LEGAL ETHICS OPINION 1792
IS IT CONSIDERED ASSISTING IN THE UNAUTHORIZED PRACTICE OF LAW FOR AN ATTORNEY TO INSTRUCT A SOCIAL WORKER TO ASSIST PRO-SE LITIGANTS TO FILL OUT SMALL CLAIMS FORMS?

Your request presents a hypothetical involving an attorney providing training to non-lawyers. Specifically, this attorney would be training social workers to assist members of the public in filling out forms for use in small claims court, usually to obtain payment of back wages from employers. The questions raised regarding that hypothetical situation are as follows:

1. Is it the unauthorized practice of law for a social worker to assist a *pro se* litigant in completing forms, such as the Warrant in Debt, for small claims court?

2. Would it be aiding in the unauthorized practice of law for an attorney to teach the social workers how to provide this assistance?

The purview of this committee is to interpret exclusively the Rules of Professional Conduct. In contrast, it is the purview of the Standing Committee on the Unauthorized Practice of Law to interpret the Unauthorized Practice Rules to determine the parameters of the practice of law. This Committee referred your first question to the Standing Committee on the Unauthorized Practice of Law, as within the purview of that Committee. The Virginia Supreme Court recently adopted UPL Op. 207, which the Unauthorized Practice of Law Committee had issued in response to your request. That opinion concludes as follows:

> The preparation of warrants in debt and other forms necessary for *pro se* representation ("legal instruments of any character") in Small Claims Court by a non-attorney social worker would be the unauthorized practice of law if the non-attorney social worker selects the forms for the litigant or advises the litigant as to which forms are appropriate based on the litigant's particular case; or provide any legal advice to the litigant. The social worker may assist the litigant with completion of the form document using language specifically dictated by the litigant.
>
> The only assistance that a social worker, or any non-lawyer, may provide to a *pro se* litigant to complete form legal documents is direct translation of the document (if the litigant does not speak or read English) to the litigant's native language, direct transcription, or direct transcription and translation to English, of information necessary to complete forms as dictated by the litigant. The social worker may also provide general administrative instructions such as to how and where and when to file the forms with the appropriate court/tribunal.

With that resolution of your first question, this Committee can now address your second question. The second question of your hypothetical is whether an attorney may train those social workers to provide the assistance outlined above. Rule 5.5(a)(1) prohibits an attorney from assisting a nonlawyer in "the performance of activity that constitutes the practice of law." Thus, the answer to this second question flows directly from that of the first. The attorney may not train the social workers to perform any work constituting the unauthorized practice of law, as outlined in this context by UPL Op. 207.

The committee wishes to clarify a point included in your request materials. Comment One to Rule 5.5 states that the rule is not intended to prohibit lawyers "from providing professional advice and instruction to nonlawyers whose employment requires knowledge of the law." Examples cited in that comment are claims adjusters, employees of financial or commercial institutions, and social workers. The critical distinction here is between employment that "requires knowledge of the law" and employment that actually is the practice of law. A nonlawyer's employment may well entail a necessary understanding of pertinent law; that knowledge, however, does not provide authority to provide legal services based on that understanding. Comment One is intended to allow lawyers to provide training on the law needed for performance of a job; it does not provide the receivers of that training an exception to the Unauthorized Practice Rules. To reiterate, this attorney cannot instruct these social workers in the unauthorized practice of law.

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

Committee Opinion
January 10, 2006

LEGAL ETHICS OPINION 1815
CAN A LOCAL GOVERNMENT ATTORNEY REPRESENT A ZONING ADMINISTRATOR IN AN APPEAL AGAINST THE BZA WHILE REPRESENTING THE BZA IN AN UNRELATED APPEAL BEFORE THE CIRCUIT COURT?

You have presented a hypothetical situation involving an attorney representing a locality. In a prior year, a citizen applicant appeared before the Board of Zoning Appeals (BZA) to appeal a decision of the Zoning Administrator pursuant to Virginia Code §15.2-2309. The Zoning Administrator had enforced zoning ordinance requirements regarding the use of land in a business zoned district. The applicant had argued that the land use should be allowed even though directly prohibited by the ordinance. At the appeal, the BZA upheld the Zoning Administrator's decision. The applicant then appealed that BZA decision to the Circuit Court. The local government attorney appeared as attorney of record for the BZA, as defendant in the applicant's petition.

In a second matter, the BZA granted a variance. The Zoning Administrator has decided to appeal the decision to the Circuit Court. The Zoning Administrator wants the local government attorney to represent him in filing that petition. The petition will name the BZA as defendant. This case involves a different piece of land and has no common issues of fact with the first matter.

The attorney attended both BZA hearings and commented on the merits of each case, but it does not appear to the attorney that the BZA considered the comments to be legal advice. His comments are normally limited to whether the variance satisfies the statutory requirements or whether an appeal has merit.

Under the facts you have presented, you have asked the committee to opine as to:

1. Would the local government attorney have an impermissible conflict if he represents the BZA in the first case and the Zoning Administrator against the BZA in the second case?

2. If so, can the local government attorney cure that conflict with consent from both the BZA and the Zoning Administrator?

In beginning the analysis of your questions, the committee initially distinguishes the present fact pattern from that in recent LEO 1785, also involving a local government attorney and a BZA. In LEO 1785, the local government attorney advised the BZA regarding the public notice for a particular zoning variance. Subsequently, that attorney represented the Board of Supervisors in a challenge to the variance and filed a petition on its behalf naming the BZA as a defendant. Accordingly, all discussion in that LEO involved one legal matter – the zoning variance. In contrast, the present hypothetical involves two different and unrelated legal matters (the land use case and the zoning variance case). The analysis in LEO 1785 does not, therefore, resolve the questions raised in the present hypothetical.

LEO 1785 considered whether an attorney could represent a party on one side of litigation having advised the opposing party regarding the same matter. Here, the analysis focuses on whether an attorney can represent a party in litigation where the attorney represents the opposing party in some other matter. The governing provision in the Rules of Professional Conduct is Rule 1.7, which states as follows:

> RULE 1.7. Conflict of Interest: General Rule.
>
> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph(a), a lawyer may represent a client if each affected client consents after consultation, and:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) the consent from the client is memorialized in writing.[1]

The structure of Rule 1.7 is a two-determination process: first, is there a concurrent conflict and, second, if so, may steps be taken to permit the representation? Thus, the first question is whether the local government attorney's representation of the BZA in the first matter while representing of the Zoning Administrator in the second triggers a concurrent conflict of interest.

FOOTNOTES

1 The Committee notes that this LEO references a new articulation of Rule 1.7, which the Virginia Supreme Court recently adopted with an effective date of June 30, 2005.

Under Rule 1.7(a), there are two sources of concurrent conflicts. If either is present, the attorney has a conflict. Paragraph (a)(2) explains that an attorney has a concurrent conflict where the representation of one client is directly adverse to the other. Comment 3 to the rule discusses direct adversity in the litigation context:

> As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. *Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated.* On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. (Emphasis added.)

