# Proposed Amendments to Part Six, Section IV, Paragraph 18

The Virginia State Bar's Committee on Lawyer Malpractice Insurance is proposing the following amendments to Part 6, Section IV, Paragraph 18 of the *Rules of the Supreme Court of Virginia*. The changes would add to the existing requirement that active members of the bar report each year on their dues statement whether or not they have malpractice insurance, a further requirement that they notify the bar within 30 days in event their liability insurance coverage lapses or terminates, unless it is simply a situation in which a change in carriers occurs with no lapse in coverage. The reason for the change is to provide something closer to real time information to members of the public about bar members who do not have malpractice insurance, rather than having this information updated only once a year at the time the annual dues statement is returned.

Any individual, business or other entity may submit written comments in support of, or in opposition to, the proposed amendments to Thomas A. Edmonds, the Executive Director of the Virginia State Bar, not later than **February 15, 2005**.

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Existing Rule With Amendments Recommended by Lawyer Malpractice Insurance Committee

18. FINANCIAL RESPONSIBILITY.—In order to make available to the public information about the financial responsibility of each active member of the Virginia State Bar for professional liability claims, each such member shall, upon admission to the Bar, and with each application for renewal thereof, submit the certification required herein or obtain a waiver for good cause shown. The active member shall certify to the Bar on or before July 31 of each year: a) whether or not such member is currently covered by professional liability insurance, other than an extended reporting endorsement; b) whether or not such member is engaged in the private practice of law involving representation of clients drawn from the public, and, if so, whether the member intends to maintain professional liability insurance coverage during the period of time the member remains engaged in the private practice of law; and c) the date, amount, and court where rendered, of any unsatisfied final judgment(s) against such member, or any firm or professional corporation in which he or she has practiced, for acts, errors, or omissions (including, but not limited to, acts of dishonesty, fraud, or intentional wrongdoing) arising out of the performance of legal services by such member.

The foregoing shall be certified by each active member of the Virginia State Bar in such form as may be prescribed by the Virginia State Bar and shall be made available to the public by such means as may be designated by the Virginia State Bar.

Each active member who certifies to the bar that such member is covered by professional liability insurance shall notify the Bar in writing within thirty (30) days if the insurance policy providing coverage lapses, is no longer in effect or terminates for any reason, unless the policy is replaced with another policy and no lapse in coverage occurs.

Failure to comply with this Rule shall subject the active member to the penalties set forth in Paragraph 19 herein. An untruthful certification or unjustified failure to notify the Bar of a lapse or termination of coverage shall subject the member to appropriate disciplinary action.

"Good cause shown"as used herein shall include illness, absence from the Commonwealth of Virginia, or such cause as may be determined by the Executive Committee of the Virginia State Bar whose determination shall be final. Any determination by the Executive Committee may be reviewed by the Supreme Court upon request of the member seeking a waiver.

## LEGAL ETHICS OPINION 1786

### DISCLOSURE AND USE OF CONFIDENTIAL DOCUMENTS OBTAINED BY A CLIENT WITHOUT AUTHORIZATION

You have presented hypothetical scenarios, each involving one attorney receiving documents regarding the opposing party. In each situation, you question whether the attorney must return the documents and whether he can read and use the information contained in the documents. Of the ten scenarios you present, one involves the conduct of government attorneys. Discussion of that scenario will occur at the end of this opinion. The other nine scenarios in your request involve legal disputes in the area of employment law with the lawyer representing an employee (or former employee) in receipt of documents. Based on the facts presented, the committee opines as follows.

The fundamental issue running through all the scenarios and questions in this request is what are the proper parameters of the general duty of confidentiality established in Rule 1.6. Rule 1.6 states as follows:

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

(1) such information to comply with law or a court order;

(2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;

(4) such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence;

(5) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;

(6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.

(c) A lawyer shall promptly reveal:

(1) the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel;

(2) information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that the client advise the tribunal of the fraud. For the purposes of this paragraph and paragraph (b)(3), information is clearly established when the client acknowledges to the attorney that the client has perpetrated a fraud; or

(3) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

Paragraph (b)(1) of Rule 1.6 is especially critical for resolution of the issues raised in this request. Where "law or a court order" requires an attorney to disclose confidential information, paragraph (b)(1) of Rule 1.6 permits the attorney to make the requisite disclosure. While the other law contemplated in Rule 1.6 (b)(1) could in many instances be legal authority other than the Rules of Professional Conduct, paragraph (b)(1) of Rule 1.6's reference to other law is not limited to law *outside* the Rules of Professional Conduct, but could also involve application of other provisions within the Rules. Particularly noteworthy in the present situation will be Rules 3.4(a) and 4.4. Rule 3.4(a) provides as follows:

A lawyer shall notobstruct another party's access to evidence or alter, destroy, or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to such act.

Similarly, Rule 4.4 directs, in pertinent part, that in representing a client, an attorney must not "use methods of obtaining evidence that violate the legal rights of a third person."

The deliberations required in each instance for this attorney must focus on discerning when the duty of confidentiality applies and when the attorney is within one of the exceptions outlined in the rule. The attorney must consider both confidences (i.e., information protected by the attorney/client privilege) and secrets (i.e., information the client has asked to be kept inviolate or that may embarrass or be detrimental to the

client) in deciding whether the situation presents an exception to the duty of confidentiality.

The balance between the general duty of confidentiality protection and other competing duties of disclosure will be the basis for resolution of many of the questions asked in this request.

**1. An employee comes to the lawyer for representation in a whistleblower situation. The employee provides the attorney with documents from the employer that the employee considers to be confidential. The employee had legitimate access to the documents, but had not sought the employer's permission to remove the documents. The lawyer's review of the documents establishes that they contain no information protected by the attorney-client privilege or any other privilege recognized in Virginia. The only sense in which the documents are confidential is that the employer does not wish anyone outside the company to know of the contents of the documents. Were litigation pending, the documents would be subject to discovery. However, at this time, neither party has filed a lawsuit.**

**a. What are the attorney's obligations regarding the documents: must he notify the employer, must he return the documents, and may he use the information?**

LEO 1702 addressed an attorney's receipt of attorney/client documents from the opposing counsel's file from an unauthorized source. However, the present hypothetical differs in two ways: the materials do not include attorney/client communications and the attorney received them not from some unauthorized source, but from his client. The principles established in LEO 1702 are, therefore, not dispositive in the present scenario.

While the materials in question do not contain attorney/client communications, the client does describe them to his attorney as "confidential". The facts of the hypothetical do not provide further detail as to the nature of the materials. The attorney in the present instance is in possession of someone else's property, though the facts do not suggest that the client actually *stole* the documents. In deciding whether he can keep confidential his receipt of the documents, the attorney needs to consider the application of Rule 1.6 and its exceptions. Rule 1.6(b)(1) would allow return of the documents where needed to comply with "law or a court order." Thus, the answer for this attorney would depend very much on the type of documents he received. The hypothetical facts presented do not provide sufficient detail for a dispositive application of paragraph (b)(1) of Rule 1.6. There could be any number of document types that may bring in other law. For example, if the documents were medical records, the attorney may need to look to the Health Insurance and Portability Accountability Act (HIPAA)[1], as medical records and those who receive them are carefully regulated. The application of Rule 1.6(b)(1) would rely both on the nature of the documents and whether any pertinent law attaches.[2]

Whether the general confidentiality duty the attorney owes his client must give way to applicable "law or court order," including Rules 3.4 and 4.4 will determine whether the attorney must notify the opposing party of the receipt of the documents and whether he must return them.

Whether he can use the information will depend on the nature of the documents, the nature of the source of the information, the method used by the client to gather the information, and finally, whether the attorney directed the client to do so. The limited facts provided prevent the committee from opining on the issue other than to reiterate that the attorney can only use such information if doing so would not violate Rule 3.4(a) and Rule 4.4. The committee notes that Rule 8.4(a) precludes an attorney from violating the Rules of Professional Conduct "through the acts of another." Thus, the attorney should not direct the client to obtain evidence via a method the attorney himself is ethically prohibited from using.[3]

**b. Would the answer change if the client brings the documents to the lawyer after the start of litigation?**

The analysis provided in part "a" of this question still pertains. In addition, the attorney must confirm that his receipt of the materials would not violate a rule of court or a court order regarding discovery. The attorney may not keep quiet about the receipt of the materials if "law or court order" would require him to disclose its receipt.[4]

The committee notes one particular fact of importance in the hypothetical presented. The hypothetical describes the particular legal matter as involving the employee/client serving as a whistleblower. No further information identifies whether a particular whistleblower statue applies and, if so, which one. However, while the committee cannot definitively resolve the impact of a whistleblower statute given the limited facts provided, the committee does note that whistleblower statutes usually provide some sort of confidentiality period for the information in question. For example, the False Claims Act places a duty on the part of the lawyer and the plaintiff that the original suit be filed under seal.[5] During a specified period, the plaintiff and attorney must keep the information confidential, including from the defendant.[6] If this attorney determines that compliance with any such whistleblower statute precludes him from informing the opposing party during a specified time period. Rules 3.4(a) and 4.4 would not require the attorney to breach that legal duty.

**2. The client in the above scenario does not provide the attorney any documents but does tell the attorney about information the client learned from documents prepared or read legitimately as part of his employment.**

FOOTNOTES

1 42 U.S.C. §1301 *et seq. See also Virginia Code §32.1-127.1:03* for the related Virginia provision.

2 There are other exceptions to Rule 1.6, but they are not suggested by this scenario and its corresponding question.

3 *See, e.g.*, LEO 1738 and LE0 1765 (discussing evidence-gathering techniques such as tape-recording).

4 There are other exceptions to Rule 1.6, but they are not suggested by this scenario and its corresponding question.

5 *See* 31 U.S.C. §§3729-33.

6 *Id.*

**a. May the attorney use the information in preparation for litigation against the employer, e.g., in preparing discovery requests?**

The analysis developed in response to Question 1, above, is pertinent to the present question. This question is particularly related to the conclusion in Question 1 regarding the use of the information learned from reading the documents. Here, the client rather than the lawyer reads the materials, and the lawyer never reviews or takes possessions of the documents. The analysis remains the same; the attorney may use the information so long as doing so does not violate Rules 3.4(a) or 4.4. The scenario lacks sufficient detail for that determination.

**b. Must he notify the opposing counsel of the receipt of the information?**

Assuming the client does not wish the attorney to provide that information to the employer, the attorney should keep the client's conversation confidential pursuant to Rule 1.6, unless circumstances exist that bring the situation within one of the exceptions listed in the rule.

**3. The scenario remains the same as in Question 1, above, except now the client is a former employee rather than a current employee.**

The question raised is whether this change in employment status of the client alters the answers to the questions addressed above. The analysis outlined in Questions 1 and 2 would remain. However, termination of the employment may go to the application of Rule 1.6(b)(1), Rule 3.4(a), or Rule 4.4, depending on, as before, the nature of the documents, how they were procured, and whether any other law applies. To reiterate, the committee lacks sufficient information to answer this question beyond a general recitation of applicable provisions in the Rules.

**4. In a whistleblower situation, the employee client presents to the attorney documents the client lawfully obtained from the employer that are subject to either the attorney/client privilege or the work product doctrine. No lawsuit is pending.**

**a. May the attorney review and use the documents in preparing his client's case, such as for developing discovery requests and must he notify the other side and/or return the documents?**

This scenario is somewhat ambiguous. The committee interprets the facts to mean that the client properly had the documents as part of his employment, the documents contained communications between the employer and its attorney, and the employer did not authorize the client to provide the documents to the client's attorney. As discussed earlier, prior LEO 1702 dealt with attorney/client materials purposefully provided by an unauthorized source. Here, unlike in the earlier questions, the materials *do* include attorney/client communications. The committee opines that the conclusions drawn in LEO 1702 address the present attorney's conduct.[7] LEO 1702 presents a general procedure for an attorney who receives an unauthorized transmission of materials containing attorney/ client communications from the opposing side: he should notify the opposing counsel, return the materials, and follow that counsel's instructions, with any dispute to be settled by a court.

LEO 1702 does allow that there may be worthy exceptions to that procedure. One example given is where someone took the documents within the protection of a whistleblower statute. The committee reiterates that where an applicable whistleblower statute requires confidentiality during a preliminary stage, the attorney may properly refrain from notifying the opposing attorney during that period.[8]

The committee sees an additional "exceptional" situation to the general LEO 1702 procedure in the earlier LEO 1688. That opinion concludes that an attorney should not disclose to the client's former employer that the attorney had received a document copied without authority, but not stolen, which contained attorney/client communications because the attorney received the document from the *client* (as opposed to the unauthorized source in LEO 1702). The client had asked the attorney to keep receipt of the document confidential; the attorney permissibly maintained that confidentiality under Rule 1.6. Thus, the client as source of the document could in some instances qualify as an appropriate exception to the LEO 1702 procedures. However, that exception is not necessarily appropriate here. In LEO 1688, the documents in question were copies of originals still in the employer's possession so the employer was deprived of neither the information nor the documents. Accordingly, if the documents in the present scenario were copies, the fact that the source of the documents is the client distinguishes this scenario from that of LEO 1702 such that this attorney may permissibly refrain from notifying the employer about the documents. However, if the documents in the present scenario were originals, the exception suggested by LEO 1688 for client-provided documents to the usual LEO 1702 procedure would not be appropriate. The scenario as presented lacks sufficient detail for a determination on this point.

**b. Would the answers to parts "a" and "b" of this question change if the client provided the documents after the start of litigation?**

The possible significance of the start of litigation may include more from clearly defined parties and formal discovery. In the analysis for part "a" of this question, the committee treated the employer as the opposing party. A potential whistleblower action is the subject matter of the representation; nothing in the conclusions regarding part "a" in this fourth scenario requires the actual filing of a lawsuit to trigger the protection of an adverse party's confidentiality. As for the existence of formal discovery, in complying with the LEO 1702 procedure, including the possible exceptions to that procedure outlined above, the attorney should, of course, comply with applicable rules of court or court orders regarding discovery. However, the exact balance of normal discovery provisions with the confidentiality provisions of most whistleblower statutes is outside the purview of this committee.[9]

FOOTNOTE

7 LEO 1702 relies in part on ABA Formal Opinions 92-368 and 94-382. Since issuing those opinions, the ABA has revised Model Rule 4.4 to include express language requiring only notice to the other attorney when the attorney/client materials are inadvertently transmitted. Virginia has not made a corresponding change to its Rules of Professional Conduct; the analysis in LEO 1702 remains the pertinent authority on this issue in Virginia.

FOOTNOTES

8 See discussion of this issue under Question 1, above.

9 See discussion of Rule 1.6(b)(1) earlier in this opinion.

**c. Do the answers to parts "a" and "b" change if the materials are not subject to the attorney/client privilege but are instead subject to an order prohibiting their discovery or otherwise limiting their use?**

LEO 1702's conclusions expressly rest on the importance of the ethical principle of the confidentiality of attorney/client communications. If the documents do not contain materials subject to the attorney/client privilege or the work product doctrine, LEO 1702 is not applicable. Therefore, the appropriate analysis is, as presented earlier regarding Question 1, that the attorney's use of and obligations regarding these materials are governed by Rules 1.6, 3.4(a), and 4.4. The presence of a court order regarding disclosure of the materials is the sort of pertinent factor the attorney must consider in applying those rules to the present fact pattern. However, the presented hypothetical does not provide sufficient facts for the committee to make that determination.

