposing Lawyer Sanctions (ABA 2015), which provides that "disbarment is generally appropriate when a lawyer engages in

any ... intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice." The Board was further guided by the mitigating and aggravating factors set forth in the ABA Standards.

The Board found the following aggravating factors: Respondent's conduct reflects a dishonest or selfish motive, a pattern of misconduct, multiple offenses, and illegal conduct in that she created the Fabricated Bank Statement and made misrepresentations of fact to the client and her supervising partner to conceal her performance issues; Respondent embezzled at least \$23,000 from two of her employer's accounts over sixteen (16) separate occasions over the course of a year; and, separately, she forged her supervising partner's signature on a legal document purporting to obligate F&Y to pay a settlement of \$265,000 to a third party.

The Board found the following mitigating factors: Respondent had no prior discipline record and she made full and free disclosure to the Bar during its investigation of this matter and demonstrated a cooperative attitude toward the disciplinary proceedings. While the Respondent also testified to having personal or emotional problems, including spousal abuse, that contributed to her misconduct, she presented no substantiating evidence in support of this testimony.

Moreover, despite Respondent's relative inexperience in the practice of law – having not always practiced as a full-time attorney since receiving her license – greater experience would not have served to prevent or minimize the risk of her misconduct, which was the result of Respondent's lack of honesty, trustworthiness, and integrity, not inexperience.

Further, the Board found that Respondent's efforts to repay the embezzled funds were not a mitigating factor. Instead, the Board found that such repayments were made not on Respondent's own initiative and in a good faith desire to remedy the damage and admit liability, but out of fear of punishment for engaging in potentially criminally culpable acts.

Finally, the Board found that Respondent did not display genuine remorse for engaging in misconduct so much as regret that her deceitful acts had been discovered and that she had damaged her relationship with Mr. Fairchild. Had Mr. Fairchild not confronted her, Respondent would not have confessed to her misconduct. Even in her testimony and the argument of her counsel, Respondent's primary motive appeared to be repairing her relationship with her supervising partner. In sum, the Board found that the aggravating factors far outweighed the mitigating factors.

DISPOSITION

After due deliberation and review of the foregoing stipulations of fact and misconduct, the exhibits, the testimony, and the argument of counsel, the Board reconvened in open session and announced that it found that Respondent's license to practice law in the Commonwealth of Virginia should be revoked.

Accordingly, it is ORDERED that the license of the Respondent, Melissa Marie Ogden is hereby REVOKED, effective May 21, 2021.

It is further ORDERED that Respondent must comply with the requirements of Part Six, Section IV, ¶ 13-29 of the *Rules*. Respondent shall forthwith give notice, by certified mail, of the revocation of her license to practice law in the Commonwealth of Virginia to all clients for whom she is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. Respondent shall also make appropriate arrangements for the disposition of matters then in her care in conformity with the wishes of her clients. Respondent shall give such notice within fourteen (14) days of the effective date of the revocation and make such arrangements as are required herein within forty-five (45) days of the effective date of the revocation. Respondent shall also furnish proof to the Bar within sixty (60) days of the effective day of the revocation that such notices have been timely given and such arrangements made for the disposition of matters.

It is further ORDERED that if Respondent is not handling any client matters on the effective date of revocation, she shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar within sixty (60) days of the effective day of the revocation. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board, which may impose additional sanctions for failure to comply with the requirements of this subparagraph.

It is further ORDERED that pursuant to Part Six, Section IV, ¶ 13-9(E) of the *Rules*, the Clerk of the Disciplinary System shall assess all costs against Respondent.

It is further ORDERED that the Clerk of the Disciplinary System shall mail an attested copy of this Order to Respondent at her address of record with the Virginia State Bar by certified mail, return receipt requested, and by regular and electronic mail, and a copy by electronic mail to Steven D. McFadgen, Sr., Esquire, counsel for the Respondent, and to Edward J. Dillon, Jr., Senior Assistant Bar Counsel.

ENTERED this 8th day of June 2021.

VIRGINIA STATE BAR DISCIPLINARY BOARD

Yvonne S. Gibney, Chair