In the present scenario, the attorney is representing the Zoning Administrator against the BZA, a current client represented in unrelated litigation. The representation of the Zoning Administrator is not merely "generally adverse" to the BZA, the attorney's client. Rather, as the BZA is the opposing party in the Zoning Administrator's litigation, the representation of the administrator is *directly* adverse to the other client of this attorney, the BZA. Under paragraph (a), a "direct adversity" conflict is triggered not only when representing opposing parties in the same case, but also when representing one client against another client, represented in some other matter. The attorney in this scenario has a concurrent conflict of interest in trying to represent these two clients in these two matters.

The determination of whether this attorney has a concurrent conflict of interest can be made under paragraph (a)(1) alone. A concurrent conflict of interest may exist under either paragraph (a)(1) or (a)(2). Nonetheless, the Committee notes that the critical concept in paragraph (a)(2), if applied to present scenario, would be whether the representation of one client would materially limit that of the other. That determination must always be decided on a case-by-case basis, with a context driven analysis rather than a bright line rule. The Committee need not make such a determination in the present instance as a concurrent conflict already exists under the first part of paragraph (a).

As the attorney in the present scenario does have a concurrent conflict under Rule 1.7(a), he may only proceed with these two representations if he fulfills the requirements of paragraph (b) of the rule. Paragraph (b) specifies that an attorney may proceed with a concurrent conflict of interest only if he obtains client consent after consultation *and* he meets four specified requirements. Note that the Preamble to the Rules of Professional Conduct defines "consultation" as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."

The first of the four requirements in paragraph (b) is that the lawyer must reasonably believe that he can competently and diligently represent each affected client.[2] The comments to the rule provide guidance for making this determination. Specifically, Comments 10 and 13 are pertinent in this context of litigation. Comment 10, in pertinent part, establishes a "disinterested attorney" standard:

> A client may consent to representation notwithstanding a conflict. However, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. A lawyer's obligations regarding conflicts of interest are not present solely at the onset of the attorney-client relationship; rather, such obligations are ongoing such that a change in circumstances may require a lawyer to obtain new consent from a client after additional, adequate disclosure regarding that change in circumstances.

Thus, the question becomes would a disinterested attorney reasonably believe that this local government attorney can provide competent and diligent representation to the BZA in the first case simultaneous with competent and diligent representation to the Zoning Administrator in the second case. As discussed in Comment 13:

> Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a

FOOTNOTES

2 The Committee notes that competent, diligent representation is, of course, required for all clients under Rules 1.1 and 1.3, respectively.

> degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

The final resolution of those issues in the present, and in any, instance, will of course rely on analysis of both the facts of the cases and the law involved in the matters at issue. The Committee notes that the above-referenced comments suggest that two especially critical factors are whether a disinterested attorney would approve of the dual representation and what sort of litigation is involved. The Committee further notes that in your request, you discuss the additional factors that the cases share no issues of fact and that one case's outcome will have no bearing on the other. Those are the sort of issues that the attorney should review in making the conflicts determinations. Other possible factors worth considering may include, but certainly are not limited to, the amount of public attention and acrimony generated by the matters, the risk of inadvertent disclosure of confidential information, and the risk that the attorney's loyalty will be divided or diluted.[3]

The second requirement from Rule 1.7(b) is that the representation is not prohibited by law. The interpretation of the legality of the actions of the local government attorney is outside the purview of this Committee. However, nothing presented in the materials accompanying this request suggests that illegality is a concern.[4]

The third requirement in paragraph (b) is that the representation not involve the lawyer asserting a claim by one client against another *represented in the same proceeding*. In the present instance, any assertions made on behalf of the Zoning Administrator against the BZA in that case will be made in a proceeding where the lawyer represents no other client. He only represents the BZA in some other matter. Thus, while this scenario of representing one client in a matter against a client represented in some other, unrelated matter does constitute a concurrent conflict under Rule 1.7(a), it does not run afoul of the distinguishable requirement set out in paragraph (b)(3).

The fourth requirement in paragraph (b) is that the consent provided by the client must be memorialized in writing. Comment 10, in pertinent part, explains this requirement:

> Paragraph (b) requires that client consent be memorialized in writing. Preferably, the attorney should present the memorialization to the client for signature or acknowledgement; however, any writing will satisfy this requirement, including, but not limited to, an attorney's notes or memorandum, and such writing need not be signed by, reviewed with, or delivered to the client.

The Committee agrees that obtaining a client's signature to acknowledge the consent is advisable in most instances; however, the requirement of (b)(4) would be met if the attorney merely makes a note to file regarding what transpired.

In sum, whether or not this attorney may represent these two clients in these two matters is not a bright-line determination. The Committee concludes that the attorney may proceed with the two representations under the following circumstances. As discussed previously, assuming no question of legality is present and as he would not be asserting a claim on behalf on one client in the matter he represents the other client, he may represent both clients in their respective matters so long as he consults with each client regarding the implications of consent, the clients each provide that consent, the attorney memorializes that in writing, and he reasonably believes that his representation in each instance will be both competent and diligent.

The Committee must make one qualification on those conclusions. The analysis of this opinion thus far has been based on the assumption provided with the request that the attorney did not represent the BZA in the second matter, in which it granted the zoning variance. The attorney did, however, "comment" on the merits of the variance application at the BZA hearing. If the BZA reasonably considered these "comments" to constitute legal advice provided by the attorney to the BZA, then an attorney-client relationship may have been created[5], and the conclusions of LEO 1785 would then apply. The committee cautions that the attorney was responsible to clarify his role as a representative of a party to the hearing, and to expressly communicate to the BZA that he was not appearing before them as their legal advisor, if necessary to dispel any confusion.

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

Committee Opinion
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FOOTNOTES

3 *See* ABA Formal Op. 05-435 (2004) (extended discussion of factors for concurrent conflicts determinations).

4 Specifically, discussion in the materials accompanying this request included highlights that a local charter provision requires the local government attorney to be the "chief legal advisor" to all boards, commissions, and agencies of the local government. A local government's charter is generally granted by The General Assembly. *See* Va. Code §§ 15.2-200 et. seq. (Local Government Charters). Nevertheless, the Rules of Professional Conduct establish the ethical responsibilities of any attorney serving in that position.

FOOTNOTES

5 *See* the Unauthorized Practice Rules, "Practice of Law in Virginia", stating in pertinent part:

> Generally, the relation of attorney and client exists, and one is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill.

LEGAL ETHICS OPINION 1820
CAN AN ATTORNEY EMPLOYEE OF A RAILROAD COMMUNICATE WITH INJURED RAILROAD WORKERS WHO ARE REPRESENTED BY COUNSEL?

You have presented two hypotheticals involving the employees of a railroad. The underlying situation in each is that an employee was injured on the job. That employee hires an attorney, who notifies the railroad claims department of his representation. The claims department has employees who investigate the claims made by injured employees. That department is supervised by a member of the Virginia State Bar. Some, but not all, of the employees in the claims department are also members of the Bar.