**d. When this attorney receives the materials from his client, do the markings on the document dictate whether the attorney must treat them as privileged, or in some other way confidential?**

The kinds of markings on a document as well as other features of its appearance involve facts not before the committee in any of the provided scenarios. However, the committee notes that an attorney receiving documents triggering the sort of concerns raised in this request will have to determine the character both of the documents and their transmission. Such determinations will combine both relevant facts and pertinent law, as discussed throughout this opinion.

**5. A client comes to the attorney with documents that expose wrongdoing on the part of his employer. Specifically, the documents expose that the employer has been defrauding the government and would form the basis of an action under the False Claims Act. The company wants to keep those documents confidential to avoid criminal or civil liability for its wrongdoing. The client did have authorized access to the documents as part of his employment.**

**a. Can the attorney review the documents and use the information he learns from them?**

The committee assumes that these materials do not contain information subject to the attorney/client privilege or the work product doctrine, as that was the subject matter of Question 4. Therefore, the attorney may review the documents and make use of the information so long as doing so would not violate Rule 4.4. In particular, that rule prohibits acquiring evidence in a manner that "violates the legal rights of others." The scenario does not provide sufficient facts for the committee to make that determination, but if the client and attorney's handling of the documents is in compliance with the False Claims Act, that would be a factor in the determination.[10]

**b. Must the attorney notify the other attorney that he has the materials and must he return them?**

As in Question 4 "c", the notification and document return duties outlined in LEO 1702 are inapplicable here as the materials do not contain information subject to the attorney/client privilege or the work product doctrine. Therefore, the attorney may refrain from informing the employer about the receipt of these documents (and from returning them), so long as that silence does not violate Rule 3.4(a), which prohibits a lawyer from concealing evidence with the "purpose of obstructing a party's access to evidence." As discussed with Question 1, part "b", compliance with the False Claims Act would be consistent with Rule 1.6 and not in violation of Rule 3.4(a). The committee notes that other jurisdictions have typically only found violations of that rules' provision in situations involving actual discovery violations or fraud.[11]

**c. Would the answers to parts "a" and "b" of this question change if the employee provided the materials to the attorney after the start of litigation?**

That the lawyer had already filed the lawsuit would be a pertinent fact in the analysis, but the foundation of that analysis would remain as outlined above. Comment 2 to Rule 3.4(a) discusses the applicability of that provision to a "pending proceeding or one whose commencement can be foreseen."

**d. Would the answers to parts "a" and "b" of this question change if the employee took the materials without authorization?**

As the term "without authorization" could apply to a range of conduct (such as merely photocopying documents without express consent to stealing the original documents), the committee can not provide a definitive answer to this question. However, the committee notes that the method of acquisition would be crucial in the application of Rule 4.4 discussed in part "a" of this question.

**e. What if the attorney's failure to disclose the documents served to cover up the employer's illegal conduct and exposed the attorney to a charge of obstruction of justice?**

Rule 8.4(b) deems it professional misconduct for a lawyer to commit a crime that reflects adversely on his honesty, trustworthiness or fitness to practice law. Whether the attorney's failure to disclose the documents constitutes "obstruction of justice" is a question of criminal law outside the purview of this committee. However, the committee notes that if failure to disclose the information would in some particular instance constitute a crime, the attorney's disclosure would be permissible under Rule 1.6(b)(1).

**f. Does the requirement of the False Claims Act that requires that the plaintiff and plaintiff's counsel to refrain from notifying a defendant company of a lawsuit until the Department of Justice has had an opportunity to review the case override any possible ethical requirement for a lawyer to notify the employer about receipt of the documents?**

FOOTNOTE

10 Also see the discussion of this issue in the analysis provided with the first three questions of this opinion.

FOOTNOTE

11 *See e.g., Florida Bar v. Burkich*, 659 So. 2d 1082 (Fla. 1995); *Mississippi Bar v. Land*, 653 So.2d 899 (Miss. 1993); *In re Herkenhoff*, (866 P.2d 350 (N.M. 1993); *In re Walker*, 828 F.Supp. 594 (C.D. Ill. 1992) (all involving discovery violations), and *see also*, 810 P.2d 1237 (N.M. 1991); Vermont Ethics Op. 89-2 (both involving fraud).

The discussion provided regarding part "b" above addresses this question.

**6. The client comes to the attorney with documents that are not confidential, such as the employee's performance evaluation. The employee took the documents without the permission of the employer. The company's rule is that an employee may read his own evaluation but does not get to keep it. No litigation is pending.**

**a. May the attorney review the documents and use the information he learns from reading them?**

As with earlier questions, this question comes down to the application of Rule 4.4 to the present scenario. While the committee cannot determine the issue conclusively on the limited facts provided, the committee notes that resolution of whether Rule 4.4 would prohibit this lawyer's use of the documents and the information depends on whether the documents are originals or copies, whether any litigation is foreseen, how the employee acquired the materials, and their relevancy to the potential litigation.

**b. Must the attorney notify the employer and return the document?**

As with similar questions above, this question comes down to the application of Rules 1.6(b)(1) and 3.4(a), regarding improper concealment of evidence. From the limited facts provided, this committee is not in a position to determine whether the materials constitute evidence. Also, even if the committee were to assume that the documents were evidence, it would be outside the purview of this committee to determine whether the materials were obtained in a manner that violates the legal rights of another (i.e., the employer).[12]

**c. Would the answers to parts "a" and "b" of this question change if the client provided the materials to the lawyer after the start of litigation?**

In resolving those questions, any attorney receiving the items after the start of litigation would need to consider applicable rules of court and discovery orders in making the determinations outlined with respect to the documents.

**7. A client tells the lawyer about information the client learned by reading the documents of a co-worker. The client did not have the employer's permission to review the documents. The information does not concern materials subject to either the attorney/client privilege or the work product doctrine.**

**a. May the attorney use the information provided?**

The analysis here is equivalent to that in the documents questions earlier; use of information would be permissible so long as Rule 4.4 is not violated by that attorney's use.

FOOTNOTE

12 Of course, Rule 4.4 only prohibits conduct of the attorney, not the client; however, as noted earlier in the discussion, Rule 8.4(a) prohibits an attorney from violating an ethical rule via the conduct of another.

**b. Must the attorney notify the employer of the employee's review of the documents?**

Normally, information a client tells a lawyer during the course of the representation would come under the protection of the general duty of confidentiality. Therefore, this attorney should not disclose the information unless his situation comes within one of the exceptions to Rule 1.6, such as paragraph (b)(1), discussed throughout this opinion. The scenario lacks sufficient detail for the committee to make a final determination of this issue.

**c. Would the answers to parts "a" and "b" change if the client provided the information to the attorney after the start of litigation?**

Again, this committee lacks sufficient information to draw a conclusion on the issue; however, rules of court and court orders regarding discovery may apply differently to the analysis of this scenario involving an attorney/client conversation than in the prior scenarios involving documents.

**d. Would the answers to parts "a" and "b" change if the client reviewed a co-worker's document that contained communications between the employer and its attorney and told that confidential information to the client's attorney?**

LEO 1702, as discussed above, directs procedures for the unauthorized receipt of documents containing information subject to the attorney/client privilege or the work product doctrine of an adverse party. The basic principle of the importance of preserving attorney/client communications would be present here as well, yet the context is different. In LEO 1702 there are actual documents that had been in the possession of the opposing party's counsel, and are now in the possession of the other attorney. Here, the adverse party has not lost access to the documents or the information. Regarding the attorney's use of this oral information, the committee finds analogous to this scenario the situation in LEO 1749. In that opinion, the committee opined that while a lawyer may interview a former employee of an adverse party, that interview should not include questions about communications between the employer and its attorney. Similarly, in the present scenario, when the attorney learns that his client has read a document containing attorney/client communications of its employer (the adverse party), the attorney should direct the client not to share the information with the lawyer, explaining that his ethical responsibilities include refraining from soliciting such information.

Regarding a duty to notify the employer or its counsel of the situation, this attorney can protect his own client's confidentiality and not inform the employer of the client's conversation. The requirement of notice in LEO 1702 is distinguished as inapplicable to this conversation between a client and his attorney.

**8. What if the client provides the attorney with documents that are not confidential and would be unquestionably subject to discovery were litigation to ensue, yet the client did take the documents without authorization?**

As discussed in Question 5, part "d", because the term "without authorization" could apply to a range of conduct

(such as merely photocopying documents without express consent to stealing the original documents), the committee cannot provide a definitive answer to this question. However, the committee again notes that the method of acquisition would be crucial in the application of Rule 3.4(a) discussed in part "b" of Question 5.

**9. If a client provides documents to the attorney that the client wrongfully procured, must the attorney inform the Commonwealth's Attorney?**

The phrase, "wrongfully procured," lacks specificity needed for this determination. The committee assumes the question contemplates original documents stolen by the client. If the documents were not stolen, the attorney is in the situation already addressed elsewhere in this opinion. With regard to stolen documents, the attorney may well have additional legal obligations beyond the provisions in the ethics rules. Interpretation of criminal law and procedure is outside the purview of this committee. Nevertheless, the committee does suggest the attorney should be mindful of the leading case in Virginia regarding an attorney's receipt of the fruits or instrumentalities of a crime from a client, *In re Ryder*, 263 F.Supp. 360 (E.D.Va. 1967).[13] If the attorney properly determines that applicable judicial authority requires disclosure of the documents to the Commonwealth's Attorney, then the attorney may properly make the disclosure pursuant to Rule 1.6(b)(1), discussed throughout this opinion.

**10. A U.S. Attorney receives documents from a government informant. The informant procured the documents from an organization without that organization's consent or knowledge. Can the attorney use the information and must he disclose to the organization that he received the documents?**

Rules 3.4(a) and 4.4 as discussed throughout this opinion can operate as restrictions on an attorney's collection of information and use of the information. In applying these provisions to the U.S. Attorney in this scenario, the committee opines that the provisions do not create *per se* bans on this form of data collection. Specifically, Rule 3.4(a)'s prohibitions concerning concealment of evidence are limited in scope to those instances in which the attorney is doing so "for the purpose of obstructing a party's access to evidence." In contrast, the U.S. Attorney, where operating properly within the scope of that office, collects the documents for the purposes of law enforcement and crime prevention. Similarly, Rule 4.4's prohibition regarding improper collection of evidence precludes only those methods that violate the legal rights of another. Whether such rights are violated in a particular incidence of a federal investigation is outside the purview of this committee, as involving the interpretation of the law regarding criminal procedure and the corresponding constitutional protections. The committee can only generally conclude that where the collection of documents is part of the lawful operation of the U.S. Attorney's investigations, that attorney is ethically permitted to use the information accordingly. *See* LEO 1765.

FOOTNOTE ————————

13 This committee considers documents to be within the scope of Ryder and its progeny. See LEOs 709, 551.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

Committee Opinion
December 10, 2004

## LEGAL ETHICS OPNION 1810

### CONFLICT OF INTEREST—ATTORNEY SERVING AS GUARDIAN AD LITEM WHEN OPPOSING COUNSEL IN THE DIVORCE MATTER WAS A FORMER PARTNER

You have presented a hypothetical involving a potential conflict of interest in a custody dispute. Previously, Attorney A and Attorney B were in the same firm. During that time, Attorney B represented the husband in a divorce. Attorney A did no work on the matter and learned no information about it. Attorney B left the firm, continued to represent that husband, and the divorce became final. That client and his ex-wife then had a custody dispute. Attorney B represents this father in that dispute. Originally, Attorney C represented the mother. The court appointed Attorney A as the guardian ad litem for the child. Attorney A presented to the court that he had been in a firm with Attorney B at the start of the divorce, but never worked on the case and learned no information. The mother orally waived any conflict before the judge. The judge permitted Attorney A to remain as guardian. The mother has subsequently changed attorneys, hiring Attorney D. Attorney D raises an objection to Attorney A's service as guardian as Attorney D maintains that it presents an impermissible conflict of interest.

Under the facts you have presented, you have asked the committee the following questions:

1) Does Attorney A have a conflict in continuing as guardian *ad litem*?

2) Does the mother waive any potential conflict by her prior actions?

The appropriate and controlling ethical rules applicable to this scenario are Rules 1.7, 1.9 and 1.10(a), which provide as follows:

**Rule 1.7 (Conflict of Interest: General Rule)**

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another existing client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

**Rule 1.9 (Conflict of Interest: Former Client)**

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless both the present and former client consent after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

**Rule 1.10 (Imputed Disqualification: General Rule)**

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9, or 2.10(e).

There is no express provision in the Rules of Professional Conduct addressing the unique circumstances of the role of guardian ad litem. In LEO 1729[1], this committee opined that

> Where fulfilling a specific duty of the guardian ad litem conflicts with the traditional duties required of an attorney under the Code of Professional Responsibility, the specific duty of the guardian ad litem should prevail. When the duties do not conflict, the GAL should follow the traditional course of action required under the Code of Professional Responsibility.

The committee opines that the present scenario is of the latter sort. The usual rules provisions regarding conflicts of interest do not conflict with this guardian ad litem's duties.

Resolution of this conflicts issue depends upon an application of Rules 1.7, 1.9, and 1.10(a) to Attorney A's representation (as guardian) of the child.

Attorney D charges that Attorney A has an impermissible conflict of interest in representing the child as guardian ad litem. The committee opines that Rule 1.7, when applied to Attorney A's representation, does not establish a conflict of interest. Attorney A does not represent the husband; thus, Attorney A does not have a conflict under paragraph (a) of the rule, regarding direct adversity between current clients. Also, the committee opines that Attorney A does not have a conflict of interest under paragraph (b) of the rule, regarding a lawyer's own interests. That Attorney A previously worked with Attorney B is not such a strong connection as to "materially limit" Attorney A's ability to represent the child.

Rule 1.9 also does not trigger a conflict of interest for Attorney A. That rule can only apply regarding a former client. The husband was never a client of Attorney A; therefore, Attorney A does not have a Rule 1.9 conflict of interest here.

Applying Rules 1.7 and 1.9 directly to Attorney A is not the end of the analysis for determining whether Attorney A has a conflict of interest preventing this representation. Rule 1.10 (a) imputes conflicts of interest to other members of an attorney's firm. Thus, the question becomes, does Attorney B's representation of the husband, either now or previously while with Attorney A's firm, preclude Attorney A from involvement as guardian. The two attorneys were in a firm together at the time Attorney B initiated his representation of the father in the divorce. As outlined above, Rule 1.7 precludes an attorney from representing one client directly adverse to another client in that matter. If that rule precludes any attorney in a firm from representing a particular client, Rule 1.10(a) extends that bar to every other attorney in the office. Thus, no member of Attorney B's present firm can represent anyone else in B's client's domestic matter.

While Attorneys A and B were in the same firm in the past, Attorney B left that firm. Comment 7 to Rule 1.10 explains the application of the imputation concept to a law firm where an attorney has left the firm. Comment 7 states, in pertinent part, that:

> Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with a firm.