In the first scenario, a nonlawyer claims agent contacts the injured employee to confirm that the lawyer does represent him. That claims agent asks why the injured employee wants a lawyer and recommends that he not use one. At no time has the department supervisor instructed the claims agent not to communicate with represented claimants.

In the second scenario, the claims department has an office entitled, "Disability Support Services." An employee of that services department, who is a Bar member, contacts the injured employee after receipt of the notice of representation, seeking medical records from the injured employee and offering rehabilitation services. If the injured employee does not respond to that offer, the department employee will testify that rehabilitation was offered and declined. If the injured employee *does* respond, the claims agent asks for a direct interview and broad access to medical records. The claims agent may then testify against the injured employee regarding statements made during the interview.

The claims agents may also consult with the in-house counsel and the railroad's retained counsel who serve as defense counsel in the matter. The railroad claims those conversations are within the protection of the attorney/client privilege.

With regard to these scenarios, your request poses the following questions:

1) Is the claims department prohibited from contacting the employee after receiving notice of representation, as the supervisor of the department is a Bar member?

2) Is the claims department permitted to contact an employee for purposes of "verifying" legal representation after receiving notice from counsel?

3) If that contact is permitted, may a representative of the claims department question the represented employee regarding why he hired counsel and advise the employee that he would be better served by dealing directly with the claims department without the assistance of an attorney?

4) May the claims department contact a represented employee directly in order to request medical records, offer job retraining, or offer vocational services?

5) May the Bar member/claims agent contact a represented employee for purposes of requesting medical records, offering job retraining, or vocational services?

6) While working for an attorney-supervised claims department, is a Virginia attorney bound by the Rules of Professional Conduct, even though maintaining that he is merely offering disability support services?

Before addressing your specific questions, it would be helpful to clarify the ethical responsibilities of the individuals in the differing roles outlined in your scenario. In all instances, the Virginia Rules of Professional Conduct govern conduct only of licensed attorneys. The rules do not govern the conduct of nonlawyers. Regulation of nonlawyers is governed by the Virginia State Bar and the Unauthorized Practice Rules. Interpretation of the Unauthorized Practice Rules is not within the purview of this Committee.[1] Thus, in the discussion of this opinion request, this Committee can apply pertinent provisions of the Rules of Professional Conduct to the *lawyers* in the scenario, not to the nonlawyer employees, or to corporate departments. In answering the questions, this Committee will not be determining whether the conduct of the lawyers, if performed by nonlawyers, would constitute the unauthorized practice of law. Such an issue is outside the purview of this Committee. The remarks in this opinion will focus specifically on whether the outlined conduct of the attorneys employed by this railroad is permissible under the Rules of Professional Conduct.

The crux of the presented scenario and questions is whether these contacts by railroad claims agents with the injured workers are permissible. The pertinent provision in the ethics rules is Rule 4.2, which states as follows:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyers knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The portion of the rule especially at issue here in resolving the questions presented is the phrase, "in representing a client." The plain language of this rule suggests that the prohibition is only triggered when the lawyer actually represents a client in the matter to be discussed. Reviewing the various attorneys in the scenario, which come within that language? Of the in-house counsel, the claims department head, and the attorney/claims agents, which actually represent the railroad such that Rule 4.2 governs their communications with the injured workers?

FOOTNOTES

1 Issuing opinions interpreting the Unauthorized Practice Rules is the task of the Virginia State Bar's Standing Committee on the Unauthorized Practice of Law.

Whether an attorney/client relationship has been formed in any particular situation is a fact-specific determination. The Rules of Professional Conduct do not specifically contain a definition of "attorney/client relationship." This Committee has consistently relied upon the definition found in the Unauthorized Practice Rules:

> Generally, the relation of attorney and client exits, and one is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge.

That definition looks to the nature of the work performed more than to some formalistic requirement of an express agreement by the client to retain the lawyer as his attorney. Consistent with that approach, this Committee found in LEO 1819 that a lawyer who works as a lobbyist may have created an attorney/client relationship with his lobbying customers if he provided them with legal advice as part of the lobbying services. Similarly, in LEO 1803, this Committee opined that an institutional attorney assisting prison inmates created attorney/client relationships with those inmates for whom he provides legal advice regarding the inmates' legal documents as well as those for whom he actually drafted their documents. In LEO 1592, this Committee concluded that an attorney/client relationship was established where the attorney hired to represent an uninsured motorist carrier had also provided legal advice and assistance to the *pro se* driver. Similarly, in LEO 1127, this Committee found an attorney/client relationship where the attorney provided legal assistance on items such as discovery requests for *pro se* litigants. In each of these opinions, the Committee focused on the nature of the services provided.

Applying this concept to the present scenario, the Committee notes that the in-house counsel represents the railroad. Regarding the head of the claims department, the Committee opines that he also represents the railroad with regard to these injured workers' claims. That attorney operates his claims department to, among other things, assist the railroad in gathering information from the claimants for the use of the railroad and its litigation attorney, the in-house counsel, and in persuading the claimants to fire their retained counsel. Such work is squarely within the concept of furnishing "to another advice or service under circumstances which imply his possession and use of legal knowledge;" the standard from the above-quoted definition. For the same reason, the work of the attorney/claims agents also constitutes representing the railroad in these matters. Those attorney/agents gather information potentially useful in any litigation that develops out of these claims and try to dissuade the claimants from legal representation. If the railroad hired a lawyer specifically for those tasks, there would be no question that the law firm was providing legal representation to the railroad. That instead the railroad places these lawyers in-house and labels them claims agents does not change the underlying character of their work. The claims management work performed by the attorneys employed by the railroad involves legal representation of the railroad. As these claims lawyers, both the department head and the claims agents, are providing legal services to the railroad, their communications with represented persons is limited by Rule 4.2.

The attorney serving as department head in this scenario has additional responsibilities in this context. The Rules of Professional Conduct establish obligations regarding how he supervises his staff. First, in considering communications with the represented workers, he must consider the interplay of Rule 8.4(a) with Rule 4.2. Rule 8.4(a) declares it impermissible for an attorney to:

> Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another.

Thus, the attorney/department head, where precluded from communicating with a represented claimant by Rule 4.2, could not permissibly direct his staff to do so. See LEOs ##233, 1375.

Also establishing ethical obligations regarding this department head's staff supervision are Rules 5.1 and 5.3, which govern the supervision of attorney staff and nonattorney staff respectively.[2]

FOOTNOTES

2 Those rules state as follows:

RULE 5.1 Responsibilities of Partners and Supervisory Lawyers

(a) A partner in a law firm, or a lawyer who individually or together with other lawyers possesses managerial authority, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

RULE 5.3. Responsibilities Regarding Nonlawyer Assistants. — With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

While the precise details of each rule differ, both rules direct the supervising attorney to supervise his staff in a manner consistent with his own ethical obligations. This attorney cannot establish and implement a procedure for his staff to routinely contact represented workers when the initiation of that contact as well as the content of the communications are incompatible with the attorney's responsibilities under Rule 4.2.

While the in-house counsel was not the focus of your inquiry, the Committee notes that this same point applies equally to the in-house counsel. Because the claims department is housed within her legal department, she also has ethical obligations stemming from her supervisory responsibilities regarding the activities of the claims department.

Based on the general principles established above, the Committee answers your particular question as follows:

1) Is the claims department prohibited from contacting the employee after receiving notice of representation, as the supervisor of the department is a Bar member?

   The Virginia Rules of Professional Conduct govern members of the Virginia State Bar. The rules do not apply to corporations, or departments of corporations, such as the claims department of this railroad. Accordingly, the provision in the rules, Rule 4.2, regarding contact with a represented party does not apply to the claims department. However, see the response to Question 3, below, for discussion of application of the rule to the individual lawyers in the claims department, including the department head.

2) Is the claims department permitted to contact an employee for purposes of "verifying" legal representation after receiving notice from counsel?

The answer to Question 1 also addresses this second question.

3) If that contact is permitted, may a representative of the claims department question the represented employee regarding why he hired counsel and advise the employee that he would be better served by dealing directly with the claims department without the assistance of an attorney?

For this third question, the identity of the particular "representative of the claims department" is important. If the representative is a nonlawyer, the rules do not directly apply to that employee's conduct. However, if the representative is a member of the Virginia State Bar, the rules do apply to his activities. The Committee has consistently opined that lawyers working in other fields nevertheless may be subject to the authority of applicable Rules of Professional Conduct.[3] This is no less true for these lawyers working in the railroad's claims department.

As discussed earlier, the particular rule at issue is Rule 4.2, governing contact with represented persons. The Committee reiterates that the lawyer/claims agents *are* providing legal services to their employer, the railroad. The conversations between claims agents and the injured workers include the lawyer/agent's analysis of the legal needs of the worker and advice regarding each worker's case. When a lawyer/claims agent tries to persuade a worker that he does not need a lawyer and that his claim will be better resolved without one, that agent is providing legal analysis and advice. The Committee opines that such a service comes within the reach of Rule 4.2. Accordingly, the lawyers operating as railroad claims agents should only be communicating with workers known to have counsel if that counsel has already provided consent to that communication. The attorney/agents in the present scenario have improperly failed to obtain that consent.

A final note regarding the issues raised in these first three questions. The counsel in each instance has already written the railroad to provide notice of the representation. There is suggestion that the purpose of the claims department's contact with the injured workers is to confirm that they are represented. That stated reason for these contacts cannot justify the communications. First, written notice from counsel is sufficient; the attorneys should rely upon that and begin any contact in these matters with counsel, and not the represented workers. Second, even if written notice was less than clear for some reason, these contacts should begin with an inquiry as to whether each worker is represented. When the workers answer that they do have counsel, the communication should stop at that point. Any further communication regarding the matter would need to be redirected to counsel. Requests for information and advice regarding the worth of legal representation would be improper.

For this third question, the role of the "representative of the claims department" is determinative. If the representative is a nonlawyer, the rules do not directly govern that individual. If the representative is a member of the Virginia State Bar, the rules do apply to his activities; the lawyer/claims agents must work within the communication restriction established by Rule 4.2. Furthermore, the department head attorney's supervision of and/or interaction with his staff must not contradict his Rule 4.2 ethical obligation.

4) May the claims department contact a represented employee directly in order to request medical records, offer job retraining, or offer vocational services?

As with Questions 1 and 2, above, this question is outside the purview of this Committee as the Rules of Professional Conduct do not apply to the railroad's claims department. However, the analysis in Question 3 regarding the individual members of the

FOOTNOTES

3 *See* 1819 (lobbying firm);1764 (attorney fee sharing with finance company); 1754 (attorney selling life insurance products); 1658 (employment law firm/human resources consulting firm); 1647 (employee-owned title agency); 1634 (accounting firm); 1579 (serving as fiduciary such as guardian or executor);1584 (partnership with non-lawyer); 1368 (mediation/arbitration services); 1442 (lender's agent); 1345 (court reporting); 1318 (consulting firm); 1311 (insurance products); 1254 (bail bonds); 1198 (court reporting); 1163 (accountant; tax preparation); 1131 (realty corporation); l083 (non-legal services subsidiary); 1016 (billing services firm); 187 (title insurance).

claims department is equally applicable here. If the member of the department is a nonlawyer, the Rules do not regulate his or her conduct. If the member of the department is a lawyer, any contact with the represented worker is impermissible if in violation of Rule 4.2. That would include communications requesting medical records as well as offering job training and/or vocational services as such requests and offers are part of the negotiation of the particular claim for which the worker has legal counsel.

5) May the Bar member/claims agent contact a represented employee for purposes of requesting medical records, offering job retraining, or vocational services?

The discussion in answer to Question 4 responds to this fifth question.

6) While working for an attorney-supervised claims department, is a Virginia attorney bound by the Rules of Professional Conduct, even though maintaining that he is merely offering disability support services?

The Committee fully discussed this question in the introduction to this opinion as well as in the response to Question 3. The attorney/claims agents are bound by the Rules of Professional Conduct while providing these claims management services. The Committee notes that offering disability support services is within the subject matter of the representation for purposes of Rule 4.2 as those services are in response to the claims of the injured workers.

Finally, the Committee would like to comment on two issues not asked expressly in one of the questions but nonetheless suggested by the facts presented. First, the facts note that the railroad does have a legal department, with an in-house counsel who represents the railroad generally and therefore, presumably, in these claims cases. That attorney would, in line with the discussion presented in response to Questions 3, 5, and 6, above, need to limit all communications with the represented workers in the claims cases to conform to Rule 4.2. Also, that attorney should be mindful of Rule 8.4(a), which precludes an attorney from violating the Rules through the acts of another. Thus, the Committee cautions that the attorney in the legal department cannot circumvent the requirements of Rule 4.2 by directing members of the claims department to initiate communications the attorney himself is precluded from conducting. Any factual determination as to whether, in a particular instance, the communication by a claims agent occurred with sufficient involvement of the in-house counsel as to trigger Rules 4.2 and 8.4(a) would depend on facts far more detailed than those provided in the present hypothetical.

Finally, the Committee clarifies that in no way do the conclusions of this opinion prohibit *parties* from direct communication. As pointed out in Comment 1 to Rule 4.2, "parties to a matter may communicate directly with each other." In many instances such communication can be effective in speedy resolution of the dispute. However, a lawyer communicating on behalf of a client, even where that client is his employer, is not a party to the dispute but instead is counsel for a party. In the context of attorneys employed in various capacities by party employers, there may be circumstances where it is unclear whether particular communication derives from the lawyer as counsel or from the party itself. As discussed throughout this opinion, the Committee opines that the present context of the railroad employees is not one of those cases that are hard to determine. The Committee reiterates that both the attorney department head and the attorney claims/agents represent the railroad in negotiating these claims. Accordingly, their communications with the represented, injured workers come within the prohibition of Rule 4.2 rather than the allowance in Comment One for parties to communicate directly with each other.