Paragraph (b) of the rule establishes that a law firm may represent any client previously represented by a firm attorney who has left the firm so long as no attorney currently in the firm has confidential information about that representation. In applying Rule 1.10 to Attorney B's representation of this client, the imputation of conflicts of interest is limited to those attorneys in the firm together *now*. See LEO 1806. Attorney B's current representation of this father cannot trigger any conflict of interest for Attorney A as Attorney A and Attorney B are now

FOOTNOTE

1 LEO 1729 makes reference to the Code of Professional Responsibility, which were the ethics rules in effect at the time of that opinion. The change to the Rules of Professional Responsibility, effective January 1, 2000, does not change the committee's position stated in LEO 1729.

in two different firms and Attorney A did not learn any confidential information about the representation[2].

Similarly, Rule 1.9(a) could only reach Attorney A, through the imputation language of Rule 1.10(a), if some member of his current firm used to represent a party in the matter; that is not the case. Attorney A would also not have a conflict of interest under Rule 1.9(c) regarding use of information gained in a prior representation. Attorney A himself received no confidential information from the father. To reiterate, Rule 1.10 does not impute Attorney B's information to members of the firm he left. Thus, Rule 1.10 does not impute the information gained by Attorney B to Attorney A as they are no longer in the same firm.

The committee opines that Attorney A has no conflict of interest in serving as the guardian ad litem for the child in the custody case even though his former partner represents the father.

Your second question asks whether the mother has waived any conflict of interest here by her prior actions. The scenario and question contemplate that the mother's oral assent to Attorney A's appointment as guardian may have operated as such a waiver. The committee opines that this position is unfounded for two reasons.

FOOTNOTE

2 The hypothetical scenario provided no facts suggesting that unlike Attorney A, some other member of his firm did learn confidential information about Attorney B's representation of the husband while at the firm. Accordingly, the committee reads the facts that Attorney A *like all members of his firm* received no such information while Attorney B was with the firm.

First, the committee opined in response to question one, above, that appointment as guardian ad litem triggers no conflict of interest for Attorney A. Accordingly, there is no conflict in need of a waiver or consent.

Secondly, were Attorney A concerned about a possible conflict of interest in this situation, it would not be the mother's consent that he would need. In LEO 1725, this committee opined that if:

> A lawyer contemplates being appointed by the court as GAL for a child and senses the potential for a conflict of interest, either because of a personal interest … or a multiple representation…then the attorney, before appointment, must make the same full disclosure to the court that he or she would make to a *sui juris* client for an informed consent to the representation.

Thus, the proper course for Attorney A if concerned about a possible conflict of interest would be to present the circumstances to the court for resolution. According to the scenario of this request, Attorney A did exactly that and the court approved his appointment. The mother's consent was neither sufficient, nor necessary.

The committee opines that Attorney A permissibly serves as guardian ad litem in this custody dispute; no conflict of interest precludes that service.

Committee Opinion
December 10, 2004

# Disciplinary Actions

**The following orders have been edited. Administrative language has been removed to make the opinions more readable.**

| Respondent's Name | Address of Record (City/County) | Action | Effective Date | Page |
|---|---|---|---|---|
| **Circuit Court** | | | | |
| Oliver Stuart Chalifoux | Glen Allen | 5 Year Suspension | December 19, 2004 | n/a |
| Eli S. Chovitz | Norfolk | Revocation | November 9, 2004 | n/a |
| Barry L. Flora | Roanoke | Public Reprimand w/Terms | October 12, 2004 | 22 |
| Kenneth R. Weiner | Fairfax | Public Reprimand | October 6, 2004 | 23 |
| **Disciplinary Board** | | | | |
| Curtis Tyrone Brown* | Norfolk | One Year Suspension | November 22, 2004 | 24 |
| William Harold Butterfield | Washington, DC | 30 Day Suspension | October 22, 2004 | 28 |
| Charles Everett Malone | Norfolk | 2 Year Suspension, w/Terms | December 10, 2004 | 29 |
| Denise Ann Maniscalco | Washington, DC | 3 Year Suspension | October 19, 2004 | n/a |
| Richard Charles Scalise | Reston | Revocation | November 29, 2004 | n/a |
| John R. Willett | Alexandria | Revocation | November 22, 2004 | 32 |
| **District Committees** | | | | |
| Jon Ian Davey | Danville | Public Reprimand w/Terms | November 15, 2004 | 36 |
| Wilber Thurston Harville | Virginia Beach | Public Reprimand | October 29, 2004 | 37 |
| Lawrence Raymond Morton | Dumfries | Public Reprimand | November 4, 2004 | 39 |

# Other Actions

| Respondent's Name | Address of Record | Jurisdiction | Effective Date | Page |
|---|---|---|---|---|
| **Disability Suspensions** | | | | |
| Steven Edgar Bennett | Williamsburg | Disciplinary Board | November 19, 2004 | n/a |
| David Michael Shapiro | Richmond | Disciplinary Board | October 22, 2004 | n/a |
| **Cost Suspensions** | | | | |
| Mac Andres Chambers | Roanoke | Disciplinary Board | November 3, 2004 | n/a |
| Mac Andres Chambers | Roanoke | Disciplinary Board | November 2, 2004 | n/a |
| Robert Spencer Lewis | Martinsville | Disciplinary Board | October 20, 2004 | n/a |
| Steven Jeffrey Riggs | Santa Ana, CA | Disciplinary Board | October 21, 2004 | n/a |
| Linda Wiser Sadler | Richmond | Disciplinary Board | December 7, 2004 | n/a |
| **Interim Suspensions** | | | | |
| Gary Blane Vanover | Clintwood | Failure to Comply w/Subpoena | November 16, 2004 | n/a |

**Respondent has noted an appeal to the Supreme Court of Virginia.*

## Circuit Court

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ROANOKE

VIRGINIA STATE BAR, ex rel.
EIGHTH DISTRICT COMMITTEE,
v.
BARRY L. FLORA, ESQUIRE
Respondent
In Chancery No. 04-615
[VSB Docket No. 02-080-0636]

**ORDER**

This matter came before the Three-Judge Court empaneled on September 24, 2004, by designation of the Chief Justice of the Supreme Court of Virginia, pursuant to § 54.1-3935 of the 1950 Code of Virginia, as amended. A fully endorsed Agreed Disposition, dated the 7th day of October, 2004, was tendered by the parties, and was considered by the Three-Judge Court, consisting of the Honorable Barnard F. Jennings and Honorable William C. Fugate, retired Judges of the Nineteenth and Thirtieth Judicial Circuits, respectively, and by the Honorable Lydia C. Taylor, Judge of the Fourth Judicial Circuit and Chief Judge of the Three-Judge Court.

Having considered the Agreed Disposition, it is the decision of the Three-Judge Court that the Agreed Disposition be accepted, and said Court finds by clear and convincing evidence as follows:

1. At all times relevant hereto, Barry L. Flora, Esquire (hereafter "Respondent"), has been an attorney licensed to practice law in the Commonwealth of Virginia.

2. During or about August of 1998 to August of 1999, the Complainant, Kimberly Michelle Boyer, worked for Respondent at his law practice. In August of 2001, when she filed her complaint with the Virginia State Bar, Ms. Boyer was a third-year law student at the University of Mississippi.

3. While employed at the office of the Respondent, Ms. Bayer's duties included the preparation of HUD-l real estate settlement statements for which the Respondent calculated in advance the amount of the title insurance premium. Following a loan closing, the original title insurance premium calculated by the Respondent was sometimes in excess of the actual realized premium. If this matter were tried, the Respondent would testify that the reasons for such difference varied, but often the loan amount changed at closing or the insurer offered a re-issue rate. The corresponding title insurance company for each particular settlement with an overage would then send a check payable to the Respondent for the amount of the overpayment. Between September 16, 1998 and February 22, 2001, Virginia Title Center, LLC (hereafter "Virginia Title"), forwarded checks in the aggregate amount of $4,657.69 to be refunded to seventy-six (76) of the Respondent's clients.

4. The refunds, ranging in amounts from $20.00 to $248.75, were not forwarded upon receipt by the Respondent to the clients involved. The last check issued by Virginia Title was dated February 22, 2001. The Respondent returned the monies to the seventy-six clients referenced on or about September 20, 2002.

5. Neither the checks nor any funds realized from negotiation of the checks from Virginia Title were deposited in the Respondent's trust account. The checks remained non-negotiated in the Respondent's office.

6. The complaint in this case was filed in August of 2001. The Virginia State Bar forwarded the complaint to the Respondent on September 19, 2001, requesting a written response within twenty-one (21) days. At some time believed to be shortly following the Bar's request for a response, William B. Hopkins, Jr., Esquire, filed a praecipe informing the Bar that he would be representing the Respondent. The Respondent filed a response on October 1, 2002.

7. In reaching its decision as to sanctions, the Court considered applicable aggravating and mitigating factors from the American Bar Association's Standards For Professional Discipline, as well as factors presented by the Virginia State Bar.

THE THREE-JUDGE COURT finds by clear and convincing evidence that such conduct on the part of the Respondent, Barry L. Flora, Esquire, constitutes a violation of the following Disciplinary Rules of the Virginia Code of Professional Responsibility and the Rules of Professional Conduct:

DR 6-101. Competence and Promptness

(B) * * *

DR 9-102. Preserving Identity of Funds and Property of a Client.

(A) (1), (2) * * *
(B) (1), (2), (3) (4) * * *

RULE 1.3 Diligence

(a), (b) * * *

RULE 1.15 Safekeeping Property

(a) (1), (2) * * *
(c) (1), (2), (3), (4) * * *

UPON CONSIDERATION WHEREOF, the Three-Judge Court hereby ORDERS that the Respondent shall receive a **PUBLIC REPRIMAND WITH TERMS**, subject to the imposition of the sanctions referred to below as alternative dispositions of this matter should Respondent fail to comply with the Terms referred to herein. The Terms which shall be met in accordance with the deadlines set forth below are:

1. Respondent shall accrue at least twelve (12) continuing legal education credit hours by enrolling in and attending Virginia State Bar approved Continuing Legal Education program(s) in either real estate and/or ethics prior to February 1, 2005; Respondent's Continuing Legal Education attendance obligation set forth in this paragraph shall *not* be applied toward Respondent's Mandatory Continuing Legal Education requirement in Virginia and any other jurisdictions in which he may be licensed to practice law. Respondent shall certify his compliance with the terms set forth in this paragraph by delivering a fully and properly

executed Virginia MCLE Board Certification of Attendance Form (Form 2) to Marian L. Beckett, Assistant Bar Counsel, at 100 North Pitt Street, Suite 310, Alexandria, Virginia 22314, promptly following his attendance of such CLE program(s).

2. Respondent shall be placed on a period of probation for a term of one (1) year, with the said period of probation to begin on the date of entry of an Order including such provision.

3. Respondent shall engage in no professional misconduct as defined by the Virginia Rules of Professional Conduct during the probationary period.

4. Upon satisfactory proof furnished by Respondent to the Virginia State Bar that the above terms have been complied with, in full, a **PUBLIC REPRIMAND WITH TERMS** shall then be imposed. If, however, Respondent fails to comply with any of the terms set forth herein, as and when his obligation with respect to any such term has accrued, the provisions of paragraphs (5) through (8) below shall become effective.

5. Should Respondent fail to accrue at least twelve (12) continuing legal education credit hours by enrolling in and attending Virginia State Bar approved Continuing Legal Education program(s) in either real estate and or ethics prior to February 1, 2005 and provide proof thereof as set forth in paragraph 1, *supra*, this matter shall be certified to the Disciplinary Board for a determination of sanction(s).

6. Any final determination of misconduct determined by any District Committee of the Virginia State Bar, the Disciplinary Board, or a three-judge court to have occurred during the one (1) year probationary period will be deemed a violation of the terms and conditions of this Agreed Disposition and will result in the imposition of an alternative disposition/sanction of a one (1) year and eleven (11) months suspension of Respondent's license to practice law in the Commonwealth of Virginia. The alternative disposition of suspension shall not be imposed during any appeal period in which the Respondent is appealing any adverse decision which might result in a probation violation.

7. The imposition of the alternative disposition for misconduct during the period of probation will not require a hearing before a three-judge court or the Disciplinary Board on the underlying charges of misconduct stipulated herein if the Virginia State Bar discovers that the Respondent has violated any of the foregoing terms and conditions. Instead, the Virginia State Bar shall issue and serve upon the Respondent a Notice of Hearing to Show Cause why the alternative disposition of suspension should not be imposed.

8. The imposition of the alternative disposition of suspension shall be in addition to any other sanction(s) imposed for misconduct during the probationary period.

* * *

ENTERED this 12th day of October, 2004
FOR THE THREE-JUDGE COURT:

LYDIA C. TAYLOR
Chief Judge of Three-Judge Court

BARNARD F. JENNINGS
Judge

WILLIAM C. FUGATE
Judge

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VIRGINIA:
BEFORE THE THREE-JUDGE COURT PRESIDING
IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

VIRGINIA STATE BAR, ex rel.
FIFTH DISTRICT COMMITTEE SECTION I,
Complainant/Petitioner,
v.
KENNETH R. WEINER, ESQUIRE
Respondent
Case No. 22681

**ORDER**

This matter came before the Three-Judge Court empaneled by designation of the Chief Justice of the Supreme Court of Virginia, pursuant to § 54.1-3935 of the 1950 Code of Virginia, as amended. An endorsed Agreed Disposition, dated the 16th day of September, 2004, was tendered by the parties, and was considered by the Three-Judge Court, consisting of the Honorable James E. Kulp and H. Selwyn Smith, retired Judges of the Fourteenth and Thirty-First Judicial Circuits, respectively, and by the Honorable Ann Hunter Simpson, Judge of the Fifteenth Judicial Circuit and Chief Judge of the Three-Judge Court.

Having considered the Agreed Disposition, it is the decision of the Three-Judge Court that the Agreed Disposition be accepted, and said Court finds by clear and convincing evidence as follows:

1. At all times relevant hereto, Kenneth R. Weiner, Esquire (hereinafter the Respondent), has been an attorney licensed to practice law in the Commonwealth of Virginia.

2. Sometime prior to May 22, 2000, Mr. Weiner met with a client who explained that she ("WIFE") and her husband ("HUSBAND") were contemplating divorce. She stated that she and her husband were agreed as to the distribution of their property. Mr. Weiner agreed to prepare a property settlement agreement (the "PSA") reflecting the distribution as stated by the wife, and told WIFE to furnish him with a list of property and directions for its distribution.

3. WIFE agreed to pay Mr. Weiner's entire fee, but Mr. Weiner told her she should not have to pay the entire fee; rather, it should be divided equally between her and her husband. Accordingly, Mr. Weiner gave WIFE a Retainer Agreement reciting that each would pay one thousand two hundred fifty dollars ($1,250.00) towards his fee for preparing the PSA and for preparing a Will for each. The Retainer Agreement also identified WIFE and HUSBAND as Clients.

4. WIFE took the Retainer Agreement, presented it to HUSBAND, and each signed the Retainer Agreement on May 22, 2000. WIFE then returned the Retainer Agreement, along with a handwritten list for the distribution of property, to Mr. Weiner. Mr. Weiner countersigned the Retainer Agreement on May 23, 2000 and assigned the task of drafting the PSA to an associate attorney in his office. The associate attorney prepared the PSA, telephoned WIFE that it was ready, and WIFE came to the office to pick up the PSA.

5. WIFE and HUSBAND reviewed the PSA together and on June 6, 2000, drove to a local bank, where they signed the PSA before a Notary Public.