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

Committee Opinion
January 27, 2006

LEGAL ETHICS OPINION 1821
POTENTIAL CONFLICT OF INTEREST WHERE AN ATTORNEY IS SUING A CORPORATE BOARD WITH A MEMBER THAT IS A PARTNER OF THE ATTORNEY.

You have presented a hypothetical situation in which Attorney A represents a Trust Company, governed by a board of directors. Attorney B sits on the board. Attorney C has now joined Attorney B's firm. Attorney C represents several remainder beneficiaries of a trust administered by Trust Company regarding their complaints regarding the administration of that trust. Attorneys B and C wrote a letter to the President of the Trust Company requesting that the President and other board members screen Attorney B from any information or discussion of the dispute between Attorney C's clients and the Trust Company. The letter proposed that the board excuse Attorney B from the board meetings when this agenda item would be discussed. Specifically, the letter stated:

> Completely screening Local Attorney [i.e., Attorney B] from all information and discussion, if any, to or by members of the board of directors of your company is consistent with the Rules of Professional Conduct imposed on him and at the same time enables him to continue to discharge his duties as a director of your company with respect to all other matters.

Attorney C then filed the law suit against the Trust Company on behalf of the remainder beneficiaries. Several members of the board have raised objections to this arrangement with Attorney A, the board's attorney.

With regard to this hypothetical scenario, you have asked the following questions:

1) Is it a conflict of interest for Attorney C to sue Trust Company if his partner, Attorney B, serves on the board of directors of Trust Company?

2) If so, can the conflict be rectified by screening Attorney B from discussion and information concerning the lawsuit?

3) If there is a conflict, can the conflict be eliminated by the resignation of Attorney B from the board, or must Attorney C withdraw from his representation of the beneficiaries?

The pertinent legal authority for resolving these questions is Rule 1.7, governing concurrent conflicts of interest. Rule 1.7 states as follows:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client consents after consultation, and:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) the consent from the client is memorialized in writing.

Your first question asks whether Attorney C has a conflict of interest in bringing this action on behalf of a client against the Trust Company, when C's partner, Attorney B, sits on the Trust Company's board.[1] Critical to evaluating this issue is the imputation effect of Rule 1.10. Specifically, Rule 1.10 (a) states as follows:

> 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 and 2.10(e).

Therefore, the starting point for analysis of this question is actually whether Attorney B could represent a party suing the Trust Company. If Rule 1.7 would preclude him from taking such a case against the company upon whose board he serves, then Rule 1.10 would preclude all members of his firm, including Attorney C, from representing that client in that matter. Accordingly, the Committee will first analyze whether

FOOTNOTES

1 The Committee stresses that the analysis in this opinion rests on the facts provided; the hypothetical presents Attorney B as serving on the board but not representing the Trust Company. However, the committee notes that even if B does not consider himself counsel for the Trust Company, if his actions and statements gave fellow board members a reasonable impression that he was providing them with legal advice and protecting the legal interests of the board and company, then Attorney B would find himself with the duties and conflicts associated with legal representation. *See* LEO 1819. Those duties and conflicts would include, among other things, the duty to maintain confidentiality as prescribed by Rule 1.6. That duty of confidentiality, if owed to the Trust Company, could constitute a conflict of interest as a "responsibility to a third person" under Rule 1.7, in addition to the other sources of conflict of interest discussed in this opinion. However, as the limited facts presented do not include such a scenario, the analysis in this opinion rested on the provided premise that Attorney B does not represent the board or the Trust Company.

Attorney B could represent the remainder beneficiaries against the Trust Company.

Rule 1.7(a) establishes concurrent conflicts of interest in two types of situations. The first is not applicable here; the representation of the beneficiaries would not be directly adverse to another client of Attorney B. *See* Rule 1.7(a)(1). While the party adverse to the remainder beneficiaries is the Trust Company, Attorney B serves only as a board member and not as counsel to the company. Thus, Attorney B would not have a direct adversity concurrent conflict.

It is the second type of concurrent conflict that is at issue here. Rule 1.7(a)(2) establishes a concurrent conflict when certain kinds of interests of the attorney may materially limit the representation. Here, "responsibility to a third person or personal interest of the lawyer" results in this scenario from Attorney B's fiduciary duty to the Trust Company as a board member. Is there a "significant risk" that the fiduciary duty will materially limit the representation of the claimant? The Committee thinks so. The specifics of this fiduciary duty are determined by corporate law generally and the company's articles of incorporation specifically and thus those parameters are outside the purview of this Committee. Nevertheless, this Committee assumes a general duty of loyalty and protection would be part of that fiduciary duty, yet Attorney B would be bringing a suit to collect money damages from the Trust Company. In the simplest of terms, in one role, Attorney B would be seeking damages from the Trust Company, and in another role, Attorney B would be working to avoid paying such damages as part of a general goal of maximizing the assets/profits of the Trust Company. It is also possible that Attorney B's own personal interest could give rise to the conflict. If the subject matter of the litigation is related to decisions that Attorney B has made personally as a Board member, then he may have a natural inclination to defend the Board's (and his own) decision.

Courts have repeatedly found this tension between corporate fiduciary duty and the duty to a client as the source of a conflict of interest. *See, e.g., Berry v. Saline Memorial Hospital*, 322 Ark. 82, 907 S.W.2d 736 (Ark. 1995) (court disqualifies firm of former hospital board member from representing patient against the Board); *Allen v. Academic Games Leagues of America, Inc.*, 831 F.Supp. 785 (C.D. Calif. 1993)(court disqualifies firm of organization's advisory board member from representation of party suing that entity); *Graf v. Frame*, 177 W.Va. 282, 352 S.E.2d 31 (1986)(court disqualifies attorney who serves on a university's board of regents from representing persons with claims against faculty members); *William H. Raley Co. v. Superior Court*, 149 Cal.App.3d 1042, 197 Cal.Rptr. 232 (1983)(court disqualifies firm of bank trustee from representation of plaintiff adverse to the bank). In line with those authorities, and its own interpretation of Virginia's Rule 1.7, the Committee opines that it would be a concurrent conflict of interest for Attorney B to represent the remainder beneficiaries against the Trust Company.

As the Committee has determined that Attorney B would have a conflict of interest with this representation, the Committee must look to Rule 1.10 to determine the effect of that prohibition on Attorney C, his partner. As highlighted above, Rule 1.10(a) prohibits an attorney from accepting a representation if any other member of his firm is precluded from that representation. Therefore, as Attorney B would have conflict in representing this plaintiff, so would Attorney C.