6. Mr. Weiner offered no advice to either WIFE or HUSBAND regarding the terms of the PSA. Mr. Weiner did not discuss with, or advise, HUSBAND of any potential conflict of interest that might exist by virtue of Mr. Weiner preparing the PSA.

7. Mr. Weiner also had one of his associates prepare wills for HUSBAND and WIFE which they signed at Mr. Weiner's office on June 16, 2000.

8. On August 8, 2000, HUSBAND, by counsel, filed a motion in the Circuit Court of Fairfax County, to have the property settlement agreement set aside. Following a hearing, the Court ruled that the Property Settlement Agreement was unconscionable and unenforceable.

THE THREE-JUDGE COURT finds by clear and convincing evidence that such conduct on the part of the Respondent, Kenneth R. Weiner, Esquire, constitutes a violation of the following Rule of Professional Conduct:

RULE 1.7 Conflict of Interest: General Rule

(a) (1), (2) * * *
(b) (1), (2) * * *

UPON CONSIDERATION WHEREOF, the Three-Judge Court hereby ORDERS that the Respondent shall receive a PUBLIC REPRIMAND.

* * *

ENTERED this 6th day of October, 2004
FOR THE THREE-JUDGE COURT:
ANN HUNTER SIMPSON
Chief Judge of Three-Judge Court

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## Disciplinary Board

VIRGINIA:
BEFORE THE VIRGINIA STATE BAR
DISCIPLINARY BOARD

IN THE MATTER OF
CURTIS TYRONE BROWN, ESQUIRE
VSB DOCKET NO. 00-010-2346

**ORDER OF SUSPENSION**

THIS MATTER was certified to the Virginia State Bar Disciplinary Board by a Subcommittee of the First District Committee on September 30, 2003, and was heard on October 22, 2004, by a duly convened panel of the Disciplinary Board consisting of Karen A. Gould, Chair, James L. Banks, Jr., Robert E. Eicher, Dr. Theodore Smith, Lay Member, and William H. Monroe, Jr. The Respondent, Curtis Tyrone Brown and his counsel, Henry L. Marsh, III made a special appearance for purposes of challenging the jurisdiction of the Disciplinary Board to hear this matter and to reassert Respondent's previous request to have this matter heard before a three-judge panel pursuant to Virginia Code § 54.1-3935. Edward L. Davis, Assistant Bar Counsel, appeared as counsel for the Virginia State Bar (hereafter "VSB").

All required notices were properly sent by the Clerk of the Disciplinary System.

The Chair polled the panel members to determine whether any member had a personal or financial interest in this matter that might affect or reasonably be perceived to affect his or her ability to be impartial in this proceeding. Each member, including the Chair, responded in the negative.

**Jurisdiction of the Disciplinary Board**

Counsel for Respondent challenged the jurisdiction of the Disciplinary Board to hear this matter. In his argument, Respondent's counsel asserted the following:

1. That on September 30, 2003, a certification letter was mailed to the Respondent from John W. Jelich, III, Subcommittee Chair of the First District Committee wherein Respondent was advised of the Subcommittee Determination (Certification) of VSB No. 00-010-2346. In the certification letter Respondent was informed that "Pursuant to Section Six, Part IV, Paragraph 13.I.1.a of the Rules of the Virginia Supreme Court, you have 21 days from the date of certification of service on the enclosed Subcommittee Determination to either 1) file an answer or 2) demand that further proceedings be conducted before a three-judge panel in accordance with Virginia Code Section 54.1-3935. Your failure to file an answer or demand within 21 days will be deemed to be consent to the jurisdiction of the Disciplinary Board."

2. That on October 21, 2003, exactly 21 days after the certification of service on September 30, 2003, the Respondent demanded, by certified mail, a three-judge panel.

3. That the demand for a three-judge panel was timely made and therefore the Disciplinary Board lacked jurisdiction to hear the matter.

For its response, the VSB agreed that the demand for a three-judge panel was mailed via certified mail by the Respondent and postmarked on October 21, 2003. However, the demand for a three-judge panel was not received by the VSB until October 23, 2003. Accordingly, the request for a three-judge panel was not deemed filed until after the expiration of the twenty-one day period. Respondent argued that Part One of the Rules of the Supreme Court of Virginia, including

Rule 1:7, allow for the addition of three days to the time prescribed to take certain action when a document is served by mail.

The VSB argued that that the rules of service under Part One of the Rules of the Supreme Court of Virginia, including Rule 1:7, are inapplicable here. Part Six of the Rules of the Supreme Court of Virginia provide that a matter is filed when received by the Clerk of the Disciplinary System, not when postmarked. Furthermore, the Board cannot waive the twenty-one day filing requirement and surrender jurisdiction to a three-judge panel because the Rules do not allow the Board to waive jurisdiction. The VSB maintains that in the absence of a timely filed answer or demand to the certification letter from the First District Subcommittee, the Respondent is deemed to have consented to the jurisdiction of the Disciplinary Board pursuant to Section Six, Part IV, Paragraph 13.I.1.a of the Rules of the Virginia Supreme Court. The VSB also cites as controlling authority the case of *Fails v. Virginia State Bar*, 265 Va. 3, 574 S.E.2d 530 (2003).

Having heard the argument of counsel and having considered the history of this matter, including the telephone conference of August 6, 2004 (a transcript of which was received into evidence and marked as VSB Exhibit 2), the Board found that no new argument had been presented that had not already been considered by the Board in the telephone conference of August 6, 2004. For this reason, the Board chose not to reconsider the Order previously entered by the past Disciplinary Board Chairman, Roscoe B. Stephenson, III, on August 30, 2004. Accordingly, Respondent's Motion to Challenge Jurisdiction of the Virginia State Bar Disciplinary Board was overruled.

**Respondent's Motion for a Continuance**

Respondent's counsel next moved to continue this matter. In support of his Motion for a Continuance, Respondent's counsel argued that he had not been consulted regarding the setting of the pre-hearing conference date of October 12, 2004, or the hearing date of October 22, 2004. Respondent's counsel further argued that the VSB would not reasonably consider the alternative dates provided by him in November and December, 2004. As additional grounds for the continuance, Respondent's counsel asserted that the Respondent had a matter which was being considered before the Supreme Court of the United States and the resolution of that matter may have a direct impact upon this disciplinary hearing.

For the VSB's response, it was noted that Respondent and Respondent's counsel each received notice of the pre-hearing conference date of October 12, 2004 via correspondence from the VSB dated September 21, 2004. Receipt of this notice by Respondent and Respondent's counsel was not disputed. Respondent and Respondent's counsel were also provided with a copy of the Order of August 16, 2004 from the Board setting this matter for hearing on October 22, 2004. Although the initial Order was evidently not received by Respondent's counsel upon its first mailing, another copy of the Order setting this matter for hearing was received by Respondent's counsel via correspondence from the VSB dated August 31, 2004. Respondent's receipt of the Order setting this matter for hearing on October 22, 2004 was also not disputed. The VSB argued that the alternative dates supplied by Respondent's counsel for purposes of setting the pre-hearing conference were unacceptable inasmuch as each of these dates would occur after the established hearing date of October 22, 2004.

The VSB also argued that Respondent's counsel was furnished with a questionnaire by the Board providing Respondent's Counsel with the opportunity to raise any issue he may have wished to raise before the Board at the pre-hearing conference in the event of his absence. No questionnaire was returned. On the day of the pre-hearing conference a call was placed by the VSB to the office of Respondent's counsel but attempts to reach him were was unsuccessful.

In further support of the VSB's position, the VSB called as a witness, Ms. Bonnie Waldeck, Assistant Clerk of the Virginia State Bar Disciplinary System. In response to Bar Counsel's direct examination, Ms. Waldeck testified that she made several attempts to work with Respondent's counsel to obtain a mutually agreeable date for the pre-hearing conference. Specifically, Ms. Waldeck testified that a call was made to Respondent's counsel's office on September 15, 2004 wherein a representative of the office staff was advised of the VSB's request to set a pre-hearing conference date. The representative advised Ms. Waldeck that the message would be given to Respondent's counsel and the VSB should expect a return call later that day. Hearing no response from Respondent's counsel, another call was made by the VSB on September 16, 2004. During this call, a representative of the office staff of Respondent's counsel was advised by the VSB that in the absence of a return call from Respondent's counsel, a pre-hearing conference date of October 12, 2004, would be set. No return call was received from Respondent's counsel or any authorized office staff representative. Accordingly, the date for the pre-hearing conference was set for October 12, 2004 at 9:00 a.m. Ms. Waldeck further testified that on September 23, 2004 the order setting the hearing for October 12, 2004, was sent to Respondent's counsel's office. Another copy of the order was sent again to a representative of the office staff of Respondent's Counsel's office on September 24, 2004.

Respondent's counsel had no questions for Ms. Waldeck.

Having heard the arguments of counsel, the testimony of Ms. Bonnie Waldeck and having reviewed the history of this matter including correspondence and notice letters preceding the pre-hearing conference, the Board finds 1) that this matter arose from events going back to January, 2000; 2) that the hearing of this matter had previously been continued for good cause shown; 3) that reasonable efforts were made by the VSB to accommodate Respondent's counsel in setting a mutually agreeable date and time to conduct the pre-hearing conference; and 4) that the alternative dates for the pre-hearing conference suggested by Respondent's counsel were unreasonable in that none of the suggested dates would have occurred prior to the previously established hearing date of October 22, 2004. Accordingly, the Motion for a Continuance filed by the Respondent was denied[1] and the hearing of this matter was ordered to proceed.

FOOTNOTE

1 Respondent's counsel was specifically asked by the Chair to explain the potential impact of any currently pending matter before The Supreme Court of the United States and/or the Supreme Court of Virginia. Despite this request, no specific argument was advanced by Respondent's counsel that served to either identify the proceeding or its potential effect upon the instant matter. Additionally, it should be noted that the arguments presented in support of Respondent's Motion for a Continuance had been previously considered and ruled upon as set forth in the October 12, 2004, Order of Board Chair, Karen A. Gould.

Upon hearing the decision of the panel to deny Respondent's Motion for a Continuance, Respondent's counsel informed the Chair that they were not ready to participate in the hearing before the Board. Whereupon, Respondent and Respondent's counsel withdrew from the hearing choosing not to participate further.

By direction of the Chair, the VSB was asked to proceed with its case. The VSB then moved into evidence a binder containing fourteen pre-numbered exhibits and the entire binder of exhibits was admitted collectively as VSB Exhibit 1. The transcript of the telephone conference held on August 6, 2004, between Respondent's Counsel, Bar Counsel and the Acting Chairman of the Disciplinary Board was admitted into evidence and marked as VSB Exhibit 2.

**I. FINDINGS OF FACT**

Having considered the VSB Exhibits entered into evidence by Bar Counsel and having heard the testimony of the witnesses called to testify, the Board unanimously found by clear and convincing evidence as follows:

1. During all times relevant hereto, the Respondent, Curtis Tyrone Brown (hereinafter Respondent or Mr. Brown) was an attorney licensed to practice law in the Commonwealth of Virginia.

2. On November 3, 1999, a grand jury sitting in the Circuit Court for the City of Norfolk indicted Germaine S. Doss for the capital murder for hire of James M. Webb on March 23, 1998, and related offenses. The alleged murderer for hire was Nathaniel McGee.

3. Mr. Doss had previously been arrested and indicted for the same crime in May 1998; however, the charges were nolle prossed.

4. For a brief time in April 1998, Joseph C. Lindsey, Esquire, represented Mr. McGee, and withdrew as counsel. Thereafter, attorney Jerrauld C. Jones was appointed by the court to represent McGee, and he did so until November 1998.

5. In December 1999, Mr. Doss hired the respondent, Curtis Tyrone Brown to represent him in the matter. Trial was scheduled to take place in February 2000 in the Norfolk Circuit Court.

6. On January 24, 2000, in the Norfolk Circuit Court, Mr. Brown endorsed and filed the following motion in the case of *Commonwealth of Virginia v. Jermaine S. Doss*:

**MOTION TO SUBPOENA**
**COUNSEL OF CO-DEFENDANT, NATHANIEL MCGEE**

COMES NOW the Defendant, Jermaine S. Doss, by counsel, and moves this Honorable Court for permission to subpoena Joseph Lindsey, Esquire, and Jerrauld Jones, Esquire to testify:

1) That Norman Thomas Esquire contacted them for help in fabricating a case against the Defendant; and

2) That these conversations were made prior to the Defendant ever being indicated on charges relating to the murder of James Webb.

**NOTICE**

PLEASE TAKE NOTICE that on February 3, 2000, at 10:00 a.m., or as soon thereafter as counsel may be heard, the Defendant, by counsel, will move this Honorable Court in accordance with the foregoing Motion.

7. Norman Thomas, Chief Deputy Commonwealth's Attorney for the City of Norfolk, was the prosecutor.

8. On January 31, 2000, Mr. Thomas filed a response to the motion, and a motion for sanctions, alleging that the grounds stated in the motion were groundless and false, that Mr. Brown had not talked to Mr. Lindsey until after he filed the motion, and that Mr. Lindsey had told Mr. Brown that he could not testify in support of the allegations.

9. On February 24, 2000, following an eight-day trial, a jury found Mr. Doss guilty of First Degree Murder, use of a firearm in the commission of a felony, statutory burglary, and conspiracy. It recommended a sentence of life plus 38 years.

10. On May 23, 2000, following a presentence report, the court imposed the sentence recommended by the jury.

11. On May 19, 2000, the court held an evidentiary hearing on Mr. Thomas' motion for sanctions against Mr. Brown.

12. Mr. Lindsey testified that Mr. Brown never communicated with him about the case prior to filing the motion, and that Mr. Thomas never asked him about fabricating a case against Mr. Doss. He testified further that Mr. Brown did speak to him after filing the motion, and told him to disregard a subpoena if he received one because his testimony was not necessary. Mr. Lindsey testified further that Mr. Brown told him words to the effect that he filed the motion to "either get Norman Thomas off balance or get under Norman Thomas' skin during the course of the prosecution of the case that was going on with Mr. Doss."

13. Likewise, Mr. Jones testified in the May 19, 2000, evidentiary hearing and in the hearing before the Board that Mr. Brown never communicated with him about the case prior to filing the motion, and that Mr. Thomas never asked him about fabricating a case against Mr. Doss.

14. The court made the specific finding that, before filing the motion, Mr. Brown did not speak to either Mr. Lindsey or Mr. Jones, that had Mr. Brown spoken to them he would have learned that Mr. Thomas never asked either of them to assist him in presenting false evidence in this case, that Mr. Brown did not care about the truth or falsity of his allegation, and that Mr. Lindsey's testimony established that Mr. Brown filed the motion to harass Mr. Thomas.

15. The court found further that the filing of the motion falsely accused Mr. Thomas of solicitation of perjury or attempting to suborn perjury, that it falsely accused Mr. Lindsey and

Mr. Jones of violations of Rules 3.3d and 8.3a of the Rules of Professional Conduct and misprision of felony, and that such conduct by a member of the bar was outrageous and intolerable.

16. The court also held that Mr. Brown's defense, that the word "fabricate" meant to "build," was disingenuous. It held that the court's conclusion that Mr. Brown's use of the word "fabricate" meant to create a falsehood was strengthened by excerpts from Mr. Brown's closing arguments to the jury in the underlying case, in which he accused police detectives of manufacturing a case against his client.

17. The court concluded by finding that Mr. Brown violated Code of Virginia Section 8.01-271.1 by filing the motion, and that his conduct warranted a sanction that both punished him and compensated the Commonwealth's Attorney's office. It imposed a $4,000 sanction against Mr. Brown, payable at the rate of $1,000 per month. The order provided further that if Mr. Brown appealed the decision, and the sanction was affirmed on appeal, that the first payment became due on the first business day of the first month after the decision became final and unappealable.

18. Mr. Brown appealed the court's decision to the Court of Appeals of Virginia, petitioned for a rehearing and petitioned for review en banc, all of which was denied. He then petitioned for appeal to the Supreme Court of Virginia, and petitioned for a rehearing, both of which were denied. He then filed for a writ of certiorari to the Supreme Court of the United States, which was denied on April 29, 2002.

19. On October 16, 2002, having found that Mr. Brown had not paid any of the sanction as previously ordered, the court issued a rule to show cause against Mr. Brown, ordering him to appear on November 15, 2002. Subsequently, Mr Brown paid the sanction.

20. The imposition of a sanction by the Circuit Court does not serve to negate the potential penalties associated with the violation of the Virginia Professional Rules of Conduct. *Joseph D. Morrissey v. Virginia State Bar, Ex Rel. Third District Committee*, 260 Va. 472, 538 S.E.2d 677 (2000).

**II. MISCONDUCT**

Following closing argument at the conclusion of the evidence regarding misconduct, the Board recessed to deliberate. The Board reviewed the foregoing findings of fact, the exhibit presented by Bar Counsel on behalf of the VSB as Exhibit 1 (tabbed documents 1–14) and the testimony of each witness called to testify at the hearing. After due deliberation the Board reconvened and stated its findings as follows:

The Board determined that the VSB failed to prove by clear and convincing evidence that the Respondent violated Rule 3.4 (d) of the Virginia Rules of Professional Conduct. Rule 3.4 (d) states:

**A lawyer shall not:**

**(d) * * ***

There was no evidence that the Respondent knowingly disobeyed or disregarded the ruling of the circuit court judge. Although there appeared to be some delay on the part of the Respondent in paying the monetary sanction imposed against him, the sanction was ultimately paid by the Respondent.

The Board determined that the VSB had proved by clear and convincing evidence that the Respondent violated each of the following Virginia Rules of Professional Conduct:

**1. RULE 3.3 Candor Toward The Tribunal**

**(a) A lawyer shall not knowingly:**

**(1) * * ***

In choosing to file his *Motion to Subpoena Counsel of Co-Defendant, Nathaniel McGee*, the Respondent clearly made false statements to the Court. Specifically, the Respondent filed his Motion stating, in pertinent part:

> COMES NOW the Defendant, Jermaine S. Doss, by counsel, and moves this Honorable Court for permission to subpoena Joseph Lindsey, Esquire, and Jerrauld Jones, Esquire to testify:
>
> 1) That Norman Thomas Esquire contacted them for help in fabricating a case against the Defendant of misconduct on the part of the Prosecutor.

In testimony at the evidentiary hearing of May 19, 2000, and/or at the hearing of this matter, Attorneys Lindsey and Jones each stated that the Respondent never spoke to them prior to filing his Motion. Moreover, had the respondent chosen to do so, he would have been informed that the Prosecutor was not guilty of the conduct alleged in the Respondent's Motion. (VSB Exhibit 1, tab 12, pp. 16 and 17.)

**2. RULE 3.4 Fairness To Opposing Party And Counsel**

**A lawyer shall not:**

**(i) * * ***

The evidence presented by the VSB clearly shows that the conduct of the Respondent was done with an intent to harass or maliciously injure the reputation of the Prosecutor before the Court. Specifically, the testimony offered by attorney Lindsey to the Court in the evidentiary hearing of May 19, 2000, provided the following:

> *Q. Was there a conversation with Mr. Brown with reference to the Motion later on?*
>
> *A. At some point after that Motion was obviously filed, I ran into Mr. Brown in the Norfolk Juvenile Court lobby and he advised me that in the event I received a subpoena to come and testify in the Jeramine Doss case, to disregard it because my testimony wasn't necessary. [ ] He said he had filed a motion with the Circuit Court as a tactical means and that it was either—and I don't remember his exact words, but the tenor of it was either to get Norman Thomas off balance or get under Norman Thomas's*

*skin during the course of the prosecution of the case that was going on with Mr. Doss. (VSB Exhibit 1, tab 12, pp. 16 and 17).*

**3. RULE 4.1 Truthfulness In Statements To Others**

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

**(a) * * ***

In the testimony offered by the Respondent, Mr. Brown, at the evidentiary hearing of May 19, 2000, the Respondent admitted that he had not spoken with Mr. Lindsey prior to filing his Motion. (VSB Exhibit 1, tab 12, p.115, lines 11-16). Likewise, there was no conversation with Mr. Jones prior to filing the Motion. (VSB Exhibit 1, tab 12, p.116, lines 13-24).

**4. RULE 8.4 Misconduct**

**It is professional misconduct for a lawyer to:**

**(c)* * ***

In addition to the Respondent's complete failure to speak with counsel in an effort to properly investigate the allegations made against the Prosecutor in his Motion, the Respondent chose to dismiss his use of the word "fabricate" as a term simply meaning to build a case. This attempt on the part of the Respondent to dismiss his intentional use of such a term is particularly troubling. The Board agrees with the finding of the Circuit Court wherein the Court stated:

*Fabricate certainly has two meanings. If we were to have furniture manufactures and someone talking about fabricating, he's talking about building furniture. In the legal context, both Mr. Thomas and Mr. Jones testified and I think the clear meaning of that word in the legal proceedings is to make something up, to falsify. I think Mr. Brown's testimony that he intended it to mean build is disingenuous at best. (VSB Exhibit 1, Tab 12, p.162, lines 17-25).*

**III. DISPOSITION**

Thereafter, the Board received evidence of aggravation from Bar Counsel, i.e., Respondent's prior disciplinary record. The Board recessed to deliberate what sanction to impose upon its finding of misconduct by Respondent. After due deliberation, the Board reconvened to announce the sanction imposed. The Board recognizes that the zealous representation of a client is not only proper, it is required. However, when counsel in the course of representing their clients step across the line of zealousness and chose to make misrepresentations and false and uninvestigated allegations that have the effect of maligning and tarnishing the reputations of fellow members of the bar, this conduct is nothing less than outrageous and intolerable. The Chair announced the sanction as being a one (1) year license suspension.

Accordingly, it is ORDERED that the license of the Respondent, Curtis Tyrone Brown, to practice law in the Commonwealth of Virginia, be, and the same hereby is, suspended, effective November 22, 2004, for a period of one (1) year.

* * *.

ENTERED this 24th day of November, 2004.
VIRGINIA STATE BAR DISCIPLINARY BOARD
BY: Karen A. Gould, Chair

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VIRGINIA:
BEFORE THE VIRGINIA STATE BAR
DISCIPLINARY BOARD

IN THE MATTER OF
WILLIAM HAROLD BUTTERFIELD
VSB DOCKET NUMBER 05-000-1513

**ORDER AND OPINION**

This matter came before the Virginia State Bar Disciplinary Board on November 19, 2004 upon an Agreed Disposition to impose Reciprocal Discipline, as a result of a Rule to Show Cause and Order of Suspension and Hearing entered on October 22, 2004. A duly convened panel of the Virginia State Bar Disciplinary Board consisting of Robert L. Freed, Esquire (1st Vice Chair), V. Max Beard (lay member), Bruce T. Clark, Esquire, Ann N. Kathan, Attorney at Law, and Russell W. Updike, Esquire, heard the matter. Paul D. Georgiadis, Assistant Bar Counsel, appeared as Counsel to the Virginia State Bar ("VSB"). The Respondent, having entered an appearance pro se and having received due notice, did not appear before the Board. This matter was recorded by Chandler & Halasz Court Reporters, P.O. Box 9349, Richmond, Virginia 23227, (804) 730-1222.

Having considered the Agreed Disposition to the imposition of Reciprocal Discipline, the Board finds by clear and convincing evidence as follows:

**STIPULATIONS OF FACTS**

1. At all times relevant hereto, the Respondent, William Harold Butterfield, Esquire (hereinafter Respondent) has been an attorney licensed to practice law in the Commonwealth of Virginia.

2. On June 17, 2004, the District of Columbia Court of Appeals entered an order suspending the Respondent's license to practice law in the District of Columbia for a period of thirty days effective July 17, 2004. The order became final and Respondent was so suspended .

3. In entering its order, the District of Columbia Court of Appeals accepted the findings of the District of Columbia Board on Professional Responsibility ("D.C. Board") in finding that Respondent violated Rules 1.7(b)(1) and 1.7(b)(2) of the District of Columbia Rules of Professional Conduct when he failed to perform a conflicts check and failed to obtain written consents, or to withdraw, once he learned of a conflict of interest.

4. The D.C. Board found that Respondent refused to acknowledge and resolve a conflict requiring waivers from two affected clients when Respondent proceeded to represent a new client, Raytheon Corporation, in filing a bid

protest against a proposal by the Federal Aviation Administration to grant a sole source contract to Lockheed Systems Integration. Lockheed Systems Integration was an existing client of Respondent's firm. Lockheed lodged the ethics Complaint.

5. This Board hereby adopts the Joint Stipulation of Facts which incorporates by reference the findings of the D.C. Court of Appeals and the D.C. Board, attached hereto as Exhibits A-1 and A-2.

**STIPULATIONS OF MISCONDUCT**

The aforementioned conduct on the part of the Respondent constitutes a violation of the following Rule of Professional Conduct:

RULE 1.7 Conflict of Interest: General Rule

(b) (1), (2) * * *

Upon consideration of the Agreement to Imposition of Reciprocal Discipline before this panel of the Disciplinary Board, it is hereby ORDERED that, pursuant to Part 6, § IV, ¶ 13(I)(7) of the *Rules of Virginia Supreme Court*, the license of Respondent, William Harold Butterfield, Esquire, to practice law in the Commonwealth of Virginia shall be, and is hereby, suspended for a period of thirty days, commencing October 22, 2004.

* * *

SO ORDERED, this 19th day of November, 2004.
By: Robert L. Freed, First Vice Chair

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VIRGINIA:
BEFORE THE VIRGINIA STATE BAR
DISCIPLINARY BOARD

IN THE MATTER OF
CHARLES EVERETT MALONE
VSB DOCKET NO. 04-010-0765
04-010-1444

**ORDER OF SUSPENSION WITH TERMS**

This matter came to be heard on December 7, 2004, upon an Agreed Disposition between the Virginia State Bar and the Respondent, Charles Everett Malone.

A duly convened panel of the Virginia State Bar Disciplinary Board consisting of Janipher W. Robinson, Esquire, Robert E. Eicher, Esquire, Glen M. Hodge, Esquire, Werner Quasebarth, Lay Member, and James L. Banks, Jr., Esquire, Acting Chair, considered the matter by telephone conference. The Respondent, Charles Everett Malone, Esquire, appeared *pro se*. Edward L. Davis, Assistant Bar Counsel, appeared on behalf of the Virginia State Bar.

Upon due deliberation, it is the decision of the board to accept the Agreed Disposition, subject to an amendment to the term as set forth herein. The Stipulations of Fact, Disciplinary Rule Violations, and Disposition agreed to by the Virginia State Bar and the Respondent, as modified, are incorporated herein as follows:

**I. STIPULATIONS OF FACT**

1. During all times relevant hereto, the Respondent, Charles Everett Malone (hereinafter Respondent or Mr. Malone) was an attorney licensed to practice law in the Commonwealth of Virginia.

***04-010-0765***
***Complainant: VSB/Trust Account***

2. On June 10, 2003, Zack Pippins sold a parcel of property to Arnold L. Shands and Eldret Watson. The settlement agent was Home Title & Escrow of Virginia Beach, Virginia. Mr. Malone received $267.50 in attorney's fees from each of the parties, according to line 1107 of the settlement statement.

3. The settlement statement indicates on line 603 that cash to the seller (Mr. Pippins) was $31,702.58.

4. Among the settlement documents was an escrow agreement between the buyers, sellers, and Mr. Malone as escrow agent containing the following paragraph:

   *1. Escrow Agent and Account: Charles E. Malone will serve as Escrow Agent to whom Buyers shall deposit, at settlement of the transfer in accordance with the Contract, the balance of the sale price of $32,000.00. Charles E. Malone shall deposit and hold in his non-interest-bearing Trust Account the $32,000.00 until June 29, 2003 on which date Escrow agent shall deliver a check to the seller for $32,000.00*

5. On July 3, 2003, check number 3-19992 in the amount of $31,702.58, drawn upon the account of Home Title & Escrow Insurance Agency, Inc., was paid "To the order of Charles Malone, in Trust for Zack Pippins."

6. On July 7, 2003, Mr. Malone deposited the check into his attorney trust account. Prior to the deposit, his trust account had a balance of one dollar.

7. On July 12, 2003, Mr. Malone disbursed check number 101, drawn on the same trust account, and payable to himself in the amount of $5,000. He annotated "Pippins fee" on the check.

8. On July 15, 2003, the check cleared, resulting in a balance of $26,702.58 in Mr. Malone's trust account. The balance remained under $31,702.58 until August 6, 2003.

9. On August 6, 2003, Mr. Malone's trust account balance was $195,707.58, resulting from a deposit on that day of $169,005.00 in an unrelated matter. By August 8, 2003, the balance was $170,525.08. On August 19, 2003, the balance was $26,702.58.

10. On August 25, 2003, Mr. Malone wrote check number 1008 in the amount of $31,702.58 from his trust account to Zack

Pippins, despite the fact that his trust account ledger showed only $26,702.58 on account for Zack Pippins.

11. Mr. Pippins negotiated the check; however, when the check was presented to Mr. Malone's bank, there were insufficient funds to pay it. The bank paid the check nonetheless, causing a negative balance of $1,374.80 in the trust account.

12. The bank reported the overdraft to the Virginia State Bar. Mr. Malone failed to respond to the bar's inquiry about the overdraft.

13. Mr. Malone advised the Virginia State Bar investigator that he recognized a possibility that there would not be enough funds in the account to cover the check when he presented the check to Mr. Pippins, but that he was hopeful some checks he had previously disbursed had not yet cleared, so there might be sufficient funds for Mr. Pippins' check to clear.

14. Mr. Malone's trust account continued to carry a negative balance until September 3, 2003, when he deposited $1,060.

15. Zack Pippins advised the Virginia State Bar investigator that he never authorized Mr. Malone to disburse $5,000 from the funds he held in trust, and never agreed to pay any legal fees to Mr. Malone above the $267.50 he paid to him at the closing.

16. Mr. Malone explained that the $5,000 represented fees for assisting Rev. Pippins in a dispute that developed with the sellers after closing over the grading of land. He said that he did not obtain Rev. Pippins' authorization to take the $5,000, and did not discuss a fee with him.

17. Rev. Pippins said that Mr. Malone did not negotiate any settlement in the dispute, that the negotiations took place between him and the buyers, and that Mr. Malone played no part.

18. Rev. Pippins said that in July 2003, realizing that he had not received his money, he contacted Mr. Malone's office, but was told that he had to talk to Malone after he returned from out of town. He did not receive his funds until the end of the following month.