The Committee notes that Rule 1.7 *does* have a curative provision, allowing for the "cure" of some conflicts. Rule 1.7(b) will allow a lawyer to continue with a representation that met the definition of a concurrent conflict of interest under paragraph (a) of the rule so long as each requirement of (b) is met. The second and third of your questions ask just what might cure a conflict in the present scenario.

The first requirement in Rule 1.7(b) is that the affected client must provide consent after consultation. In this instance, the "affected client" is the remainder beneficiaries, as the company is not a client. For Attorney B to be able to represent these plaintiffs, among other things, he must explain the consequences of the conflict to the plaintiffs and the plaintiffs must then consent. Rule 1.7(b)(4) requires that the attorney memorialize in writing that the consultation and consent occurred. Comment 10 to Rule 1.7 clarifies that while best practice is to actually have the client provide the consent in writing, any written memorialization (such as a note to the file) will suffice.

While consent is a requirement to cure this conflict, it is not alone sufficient. Assuming the plaintiffs provide the consent after consultation, the additional requirements of Rule 1.7(b) must be met. Rule 1.7(b)(1) requires that the lawyer must reasonably believe he can provide competent, diligent representation to the client.[2] Comment 1 to Rule 1.3 ("Diligence") elaborates upon what is required:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

As stated above, the Committee believes that Attorney B may not sue a company on whose board he serves. That conflict is imputed to Attorney C by operation of Rule 1.10. Question Two suggests Attorney B could recuse himself from all discussion and voting on the matter as a possible cure to the conflict. While such recusal is not mentioned in the rule itself, it certainly is a factor to consider in Rule 1.7(b)(1). In this instance, would recusal resolve the tension between the attorney's fiduciary duty to the board and his professional obligation to his clients? The Committee thinks that this is possible, if the board has approved of the recusal strategy, after consultation with its attorney.

FOOTNOTES

2 The Committee notes that the duty of competent, diligent representation is present for all clients, regardless of the existence of a potential conflict. *See* Rules 1.1, 1.3.

Presumably the Board would consider such matters as whether the litigation is "routine" or "non-routine" in the course of the board's business; whether the claim goes to matters that have been determined by the board, or by lower level administrative staff; and whether the claim involves matters on which Attorney B has voted or has been involved in. Under the right circumstances, the risk of diluted loyalty to this client could be significantly reduced. Attorney B's recusal could be effective in two ways. First that recusal would substantially reduce the opportunity for improper influence between Attorney B and the board. Similarly, Attorney B's recusal lessens the risk that Attorney C would be improperly loyal to the corporation at the expense of his clients. Attorney B's recusal could facilitate the competent, diligent representation of the plaintiffs.

Rule 1.7(b) has two additional requirements for an effective conflict "cure": that the conduct is legal and that the representation not involve the assertion of a claim against another client in the same proceeding. *See* Rule 1.7(b)(2) and (3), respectively. Nothing in the facts suggests that Rule 1.7(b)(2) would in any way preclude curing this particular conflict; illegality does not seem to be an issue here. The requirement of Rule 1.7(b)(3) is similarly not a block to curing this conflict. The potential conflict of interest was not between two clients, but instead between client interest and duty to a third person, namely the board. Accordingly, the requirement of Rule 1.7(b)(3) does not impede a consent cure to this conflict. If Attorney B and his board create a proper screen for him, including recusal from all discussion of the matter, then Attorney C can properly seek consent from his clients to cure what would otherwise be a conflict of interest preventing that representation.

Question Three raises two other possible cures for Attorney C's conflict. First, would the resignation of Attorney B from the board cure the conflict for Attorney C? The Committee opines that such an action is likely, but not guaranteed, to cure this conflict. The end of Attorney B's role as a board member presumably would end his fiduciary duty to the Trust Company. As he never represented the company, Rule 1.9's requirements regarding duty of loyalty to former clients would not be triggered. However, if the corporate documents establishing the specifics of the duties of Trust Company board members included some duty to avoid adverse business actions regarding the Trust Company for some period after board membership, then Attorney B's resignation would not necessarily cure this conflict. That lingering duty could possibly create the sort of conflict already established for current board membership. Similarly, if the corporate documents establish a duty to keep certain corporate information confidential, that duty may also continue beyond the term of the attorney's service on the board. The factual scenario lacks sufficient detail to make that determination. The Committee notes that absent any such fiduciary duty, Attorney B and, in turn, Attorney C would not be precluded from this representation once Attorney B resigned. However, the presence of any such duties would render Attorney B's resignation alone ineffective in curing this conflict. Nevertheless, as with the recusal option discussed with Question 2, if this resignation were combined with proper consent from the plaintiffs, Attorneys B and C could effectively cure this conflict.

The final suggestion in Question Three is that Attorney C withdraw from the representation. If Attorney C withdraws from representing the plaintiffs, no conflict would remain in need of a cure. The firm of Attorneys B and C would no longer have any members representing a party against the Trust Company.

The Committee wants to respond to two points that, while not presented as a formal question, were discussed in the materials provided with this request. The first issue is whether the income beneficiaries would have cause to object to Attorney B's firm representing the remainder beneficiaries, whose interest are adverse to the income beneficiaries. The implication is that Attorney B's firm has a special connection to the Trust Company, via Attorney B's board membership, that could give Attorney B and C's firm an unfair advantage over the income beneficiaries. The Committee notes that neither Attorney B nor Attorney C represents, nor has ever represented, the income beneficiaries in this matter. Therefore, neither attorney has ethical obligations of loyalty, competence or diligence with regard to the income beneficiaries. Accordingly, the interest of those parties is not a factor in the analysis of the potential conflicts of interest for Attorneys B and C.

Finally, the Committee wishes to note that there is an Attorney A in this scenario. Attorney A represents the Trust Company. The facts suggest that Attorney B and C together sent a letter to the company president and each board member regarding the potential conflict of interest providing advice as to what would cure the conflict. The facts do not include any contact by Attorney C with Attorney A, the company's attorney, prior to sending that letter regarding the litigation. Rule 4.2 requires that:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

With an entity client, like this company, a lawyer should treat anyone within the entity's "control group" as within the protection afforded by Rule 4.2. *See* Rule 4.2, Comment 4. The company president and board members are without question within that group. Attorney C should have only sent this letter regarding his client's litigation against the company if Attorney A had consented in advance to the communication.

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

Committee Opinion
January 11, 2006

LEGAL ETHICS OPINION 1822
WHETHER ATTORNEY, WHO LEAVES A FIRM, IS REQUIRED TO INFORM FIRM WHICH CLIENTS HE CONTACTED ABOUT HIS DEPARTURE AND ABOUT THE CONTENT OF THE COMMUNICATION.

You have presented a hypothetical involving a lawyer's departure from a firm. An associate attorney worked for six years in the trademark department and was supervised by the head of that department, who reported to the firm's Executive Committee. The associate worked primarily for firm clients, usually preparing correspondence for the signature of a firm partner but sometimes under his own signature. Many of the firm's trademark clients are foreign, especially Japanese companies and law firms. Partners in the firms have long-established relationships with firm clients, including personal relationships with some of the clients.