**II. NATURE OF MISCONDUCT (04-010-0765)**

The parties agree that the foregoing facts give rise to violations of the following Rules of
Professional Conduct:

**RULE 1.1 Competence**

* * *

**RULE 1.3 Diligence**

(a) * * *

**RULE 1.5 Fees**

(a) (1), (2), (3), (4), (5), (6), (7), (8) * * *

**RULE 1.5 Fees**

(b) * * *

**RULE 1.15 Safekeeping Property**

(a) (1), (2) * * *

**RULE 1.15 Safekeeping Property**

(c) (3), (4) * * *

**RULE 8.1 Bar Admission And Disciplinary Matters**

(c) * * *

**RULE 8.4 Misconduct**

(b), (c) * * *;

**I. STIPULATIONS OF FACT (Continued)**

***04-010-1444***
***Complainant: Mrs. Vivian L. Warren***

19. On February 26, 2002, the Circuit Court for Southampton County sentenced Elijah M. Warren to several years of incarceration on his convictions of burglary, grand larceny, armed robbery and use of a firearm during the commission of a robbery.

20. On March 18, 2002, Mr. Warren noted an appeal through his hired attorney, Dwayne B. Strothers.

21. On May 20, 2002, the court appointed Mr. Strothers to prosecute the appeal, Mr. Warren being unable to pay Mr. Strothers.

22. Mr. Strothers perfected the appeal, and the Court of Appeals denied it on August 21, 2002.

23. Meanwhile, during May 2002, Mr. Warren's Aunt, Vivian Warren, consulted with Mr. Malone about prosecuting her son's appeal in place of Mr. Strothers, and Mr. Malone agreed to do so.

24. On May 6, 2002, Mrs. Warren paid Mr. Malone $560 for the purpose of reviewing the trial transcript and file. On June 3, 2002, she paid him $1,500 cash as partial payment for the appeal. On June 21, 2002, she paid him an additional $500 in cash and $500 by check for the balance of the appeal fee.

25. On June 28, 2002, Mr. Malone filed a "Motion for Extension to File Petition for Appeal" with the Court of Appeals of Virginia.

26. In the motion, Mr. Malone acknowledged that the Court had already appointed Mr. Strothers for the appeal, but said that the Petitioner was not satisfied with Mr. Strothers' representation at trial and sentencing, and desired to have another lawyer represent him. He said further that the Petitioner's family, "after much solicitation," raised and delivered the necessary funds to Mr. Malone on June 21,

2002. He said that he did not have time to prepare, complete and file a petition for appeal by June 24, 2002. Finally, he said that the Petitioner's aunt had advised Mr. Strothers that he did not desire Mr. Strothers' services as they had hired Mr. Malone.

27. Despite the fact that he knew Mr. Strothers was counsel of record, Mr. Malone never filed a motion or order allowing him to substitute himself as counsel or allowing Mr. Strothers to withdraw.

28. By letter, dated June 28, 2002, the Court of Appeals responded to Mr. Malone's motion, stating that Mr. Malone had no standing to file his motion because Mr. Strothers was counsel of record, that Mr. Strothers had already timely filed a petition for appeal, and that the Court, accordingly, would take no action on Mr. Malone's motion.

29. Thereafter, Mr. Malone never entered the case, and never took any further action in the matter, although it was eventually concluded at the Supreme Court of Virginia.

30. Mr. Malone never advised Ms. Warren about the letter from the Court of Appeals, and Mrs. Warren never learned the outcome of the appeal until she wrote to the Court of Appeals herself.

31. Mr. Malone never refunded any of the $3,060 advanced to him by Mrs. Warren, despite repeated requests by her, including a letter, dated March 1, 2004, and his advice to the Virginia State Bar investigator that he would do so.

32. A review of Mr. Malone's trust account records revealed that he never deposited Mrs. Warren's advanced fees into his attorney trust account, except possibly the $560 in May 2002, and possibly a $500 portion of the $1,500 cash payment on June 10, 2002. Due to lack of records, however, he could not confirm if Ms. Warren's funds were the source of these deposits.

33. Mr. Malone acknowledged that he may not have deposited any of the funds into his attorney trust account, saying that there were problems with his trust account during that time period.

34. Further investigation revealed that he endorsed Ms. Warren's $500 check to Arlene Malone, who deposited it into a non-trust account at the Chartway Federal Credit Union on June 22, 2002.

35. Mr. Malone did not respond to the bar complaint.

**II. NATURE OF MISCONDUCT *(04-010-1444)***

The parties agree that the foregoing facts give rise to violations of the following Rules of Professional Conduct:

**RULE 1.1 Competence**

* * *

**RULE 1.3 Diligence**

(a), (b) * * *

**RULE 1.4 Communication**

(a), (b), (c) * * *

**RULE 1.15 Safekeeping Property**

(a) (1), (2) * * *

**RULE 1.15 Safekeeping Property**

(c) (3), (4) * * *

**RULE 1.16 Declining Or Terminating Representation**

(d) * * *

**RULE 8.1 Bar Admission And Disciplinary Matters**

(c) * * *

**RULE 8.4 Misconduct**

(b) * * *

**III. DISPOSITION**

In accordance with the Agreed Disposition, Charles Everett Malone's license to practice law in the Commonwealth of Virginia is hereby Suspended for a period of two (2) years, effective December 10, 2004, subject to the following terms and conditions:

1. By June 10, 2005, The Respondent, Charles Everett Malone, will issue a refund in the amount of $3,060 (three thousand and sixty dollars) to Vivian L. Warren. (The Respondent and the bar agreed during the telephone conference to amend the amount owed to $3,060.)

Failure to comply with the foregoing term will result in the imposition of the alternate sanction, the Suspension of the Respondent's license to practice law in the Commonwealth of Virginia for an additional two-year period (an aggregate suspension of four years).

The imposition of the alternate sanction will not require a hearing before the Three-Judge Court or the Virginia State Bar Disciplinary Board on the underlying charges of misconduct stipulated to in this Agreed Disposition if the Virginia State Bar discovers that the Respondent has violated any of the foregoing terms and conditions. Instead, the Virginia State Bar shall issue and serve upon the Respondent a Notice of Hearing to Show Cause why the alternate sanction should not be imposed. The sole factual issue will be whether the Respondent has violated the terms of this Agreed Disposition without legal justification or excuse. The imposition of the alternate sanction shall be in addition to any other sanctions imposed for misconduct during the probationary period. All issues concerning the Respondent's

compliance with the terms of this Agreed Disposition shall be determined by the Virginia State Bar Disciplinary Board, unless the Respondent makes a timely request for hearing before a three-judge court.

* * *

ENTERED THIS 7TH DAY OF DECEMBER, 2004
THE VIRGINIA STATE BAR DISCIPLINARY BOARD
By James L. Banks, Jr., Esquire
Acting Chair

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BEFORE THE VIRGINIA STATE BAR
DISCIPLINARY BOARD

IN THE MATTER OF
JOHN R. WILLETT
VSB DOCKET: 99-042-1438

**ORDER OF REVOCATION**

This matter came before a duly constituted Panel of the Virginia State Bar Disciplinary Board on October 21 and 22, 2004, pursuant to a certification of a Subcommittee of the Fourth District Disciplinary Committee, Section Two. The Panel consisted of Peter A. Dingman, Chairman, William C. Boyce, Jr., Glenn M. Hodge, David R. Schultz, and V. Max Beard, Lay Member. The Respondent, John R. Willett, appeared and was represented by Bernard J. DiMuro. The Bar was represented by Assistant Bar Counsel Seth M. Guggenheim.

Prior to the commencement of proceedings, the Chairman polled the members of the Board as to whether any of them were conscious of any personal or financial interest or bias which would prevent the member from fairly and impartially hearing the matter. Each member, including the Chairman, answered in the negative.

The hearing began with Mr. Willett's Motion to Dismiss alleging a due process violation and laches. The motion was denied.

**I. FINDINGS**

After hearing testimony presented by both parties and the receipt of numerous documents into evidence, the Board finds as follows:

At all times relevant to this proceeding, John R. Willett, has been licensed to practice law in the Commonwealth of Virginia.

On November 26, 1997, Eugene Woodward was operating a motor vehicle which was involved in a crash. Mr. Woodward suffered severe and permanent injuries to his leg. His mother, Margaret Woodward, who was a passenger in the car, also sustained injuries. The crash was caused by the driver of a second car, Filomena Newton. Ms. Newton was insured by the Hartford Insurance Company.

In early December of 1997, Mr. Woodward and Mrs. Woodward met with a lawyer in Warrenton, Virginia, John Carter Morgan, Jr. Mr. Morgan agreed to represent Mr. Woodward but, out of a concern for potential conflicts of interest, referred Mrs. Woodward to other counsel. Mr. Woodward hired Mr. Morgan on January 5, 1998, and signed a fee agreement calling for, among other things, a one-third contingent fee. That same day, Mr. Morgan sent a letter of representation to the Hartford Insurance Company.

On February 2, 1998, Mrs. Woodward met with Mr. Willett regarding her claim. She was accompanied by her son, Eugene Woodward. At this meeting Mr. Willett determined to represent to the implicated insurance companies that Mr. Woodward was his client as well as his mother, despite being aware of the fact that Mr. Woodward was already represented by counsel and despite being aware that there existed at least a potential conflict of interest between Mr. Woodward and his mother. Mr. Willett's decision to claim representation of Mr. Woodward is evidenced by a letter dated February 3, 1998, addressed to Mr. Woodward, in which Mr. Willett purported to confirm a fee agreement with Mr. Woodward. Mr. Willett testified that the date of February 3rd was a secretarial mistake, and that he actually began to represent Mr. Woodward on August 8, 1998, (the date Mr. Woodward actually signed the fee letter) after Mr. Woodward told Mr. Willett that he was dissatisfied with Mr. Morgan. Mr. Willett's testimony notwithstanding, he wrote a letter to the Hartford Insurance Company, also dated February 3, 1998, in which he notified the company that he was counsel for both Mrs. Woodward and Mr. Woodward. Again, Mr. Willett testified, and his counsel argued, that the date of February 3, 1998, on the initial letter to the Hartford Insurance Company was a "mistake". The Bar argued that the date of February 3, 1998, was, as evidenced by language in subsequent letters, an accurate reflection of the date upon which Mr. Willett began falsely asserting to others that he represented Mr. Woodward. The Bar pointed out that Mr. Willett wrote a subsequent letter on March 2, 1998, to the Omni Insurance Group, Mrs. Woodward's insurer (she owned the car her son was driving), in which Mr. Willett once again identified his clients as Margaret W. Woodward and Eugene F. Woodward. On August 10, 1998, Mr. Willett wrote a letter to Mr. Morgan in which he states "Please be advised Mr. Eugene F. Woodward came in to see me and he asked me, **several weeks ago**, to be his attorney in connection with his accident of November 26, 1997." [Emphasis added] Also on August 10, 1998, Mr. Willett wrote the Omni Insurance Group, once again identifying his clients as Margaret W. Woodward and Eugene F. Woodward. In this letter he wrote, "Reference is made to my letter of March 2, 1998. As I told you, I represent Mrs. Margaret W. Woodward and Eugene F. Woodward . . . ." Finally, on August 14, 1998, Mr. Willett wrote a letter to Pam Rolfe, Claims Adjuster with the Hartford Insurance Company, in which he states, "You acknowledged your company received notification from me in February, 1998, that I represent Eugene Woodward." Mr. Willett testified that all of the dates referenced in his letters, except the last three which were written after he was hired on August 8, 1998, were "mistakes" or "errors". The Bar pointed out that Mr. Willett wrote three letters subsequent to August 8, 1998 in which he references previous communications relating to his representation of Mr. Woodward.

The Board finds the Bar's argument to be compelling. It is difficult to believe that Mr. Willett wrote four letters in which he claimed to be counsel for Eugene Woodward which were dated in error. Furthermore, the Board cannot accept that Mr. Willett wrote a letter two days after Mr. Woodward actually hired him in which he refers to being hired "several weeks ago" unless that language is a continuation of the pattern of misrepresentation begun in February. Most revealing is Mr. Willett's letter of August 14, 1998, six days after he was hired by Mr. Woodward, in which he references his letter of repre-

sentation of February, 1998. Indeed, on September 14, 1999, in a letter to the Bar (submitted by Mr. Willett as his Exhibit #51), Mr. Willett himself stated, "my best recollection is that I started representing him [Mr. Woodward] on or about February 3, 1998." We find that Mr. Willett began a deceptive pattern of claiming to represent Mr. Woodward on February 2, 1998, despite Mr. Woodward being represented at that time by Mr. Morgan.

The Bar's evidence was that, as a result of his investigation of Mr. Woodward's case, Mr. Morgan determined that Mrs. Newton likely had few or no assets beyond her policy of liability insurance with the Hartford, that Mr. and Mrs. Woodward's under-insurance coverage did not exceed $100,000.00, and that Mr. Woodward lacked the financial resources to fund a law suit.

Mr. Morgan testified that he discussed this with Mr. Woodward, explained that litigation would require Mr. Woodward to finance deposition costs and expert witness fees, and might result in a judgment against Mrs. Newton, but that the judgment would be of little value unless Mrs. Newton in fact owned real estate or other assets then undiscovered. According to Mr. Morgan, Mr. Woodward stated he did not want to take Mrs. Newton's house, and he authorized Mr. Morgan to settle his case for anything in excess of $70,000.00.

On July 1, 1998, the Hartford indicated a willingness to tender the policy limits of $100,000.00 in settlement of Mr. Woodward's claim if Mr. Morgan could substantiate the medical costs as outlined during their negotiations. Mr. Morgan called Mr. Woodward to inform him of the insurance company's position, and Mr. Woodward authorized Mr. Morgan to settle the case. On July 23, 1998, Mr. Morgan provided the demand package to the Hartford which was contained in a three-ring binder and was detailed and comprehensive.

After receipt of the demand package Ms. Rolfe of the Hartford informed Mr. Morgan that the company would settle the matter for the policy limits of $100,000.00 and would mail a check.

During the period from February 3, 1998, to August 8, 1998, it was Mr. Woodward's practice to accompany his mother to her interviews with Mr. Willett. He would often sit in on these interviews. By Mr. Willett's own admission, he would occasionally question Mr. Woodward about the accident despite the fact that he was aware that Mr. Woodward was represented by Mr. Morgan. Mr. Willett attempted to justify his actions by pointing out that it was his responsibility to determine whether contributory negligence was an issue in the case. It was during one of these discussions that Mr. Willett learned that Mr. Morgan was in the process of settling Mr. Woodward's case for $100,000.00. Mr. Willett told Mr. Woodward that he, Mr. Willett, could settle Mr. Woodward's case for a significantly greater sum than $100,000.00 and, as a result, Mr. Woodward determined to terminate Mr. Morgan's representation and hire Mr. Willett. Mr. Woodward testified that, before making the switch of lawyers, he expressed to Mr. Willett concern about his existing fee obligation to Mr. Morgan, but Mr. Willett assured Mr. Woodward that "he would take care of it."

On August 10, 1998, Mr. Woodward officially relieved Mr. Morgan.

On August 11, 1998, Mr. Willett called Mr. Morgan to inform him that he had been hired by Mr. Woodward. The majority of the telephone conversation consisted of Mr. Willett telling Mr. Morgan of his great ability as a litigator, and of the large verdicts which he had won in the past. When Mr. Morgan told Mr. Willett that the matter was already settled for the amount of $100,000.00 due to the fact that Mrs. Newton was indigent and there was no other coverage, Mr. Willett accused Mr. Morgan of withholding the file and hung up on Mr. Morgan.

On August 12, 1998, Mr. Morgan informed the Hartford that he no longer represented Mr. Woodward and asserted a lien for one-third of the $100,000.00 settlement previously offered by the Hartford and accepted by Mr. Woodward.

On September 18, 1998, Ms. Rolfe of the Hartford sent Mr. Willett a check in the amount of $100,000.00, payable to Mr. Woodward, Mr. Morgan, and Mr. Willett. Mr. Willett wrote Ms. Rolfe on September 28, 1998, acknowledging receipt of that check.

On September 24, 1998, Mr. Willett wrote Mr. Woodward and informed him that he would charge a flat fee of $5,000.00 to defend Mr. Woodward against Mr. Morgan's lien.

Mr. Willett rejected the offer of $100,000.00 on behalf of Mr. Woodward and on September 28, 1998, returned the check to the Hartford, claiming that he had already filed suit against Ms. Newton.

On September 29, 1998, Mr. Willett did file suit in the Circuit Court of Fauquier County on Mr. Woodward's behalf, naming Mrs. Newton and Mr. Morgan as defendants. In that pleading Mr. Willett made statements to the Court, claiming that Mr. Morgan's filing of the lien had precluded the Hartford from paying Mr. Woodward the policy limits. Mr. Willett also stated that despite numerous demands that he do so, Mr. Morgan had refused to escrow the amount of the lien. These statements were false or misleading when made.

In this litigation, a demurrer was filed on behalf of Mr. Morgan asserting that the fee dispute was not properly brought together with the personal injury action against Mrs. Newton. The Court disposed of the demurrer, after a hearing, by severing the two matters. A sketch order was entered by the Court after endorsement by Mr. Willett and counsel for Mr. Morgan. That order recites the basis for the ruling, including the following: " . . . that, Mr. Willett, as an officer of the Court, represented to this Court that no check for such amount [$100,000] was received by his office . . ." As noted above, Mr. Willett in fact received that check in September, 1998.

Mr. Willett continued to prosecute this suit until August of 2000, approximately two years after Mr. Morgan had obtained a policy limits settlement of Mr. Woodward's case. Mr. Willett finally settled the same case for $50,000.00 in cash, and $561.11 per month in the form of an annuity for a period of ten years. Considering the annuity's present value, and Mr. Woodward's circumstances, this is a less favorable settlement than the one achieved by Mr. Morgan.

In a letter dated September 13, 2000, Mr. Willett asked the Hartford to make out the monthly annuity checks to both him and Mr. Woodward. Nevertheless, Mr. Willett wrote a letter to Mr. Woodward on September 13, 2000 in which he told Mr. Woodward that the Hartford had requested Mr. Woodward to

sign a letter authorizing the company to make the annuity checks payable to both Mr. Willett and Mr. Woodward. He also enclosed a Power of Attorney granting Mr. Willett authority to sign the checks for Mr. Woodward. Mr. Woodward declined to sign the Power of Attorney.

As a result of the suit filed by Mr. Willett naming Mr. Morgan as a defendant, Mr. Morgan hired local counsel, Jud Fischel, to represent him in the lien dispute. Through conversations and letters, Mr. Fischel capably argued that Mr. Willett's analysis of Mr. Morgan's entitlement was flawed and that Mr. Morgan was entitled to a large portion, if not all of the approximately $33,333.00 which Mr. Fischel thought was in question. Both Mr. Fischel and Mr. Morgan believed at all times that the dispute was over how the one-third fee would be split. In fact, the word "split" was used in some of Mr. Fischel's correspondence. At all times during the negotiations, it was one of Mr. Morgan's primary concerns that Mr. Woodward not suffer as a result of this dispute. Eventually, Mr. Morgan settled for $16,650.00, which he believed represented approximately one-half of the $33,333.00 in dispute.

On January 3, 2001, Mr. Willett sent Mr. Woodward a letter and disbursement sheet. In the letter Mr. Willett informed Mr. Woodward that he was able to settle Mr. Morgan's claim for $16,650.00, and Mr. Willett claimed "I saved you $16,683.33". Mr. Willett went on to claim a full one-third of $100,000.00 as his fee. In other words, he did not split the one-third with Mr. Morgan but claimed a full $33,333.33. This claim actually represented an adjustment on Mr. Willett's part. In a letter dated August 4, 1998 to Mr. Woodward, and in correspondence with Mr. Fischel, Mr. Willett had interpreted his fee agreement with Mr. Woodward to entitle him to one-third of the total ($117,333.20, as computed by Mr. Willett) of present and deferred payments to be received by Mr. Woodward. In addition, Mr. Willett listed all costs associated with the case, including $5,000.00 for his handling of the fee dispute with Mr. Morgan. The total of costs was $7,933.00. Mr. Willett informed Mr. Woodward that Mr. Woodward owed Mr. Willett $41,233.66. Mr. Willett informed Mr. Woodward that he had applied the amount of $31,790.71, the amount remaining in escrow after paying Mr. Morgan, to his fees and costs. Mr. Willett concluded by informing Mr. Woodward that he owed Mr. Willett an additional $9,442.95. Mr. Woodward also remained responsible for his medical bills, none of which were paid out of the settlement. Mr. Willett did remind his client that he had the option of pursuing bankruptcy.

**II. MISCONDUCT**

From the foregoing facts the Board finds by clear and convincing evidence that Mr. Willett has violated the following rules of professional conduct.

DR 1-102. Misconduct.

(A) (3) * * *

Mr. Willett violated this Rule by signing the sketch order which was presented to the Fauquier County Circuit Court in which it is recited that Mr. Willett never received a settlement check.

(4) * * *

Mr. Willett violated this Rule as well by signing the order which was presented to the Fauquier County Circuit Court in which false statements were made. His initial pleadings in the case contained false and misleading statements. In addition, Mr. Willett was fraudulent and deceitful in his numerous letters to the insurance company in which he claimed to represent Mr. Woodward.

DR 2-103. Recommendation or Solicitation of Professional Employment.

(A) (1) * * *

Mr. Willett violated this Rule when he lured Mr. Woodward away from Mr. Morgan by telling Mr. Woodward that he could settle the case for more money than Mr. Morgan could.

(2) * * *

Mr. Willett violated this Rule as well when he lured Mr. Woodward away from Mr. Morgan. Likewise, Mr. Willett's actions in persuading Mr. Woodward to hire Mr. Willett as his counsel contained unwarranted promises of benefits.

DR 2-105. Fees.

(A) * * *

Mr. Willett's fees were not adequately explained to Mr. Woodward. At no time did Mr. Willett explain to Mr. Woodward that hiring Mr. Willett might result in total fees in excess of one-third of the amount of settlement. He also neglected to inform Mr. Woodward that terminating Mr. Morgan might result in a demand for additional fees to defend Mr. Woodward against Mr. Morgan's claims.

(C) * * *

Mr. Willett violated this Rule by failing to state in his fee agreement with Mr. Woodward the method by which the fee was to be determined. He simply informed Mr. Woodward of the method in his letter containing the disbursement sheet.

DR 6-101. Competence and Promptness.

(A) (1) * * *

Mr. Willett violated this Rule by failing to demonstrate requisite knowledge of rules relating to the stacking of policies of "underinsurance". In Mr. Willett's letter of August 26, 1998 to Mr. and Mrs. Woodward, Mr. Willett states ". . . you have a total of $100,000.00 per person coverage under your underinsured provision, due to the fact that you have four vehicles. This was verified on August 26, 1998.

"Mr. Morgan had not even looked into this and would have let you settle. Now you have an opportunity to get a total of $300,000.00; $100,000.00 from the tortfeasor and $200,000.00 from your insurance."

This letter demonstrates Mr. Willett's lack of knowledge or misunderstanding of the rules regarding stacking, in that the claimant cannot collect under a policy of underinsurance until the amount of underinsurance exceeds the settlement or award. In this case, the $100,000.00 of coverage does not exceed the

amount of the settlement and therefore results in no additional coverage to the claimant.

DR 7-102. Representing a Client Within the Bounds of the Law.

(A) (3) * * *

Mr. Willett violated this Rule by signing the Fauquier County Circuit Court Order.

(5) * * *

Mr. Willett violated this Rule by his false and misleading letters to the insurance company, by his statements in his letter of August 26, 1998 in which he misstates the law of stacking and accuses Mr. Morgan of incompetence.

DR 7-103. Communicating with One of Adverse Interest.

(A) (1) * * *

Mr. Willett violated this Rule by conversing with Mr. Woodward while Mr. Woodward was represented by Mr. Morgan. Mr. Willett acknowledged during his testimony that he did so in order to, among other reasons, determine whether contributory negligence existed on the part of Mr. Woodward. The Board fails to see how this explanation is mitigating. This is exactly the sort of discussion which should have occurred through Mr. Woodward's counsel.

RULE 1.1 Competence

* * *

Mr. Willett violated this Rule by maintaining the lawsuit after the first of January, 2000. A competent lawyer would have known that $100,000.00 was the most that could be collected in this case. By maintaining the lawsuit, the settlement was delayed for almost two years and additional costs were incurred.

RULE 1.3 Diligence

(a) * * *

Mr. Willett should have determined the extent of underinsurance coverage through Mrs. Woodward's policy at the time that Mrs. Woodward hired. In fact, Mr. Willett waited until Mr. Woodward relieved Mr. Morgan. Even then, he continued the litigation another twenty months before settling the case on terms less favorable than available in September, 1998.

RULE 1.5 Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1), (2), (3), (4), (5), (6), (7) and (8) * * *

(c) * * *.

Mr. Willett's fees were unreasonable. Despite a fee dispute of Mr. Willett's own making, and Mr. Morgan's settlement for approximately half of the disputed fee, Mr. Willett took an entire one-third of the settlement as his fee. In addition, Mr. Willett charged Mr. Woodward $5,000.00 to litigate the dispute. Additionally, Mr. Willett took one-third of $100,000.00, despite the fact that only $50,000.00 was received as a cash settlement.

RULE 4.1 Truthfulness in Statements to Others

(a) * * *

Mr. Willett's letter to Mr. Woodward of August 26, 1998, asserted to Mr. Woodward that the Hartford required the Power of Attorney. This was false. It was actually Mr. Willett who desired the Power of Attorney.

RULE 8.4 Misconduct

(b) * * *

Mr. Willett violated this Rule by his continuing fraud and by his letter to Mr. Woodward regarding the Power of Attorney.

(c) * * *

The letter to Mr. Woodward regarding the Power of Attorney also violates this part of the Rule.

The Bar withdrew the following violations:

DR 7.104(A)
DR 9.101(C)

The Board did not find that Mr. Willett violated the following Rules:

DR 6.101(A)(2)
DR 6-101(B)
DR 7-102(A)(1)
DR 7-102(A)(2)
DR 7-102(A)(4)
DR 7-102(A)(6)
DR 7-102(A)(7)
RULE 1.5(e)
RULE 4.4

**II. SANCTION**

The Board is of the opinion that this case is an example of lawyer greed to the detriment of the client. The Bar argued that Mr. Willett, as early as February 2, 1998, recognized the value of Mr. Woodward's claim and resolved that he would represent Mr. Woodward, not Mr. Morgan. Mr. Willett argued that his actions did not constitute a scheme to acquire Mr. Woodward as a client, but that the change in lawyers was occasioned solely by Mr. Woodward's dissatisfaction with Mr. Morgan's representation.

The Bar's position was supported by clear and convincing evidence. Mr. Willett placed great weight on an affidavit which was purportedly signed by Mr. Woodward in which he stated that he was dissatisfied with Mr. Morgan's handling of the case. Nevertheless, Mr. Woodward testified that he didn't remember signing the affidavit, and that his only reason for dissatisfaction was that Mr. Morgan was settling the case for policy limits and he believed Mr. Willett when Mr. Willett said that he could get more. The overwhelming weight of the evidence in this case indicates that Mr. Willett was motivated from the very start by a desire to make money. He attempted to assert control over Mr. Woodward's case long before he lured the client away from Mr. Morgan. Mr. Willett regularly discussed the case with Mr.

Woodward while the client was represented by Mr. Morgan. By the time Mr. Woodward was persuaded, by unwarranted promises of a larger recovery, to change lawyers, Mr. Morgan had done everything necessary to secure the maximum available relief for Mr. Woodward. Mr. Willett then proceeded to maintain litigation at Mr. Woodward's expense for another two years. To further that litigation, Mr. Willett made false and misleading statements.

Mr. Willett's misconduct, however, did not end with his solicitation of the case. He went on to take advantage of Mr. Woodward and deprive him of the settlement to which he was otherwise entitled and so desperately needed. Mr. Willett lied to and deceived his client, representatives of insurance companies, opposing counsel, and the Circuit Court for Fauquier County. He collected unreasonable fees for work lacking in competence and prosecuted with a lack of diligence.

The Board considered the following to be aggravating factors in Mr. Willett's case:

1. Mr. Willett has been disciplined on three prior occasions. All of the prior disciplinary matters involved unreasonable or inadequately explained fees. In one case, Mr. Willett was disciplined for billing a client for time spent in defending himself in a disciplinary case brought by the client. It is also significant to note that Mr. Willett's conduct in this case occurred while the prior disciplinary matters were in process.

2. We are of the opinion that Mr. Willett was acting out of a dishonest or selfish motive.

3. Mr. Willett refuses to acknowledge the wrongful nature of his conduct. His testimony to the Board lacked candor.

4. Mr. Willett's client was exceptionally vulnerable. Mr. Woodward is not a sophisticated man. He has a ninth grade education, and reads with difficulty. He is morbidly obese, and at the time of the settlement of this case was confined to bed. Perhaps most revealing is the fact that Mr. Woodward doesn't fully appreciate the extent of the abuse inflicted on him by Mr. Willett.

5. Mr. Willett has been practicing law for in excess of 50 years, a more than adequate time to be familiar with these Rules and the professional aspirations which they represent. Despite his years of practice, not a single witness spoke in support of Mr. Willett during the penalty phase of the hearing.

In mitigation, this case was not presented to the Board promptly. Nevertheless, the Bar's unexplained delay is insignificant compared to Mr. Willett's actions. Furthermore, it did not appear that Mr. Willett was prejudiced by the delay.

In summary, the Board finds Mr. Willett's conduct to be unconscionable. Mr. Willett took advantage of an uneducated, vulnerable client simply to make more money. In doing so, he harmed Mr. Morgan, perpetrated several frauds and brought discredit upon the legal profession. Mr. Willett's actions in this case are of the sort that reinforces the popular, but inaccurate, public stereotype of lawyers. The Board finds that only revocation is sufficient to protect the public from such reprehensible conduct by an unrepentant lawyer. It is so ordered effective November 22, 2004.