At the end of the six years, the associate left the firm and joined a second firm, also as an associate. At the time of his departure, there were four or five clients for whom the associate was the client originator.

After leaving the firm, the associate wrote letters to a number of clients, his own clients and the firm's clients. At least one of those letters stated as follows:

> After over 6 years, I have decided to leave First Firm to join Second Firm. The Virginia State Bar Ethics Counsel indicates that you should be advised of my departure from First Firm and that you should be informed of the following options: I can continue representing you in trademark matters, you can hire other counsel, or you can stay with First Firm.

The associate did not inform the first firm of his intention to contact the clients and did not copy the first firm on the letters to clients. After learning that the associate had been contacting clients, the first firm requested him to provide a list of the clients who were contacted and copies of those letters. The associate refused both requests.

Based on this hypothetical scenario, you have asked the Committee to opine on the following questions:

1. Whether it was unethical for the associate to refuse to provide the first firm with copies of the letters to the clients and the list of clients to whom the letters were sent, and

2. Whether the letter sent by the associate was misleading, or otherwise violated Rule 7.1 ("Communications Concerning a Lawyer's Services").

In determining the permissibility of this associate's letter-writing, this Committee will focus its remarks on whether the content and transmission of the letters conformed to the requirements of the Rules of Professional Conduct, as interpretation of those rules is the role of this Committee. See Rules of the Virginia Supreme Court, Pt. 6, IV, Para. 10. There may be other sources governing this associate's conduct, such as a possible fiduciary relationship between the lawyer and his firm, which would be governed both by the general law regarding partnerships as well as this specific firm's partnership and/or employment agreements. Interpretation of that law or those agreements would be outside the purview of this Committee. This opinion exclusively addresses the application of the Rules of Professional Conduct to this attorney's departure.1 The Committee endorses the following advice in this context:

> Before preparing to leave one firm for another, the departing lawyer should inform herself of applicable law other than the Model Rules, including the law of fiduciaries, property and unfair competition.

ABA Formal Op. 99-414.

Your first inquiry questions the permissibility of the associate refusing to provide both the list of clients contacted and the content of the letters sent. The primary ethical provisions governing this firm departure are Rule 1.4 ("Communication") and Rule 1.16 ("Declining or Terminating Representation"). Rule 1.4 provides as follows:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
>
> (c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

Rule 1.16, in pertinent part, provides as follows:

> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).

FOOTNOTES

1 The Committee notes that a serious breach of a clear fiduciary duty by an attorney in any context could rise to the level of some ethical impropriety, such as a violation of the prohibition against deliberately wrongful acts in Rule 8.4. Nevertheless, the identity of the parameters of the fiduciary duty and what constitutes a breach is, to reiterate, outside the purview of this Committee. Moreover, parameters can not be determined with the limited facts presented, especially without reference to any partnership or employment agreements in effect at this firm.

This Committee has addressed the ethical obligations of both a departing attorney and the firm he leaves in LEO 1332.[2] LEO 1332 discusses the duty of an attorney to notify clients of his departure from a firm. Rule 1.4 requires an attorney to inform clients of pertinent facts about their case and to keep them updated regarding the status of that case. That the attorney, or one of the attorneys, representing a client is departing the firm is the sort of information that must be provided to a client. LEO 1332 recommends but does not require that the firm and the departing attorney prepare a joint letter to all appropriate clients that:

(1) identifies the withdrawing attorneys;

(2) identifies the field in which the withdrawing attorneys will be practicing law, gives their addresses and telephone numbers;

(3) provides information as to whether the former firm will continue to handle similar legal matters, and;

(4) explains who will be handling ongoing legal work during the transition.

LEO 1332, citing California Bar Op. 1985-86. This notion of a joint letter is also recommended in ABA Formal Op. 99-414. In addition to the above four items for inclusion in a departure notice letter, the ABA suggests that such a letter be written as follows:

(1) the notice should be limited to clients whose active matters the lawyer has direct professional responsibility at the time of the notice (*i.e.*, the current clients);

(2) the departing lawyer should not urge the client to sever its relationship with the firm, but may indicate the lawyer's willingness and ability to continue her responsibility for the matters upon which she currently is working;

(3) the departing attorney must make clear that the client has the ultimate right to decide who will complete or continue the matters; and

(4) the departing lawyer must not disparage the lawyer's former firm.

FOOTNOTES

2 The Committee clarifies that as this opinion request is specifically about the letters used as notice to clients when an attorney departs a firm, the discussion will focus on that issue and LEO 1332's prior discussion of it. However, the Committee notes the prior LEOs, involving departing attorneys, that address other ethical responsibilities in this situation. *See* LEO 1757 (provision of client list to departing attorney to perform conflicts checks); LEO 1732 (fee arrangement regarding cases departing attorney takes with him); LEO 1556 (financial arrangements with departing attorneys); LEO 1506 (firm's refusal to provide contact information for departed attorney); LEO 1403 (handling of client files and fees when attorney departs).

The Committee endorses this advice from the ABA.

The recommendation is for a *joint* letter. However, should a departing attorney conclude that his firm is being uncooperative regarding such a letter, either by a direct refusal or by stalling the actual production and transmission of the letter, then the departing attorney should send the letter unilaterally. In the present scenario, there is no indication that the attorney ever sought that cooperation from the firm before sending his letters, but the Committee would recommend that departing attorneys, where feasible, do so. However, as noted in ABA Formal Op. 99-414:

> Unfortunately, this [joint letters] is not always feasible when the departure is not amicable. In some instances, the lawyer's mere notice to the firm might prompt her immediate termination. When the departing attorney reasonably anticipates that the firm will not cooperate on providing such a joint notice, she herself must provide notice to those clients for whose active matters she currently is responsible or plays a principal role in the delivery of legal services …

The facts provided with the present scenario do not shed light on the climate of this firm and the nature of its relationship with this attorney to allow for determination of whether a joint letter was feasible. In the facts you present, the departing associate did not write his letters until after he left the firm. In the end, the idea of a joint letter sent by a firm and departing attorney to clients about the upcoming departure is only a strong Committee recommendation, and not a requirement. Either the departing attorney or the attorneys in the remaining firm will have met their independent 1.4 obligation to provide notice to the clients of the employment change by unilaterally sending an appropriate letter.[3] Of course, a firm that would like all departures to go smoothly could develop a firm policy, with formal agreement by all partners and associates, laying out the procedure to be followed by any attorney departing the firm. Such a policy could include a requirement that a joint letter be sent, containing language in line with the discussion in this opinion and LEO 1332 regarding proper notice to clients.