* * *

ENTERED THIS 18TH DAY OF NOVEMBER, 2004
VIRGINIA STATE BAR DISCIPLINARY BOARD
By Peter A. Dingman, Chairman

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## District Committees

VIRGINIA:
BEFORE THE NINTH DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

IN THE MATTER OF
JON IAN DAVEY
VSB Docket No. 04-090-1804

**SUBCOMMITTEE DETERMINATION**
**(PUBLIC REPRIMAND WITH TERMS,**
**PURSUANT TO AGREEMENT)**

On September 14, 2004, a meeting in this matter was held before a duly convened Ninth District Subcommittee consisting of Paul J. Feinman, Esquire, Chair presiding, Tyler E. Williams, Esquire and Langhorne S. Mauck, lay member. Pursuant to Virginia Supreme Court Rules of Court Part Six, Section IV, ¶ 13.G.1.c.(3), the Subcommittee hereby approves the Agreed Disposition entered into by Kathryn A. Ramey, Assistant Bar Counsel, and the Respondent, Jon Ian Davey ("Respondent"), for a Public Reprimand with Terms.

**I. FINDINGS OF FACT**

1. At all times relevant to this matter, Respondent was an attorney licensed to practice law in the Commonwealth of Virginia.

2. Respondent has failed to perfect appeals from criminal convictions in three separate cases as follows:

   - On April 2, 2002, the Supreme Court of Virginia dismissed an appeal because Respondent failed to set forth assignments of error in the petition.

   - On June 11, 2002, a belated appeal to the Court of Appeals was granted due to Respondent's failure to timely file a petition for appeal.

   - On July 2, 2003, the Supreme Court dismissed a petition for appeal because Respondent failed to file a notice of appeal in the Court of Appeals, although he did timely file the petition for appeal.

3. Upon learning of the dismissals, Respondent prepared habeas corpus petitions for his clients in the first and third instances listed above.

**II. RULES OF PROFESSIONAL CONDUCT**

Such conduct on the part of Respondent constitutes misconduct in violation of the following Rules of Professional Conduct:

**RULE 1.1 Competence**

* * *

**RULE 1.3 Diligence**

(a) * * *

**III. APPROVAL OF AGREED DISPOSITION FOR A PUBLIC REPRIMAND WITH TERMS**

Accordingly, the Subcommittee hereby approves the Agreed Disposition of a Public Reprimand with Terms. Respondent is hereby Reprimanded and must comply with the following Terms:

1. By **April 1, 2005**, Respondent shall certify to Assistant Bar Counsel Kathryn A. Ramey, or her designee, that he has completed six (6) hours of continuing legal education (CLE) in the areas of time management, law office management, or handing criminal appeals. The six (6) CLE hours shall be MCLE approved, but shall not count towards Respondent's annual MCLE requirement and Respondent shall not seek credit for the CLE hours.

If, however, Respondent fails to meet these terms within the time specified, the Ninth District Committee shall certify the case to the Virginia State Bar Disciplinary Board for Sanction Determination. If there is disagreement as to whether the Terms were fully and timely completed, the Ninth District Committee will conduct a hearing on the issue. At the hearing, the sole issue shall be whether Respondent fully completed the Terms within the time specified above. The Respondent shall have the burden of proof by clear and convincing evidence at the hearing.

* * *

NINTH DISTRICT COMMITTEE
SUBCOMMITTEE
VIRGINIA STATE BAR
By: Paul J. Feinman, Chair Presiding

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VIRGINIA:
BEFORE THE SECOND DISTRICT COMMITTEE—SECTION I OF THE VIRGINIA STATE BAR

IN THE MATTERS OF
WILBER THURSTON HARVILLE
VSB Docket No. 04-021-1489 (Hunt)
VSB DOCKET No. 04-021-0737 (Hill)

**DISTRICT COMMITTEE DETERMINATION (PUBLIC REPRIMAND)**

On October 14, 2004, a hearing in these matters was held before a duly convened panel from the Second District Committee—Section I, consisting of Croxton Gordon, Esquire, James Lang, Esquire, Mr. Kurt Rosenbach, (lay member), Donald Schultz, Esquire, S. Clark Daugherty, Esquire, Mr. Robert W. Carter, lay member, and Afshin Farashahi, Esquire, Chair presiding. The bar appeared by its Assistant Bar Counsel Paul D. Georgiadis. The Respondent, Wilber Thurston Harville, was present and was represented by Andrew A. Protogyrou.

Pursuant to Virginia Supreme Court Rules of Court Part Six, Section IV, Paragraph 13(H)(2)(l)(2)(d), the Second District Committee—Section I of the Virginia State Bar hereby serves upon the Respondent, Wilber Thurston Harville, the following Public Reprimand.

**VSB Docket No. 04-021-1489 (Hunt)**

I. FINDINGS OF FACT

1. On or about August 7, 2002, Wilber Thurston Harville, hereinafter Respondent, was retained by Richard Hunt to represent him in a dispute with a credit card company by filing suit against the company, following Respondent's initial review and initial informal action in this regard in June, 2001.

2. When Mr. Hunt retained Respondent, Mr. Hunt paid Respondent $750.00 as an advance payment toward legal fees. Respondent indicated on his retainer agreement that the $750.00 was accepted as a "deposit". Respondent did not deposit said $750.00 into his escrow account, but rather deposited it into his operating account and spent it.

3. When Mr. Hunt retained Respondent on August 7, 2002, Respondent advised that he would complete the preparation of the Motion for Judgement within a few weeks. Notwithstanding this understanding, Respondent did not complete the drafting and filing of the Motion for Judgement until December 10, 2002.

4. After contacting Respondent several times during the ensuing months to learn the status of the matter, Mr. Hunt went to Respondent's office in early December, 2002 to meet with Respondent regarding the delay in the drafting and filing of the motion for judgement. Arriving at Respondent's office, Mr. Hunt found Respondent's office locked and dark, although it was during normal business hours. Returning to the office a few days later during business hours, Mr. Hunt found the office empty, with no signs of occupancy.

5. Respondent had moved over the weekend of Thanksgiving and had failed to notify Mr. Hunt of his move and of his new office address.

6. Mr. Hunt located Respondent by telephoning Respondent at his residence. Mr. Hunt advised Respondent that he was terminating Respondent. Respondent asked that he be given more time; Mr. Hunt agreed and Respondent thereafter filed a motion for judgement on December 10, 2002.

7. Upon Mr. Hunt's receipt of a copy of the motion for judgement on or about December 23, 2002, Mr. Hunt terminated Respondent.

8. During the approximately four months of the representation, all communications commenced from Mr. Hunts efforts. At no time did Respondent initiate communications with Mr. Hunt.

9. After terminating Respondent, Mr. Hunt telephoned Respondent and left a message requesting a partial refund of $500.00, with Respondent keeping $250.00 for his work

to-date. Respondent not only failed to issue any refund, but failed to respond in any fashion to Mr. Hunt's message, including failing to acknowledge it or provide any accounting of fees charged against the $750.00 advance payment.

10. Thereafter, Mr. Hunt filed suit against Respondent for the return of his $750.00 advance payment.

11. From January 27, 2003–April 18, 2003, Respondent repeatedly thwarted service of process by avoiding service attempts at his address of record by both the Sheriff's office and a private process server on over 16 instances, including failing to respond to written and voice-mail messages that the Sheriff and the process server were attempting to serve him. During this time, Respondent had notice of the outstanding warrant in debt. This resulted in Mr. Hunt having to dismiss his action and re-file the warrant in debt against Respondent.

12. On the return date of July 2, 2003, Respondent appeared in Chesapeake General District Count and offered to settle Mr. Hunt's claim for a refund in exchange for Mr. Hunt's dismissal of the pending action. Respondent drafted and executed a settlement agreement calling for Respondent to pay Mr. Hunt $804.00 by August 2, 2003 and for Respondent to non-suit the pending circuit court action he had filed for Mr. Hunt on December 10, 2002.

13. Although Mr. Hunt dismissed the pending action against Respondent, Respondent did not pay Mr. Hunt. After agreeing to grant Respondent an additional two weeks to pay him, Mr. Hunt filed suit again against Respondent. On September 22, 2003, Mr. Hunt obtained a default judgement against Respondent.

14. After Mr. Hunt filed this instant bar complaint and after the subcommittee of the Second District Committee–Section I had referred this matter for a full district committee hearing, Respondent paid Hunt in full on or about June 4, 2004.

15. Respondent has not non-suited the Circuit Court action he filed on behalf of Mr. Hunt.

II. NATURE OF MISCONDUCT

Such conduct on the part of Respondent constitutes misconduct in violation of the following Rules of the Virginia Rules of Professional Conduct:

**RULE 1.3 Diligence**

(a) * * *

**RULE 1.4 Communication**

(a) * * *

**RULE 1.15 Safekeeping Property**

(a) (1), (2) * * *

(c) (4) * * *

**RULE 8.4 Misconduct**

(b) * * *

**VSB DOCKET No. 04-021-0737 (Hill)**

III. FINDINGS OF FACT

1. On or before July 23, 1998, Wilber Thurston Harville, hereinafter Respondent, was retained by Ruth Hill to represent her son Lloyd Hill on criminal charges pending in the Circuit Court of the City of Suffolk.

2. Following the entry of a guilty plea, Lloyd Hill was sentenced on August 20, 1999 to serve a prison term of 45 years. At the request of Lloyd Hill's mother, Mrs. Ruth E. Hill, Respondent thereafter agreed to appeal the matter.

3. On September 20, 1999, Respondent filed a Notice of Appeal. In the accompanying Certificate, Respondent stated that he had been appointed by the Court to represent the appellant, and therefore the filing fee for the appeal was waived. In fact, Respondent was never appointed on the appeal. Respondent did not accompany the Notice of Appeal with the required filing fee.

4. On October 21, 1999, Respondent filed a motion for extension of time to file the transcript in the appeal, one day after the deadline for requesting an extension had expired.

5. By order dated October 22, 1999, the Court of Appeals denied said motion for extension as not timely filed.

6. On December 14, 1999, the Clerk's Office of the Court of Appeals wrote Respondent advising that a filing fee of $25.00 was due by December 27, 1999 or else the appeal would be dismissed.

7. On December 30, 1999, the Court of Appeals dismissed the appeal for Respondent's failure to file a filing fee as requested.

8. Respondent did not ever advise Lloyd Hill of the dismissal of his appeal by the Virginia Court of Appeals, although he contends—and Mrs. Ruth E. Hill denies, that he advised Mrs. Ruth E. Hill of the denial of the appeal.

IV. NATURE OF MISCONDUCT

Such conduct on the part of Respondent constitutes misconduct in violation of the following Rules of the Virginia Rules of Professional Conduct:

**RULE 1.3 Diligence**

(a) * * *

**RULE 1.4 Communication**

(a) * * *

Although the bar alleged a violation of Rule 1.16(c), the Committee found that the bar failed to present clear and convincing evidence of such and dismissed the Rule violation.

V. IMPOSITION OF PUBLIC REPRIMAND

Accordingly, it is the decision of the Committee to impose a Public Reprimand on the Respondent, Wilber Thurston Harville, and he is so reprimanded.

* * *

SECOND DISTRICT COMMITTEE—SECTION I
OF THE VIRGINIA STATE BAR
By: Afshin Farashahi
Chair Presiding

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VIRGINIA:
BEFORE THE FIFTH DISTRICT--SECTION III
SUBCOMMITTEE OF THE VIRGINIA STATE BAR
IN THE MATTER OF
LAWRENCE RAYMOND MORTON, ESQ.
VSB Docket # 03-053-1264

**SUBCOMMITTEE DETERMINATION**
**PUBLIC REPRIMAND**

On October 25, 2004, a meeting in this matter was held before a duly convened Fifth District—Section III Subcommittee consisting of E. Allen Newcomb, Esq., William Hanson, lay member,[1] and H. Jan Roltsch-Anoll, Esq., presiding.

Pursuant to the provisions of the Rules of the Supreme Court of Virginia, Part 6, § IV, ¶ 13(G), the Fifth District—Section III Subcommittee of the Virginia State Bar hereby serves upon the Respondent the following Public Reprimand, as set forth below:

**I. FINDINGS OF FACT**

1. At all times relevant hereto, Lawrence Raymond Morton, Esq. (hereafter "Respondent"), was an attorney licensed to practice law in the Commonwealth of Virginia.

2. On or about March 6, 2002, Bert Eyler (hereafter "Complainant") retained the Respondent to represent him in a divorce matter that had been filed in the Fairfax County, Virginia, Circuit Court on February 5, 2002.

3. One of the objectives of the Complainant was to have an adjustment made in the level of child support he was to pay pursuant to the terms of a property settlement agreement which he had entered into with his wife prior to the time he had retained the Respondent.

4. The Respondent filed an Answer and Cross-Bill of Complaint on behalf of the Complainant on or about April 3, 2002. On Complainant's behalf, Respondent made the following averments in Paragraphs 12E and 12F of the Cross-Bill:

   Defendant [Complainant in this disciplinary proceeding] does not agree to the child support provision of the purported agreement (Paragraph 5). To the knowledge of Defendant's counsel, there has been no attempt to do a calculation of the child support as would be recommended by the Virginia child support guidelines to be found at Virginia Code section 20-108.2.

   Complainant [Complainant's wife] has not performed or satisfied, her obligations of financial disclosure as required by paragraph 31 of the purported agreement. To Defendant this evinces intent by Complainant that she not be bound by the purported agreement, but that the tendrils of legal binding extend only in the direction of the Defendant. In addition, Complainant's lack of financial disclosure leaves counsel for Defendant unable to advise his client as to whether the amount of child support called for in the purported agreement is at all consistent with the Virginia child support guidelines.

5. The Respondent propounded no discovery on Complainant's behalf in the Circuit Court proceedings for the purpose of securing the financial information essential to the calculation of child support under the statutory schedules. Respondent also failed to file any motion and notice any hearing thereon at which Respondent would request the Court to set Complainant's child support obligations pursuant to the statutory schedules.

6. On September 23, 2002, following the Court's entry of an Order incorporating the aforesaid separation agreement on June 18, 2002, and the entry of a Final Decree of Divorce on August 15, 2002, the Complainant engaged new counsel, who reopened the case, filed a motion to modify child support, conducted discovery, and successfully negotiated a reduction of Complainant's child support obligation and other matters.

7. The Virginia State Bar opened a formal Complaint respecting the Respondent's aforesaid conduct. On November 8, 2002, Bar Counsel directed a letter of that date to Respondent, enclosing the Complaint, and stating, *inter alia*, in bold and underlined text, the following: "please review the complaint and provide this office with a written answer, including an original and one copy of your response and all attached exhibits, within twenty-one (21) days of the date of this letter." The Respondent failed to file a written response to the Complaint with the Bar as required by the said letter, either within twenty-one (21) days, or at any time thereafter.

**II. NATURE OF MISCONDUCT**

The Subcommittee finds that the following Rules of Professional Conduct have been violated:

**RULE 1.1 Competence**

* * *

**RULE 8.1 Bar Admission And Disciplinary Matters**

(c) * * *

**III. PUBLIC REPRIMAND**

Accordingly, it is the decision of the Subcommittee to impose a PUBLIC REPRIMAND on Respondent, Lawrence Raymond Morton, Esquire, and he is so reprimanded.

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FIFTH DISTRICT—SECTION III SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

By H. Jan Roltsch-Anoll
Chair/Chair Designate

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FOOTNOTE ————————————

1 Member, Fifth District—Section II Committee, serving as substitute for unavailable lay members of Fifth District—Section III Committee.