In considering whether this attorney was required to provide to the firm the list of clients to whom he sent the letter as well as the content of the letter, the standard of Rule 1.16(d) governs. That standard is not one of courtesy to colleagues, but rather avoiding prejudice to clients. While certainly the departing attorney's secretive manner regarding these letters may sour his relationship with the firm, that manner is not *per se* prohibited. The issue for ethical permissibility is whether that secretiveness hurt the clients in some way. Rule 1.16(d) requires that

FOOTNOTES

3 The Committee notes from the facts that the departing attorney actually sent the letters to clients *after* departure from the firm. The limited facts provided do not allow the Committee to determine whether the timing of those letters rendered their transmission insufficient to fulfill the attorney's Rule 1.4 communication obligation to clients. *See* LEO 1332.

termination of representation includes "steps to the extent reasonably necessary to protect a client's interest." Thus, an attorney may not simply disappear; he must depart a firm and clients in a way that protects the clients. However, the Committee does not see any facts in the present scenario indicating that notice to the clients was insufficient protection such that providing the firm with a mailing list and a copy of the letters was in some way essential for client protection. So long as the letters contained the appropriate notice language, as discussed above and in LEO 1332, then the requisite protection had already occurred with no further action required, including this sharing of information with the firm.[4]

The request raises the concern as to how the firm is to ensure that the letters are appropriate in content and the list of clients contacted is not overly inclusive if the departing attorney is not required to provide that information. The Committee opines that while the departing attorney has this duty to communicate, nothing in the rules establishes a right on the part of the firm to police the exercise of that duty. The Committee sees no provision in the Rules of Professional Conduct creating an affirmative duty to provide that information to the firm. Nonetheless, the Committee recognizes that this sort of lack of cooperation serves no valuable purpose beyond continuing the hostilities between a departing attorney and the firm which he leaves.

Your second question asks whether the letters themselves were misleading. The facts do not provide the content of most of the letters but do provide language from one letter. The Committee can only answer this question with regard to that language; consideration of any other letters would only be speculative.

Your question regarding whether these letters were misleading refers to Rule 7.1 ("Communications Concerning a Lawyer's Services"). Rule 7.1 states, in pertinent part, as follows:

> (a) A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim. For example, a communication violates this Rule if it:
>
> (1) contains false or misleading information; …

Your request suggests three different aspects of the present situation that potentially render the quoted language as misleading. The first is that the letter refers to the Virginia State Bar. Specifically, the letter states:

> The Virginia State Bar Ethics Counsel indicates that you should be advised of my departure from First Firm and that you should be informed of the following options: …

The implication in your request is that this reference to the Bar's Ethics Counsel creates an impression on the reader that the firm is in some sort of ethical trouble, perhaps triggering this attorney's departure. While it is not implausible that some reader might draw that particular conclusion, there are no facts to support that such was the case. On the contrary, the language presumably is intended to formalize advice the attorney apparently obtained from Ethics Counsel as to his obligations when departing the firm, with the letter serving as the implementation of that advice. Was it necessary to explain to the clients that the attorney consulted with Ethics Counsel? No. Was it misleading to reference that consultation? No. Any confusion on the part of the reader regarding this language would be speculative at best, with nothing indicating that the attorney intended anything other than a recitation of his notice obligation.

A second aspect of the present situation that your request implies renders the letter misleading is the identity of these particular clients. Specifically, the clients are foreign citizens living overseas. Thus, the implication is that these clients would more easily be confused by the quoted language. Again, while the Committee understands the concern, the Committee finds it to be too speculative to support a determination that the attorney impermissibly used misleading language. Certainly, with all client communications, an attorney must be cognizant of any language or cultural barrier or disability calling for extra effort to ensure effective communication. However, the mere fact that these clients are from another country does not render this letter to them misleading; the language is not especially technical or complex. Absent any additional facts, the Committee does not consider the citizenship or residency of the clients alone sufficient to render this language misleading.

Finally, your request suggests that the language is misleading in that the order of options presented places the choice of staying with the firm last. While the Committee recognizes a time-honored etiquette tradition of always mentioning oneself last, the Committee finds no provision in the Rules of Professional Conduct requiring that particular courtesy in these departure letters. So long as nothing in the language attempts to persuade the client to make one choice over another regarding choice of counsel, the particular order in which the choices are presented is not an issue. The listing of the choices in the quoted language comports with proper notice requirements as articulated earlier in this opinion and in LEO 1332.

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

Committee Opinion
January 10, 2006

FOOTNOTES

4 The Committee reiterates at this point that, as discussed at the introduction of this opinion, the conclusions drawn here analyze exclusively the obligations of the attorney under the Rules of Professional Conduct and not the law of fiduciary relationships or any partnership/employment agreements that may have been in effect.

LEGAL ETHICS OPINION 1823
CAN A DEFENSE ATTORNEY WAIVE A CLIENT'S RIGHT TO A JURY TRIAL AND FAIL TO DISCLOSE TO THE COURT THAT THE CLIENT HAS NOT AUTHORIZED THE WAIVER?

You have presented a hypothetical involving a criminal defense attorney's selection of a bench trial for her client. The attorney serves as an assistant public defender and was assigned the case of Mr. Smith. At the preliminary hearing, the matter was certified for trial to the Circuit Court. Local rules require that the defense attorney advise the court prior to the next docket call whether to schedule the case as a jury trial or a bench trial. If set as a bench trial, the court does not summons a jury. The attorney had been unable to contact her client[1] and was, therefore, unable to determine if he wishes to waive a jury trial and be tried by the court. Aware that juries have imposed lengthy sentences in similar cases, the attorney assumed the defendant would not want a jury trial. She advised the Commonwealth's Attorney and the court that she wished the matter to be set for trial as a bench trial. She did not inform the prosecutor or the court that she had not spoken with her client, nor had he consented to waiving the jury trial. The case was set on the court's docket as a bench trial. On the day of the trial, with the witnesses present, the defendant was asked by the judge if he consented to waiving a jury and being tried by the court. The defendant said that he did not consent and requested a jury trial. As a result, the case had to be continued to a later date.

Regarding this hypothetical, you have asked the following questions:

1) Does the fact that the lawyer had requested that the case be set as a bench trial, thereby waiving the defendant's right to a jury trial, without express authorization from the client to do so, violate Rule 1.2(a)?

2) Does the lawyer's failure to disclose to the court that she had not consulted with her client regarding waiving a jury and that she did not have authority from her client to do so constitute an affirmative misrepresentation to the court?

Rule 1.2 governs the parameters of the scope of an attorney's authority. Rule 1.2 provides as follows:

> (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
>
> (b) A lawyer may limit the objectives of the representation if the client consents after consultation.
>
> (c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.
>
> (d) A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.
>
> (e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Specifically, the rule addresses which decisions may be made by the attorney and which are within the exclusive purview of the client. In many instances, as indicated by the language of paragraph (a) of the rule, the determination of what decisions are for the lawyer and which are for the client involves a careful analysis of means versus objectives. *See e.g.*, LEO 1816 (determining whether an attorney must respect a client's directive to put on no defense where the client is hoping for the death penalty). The present situation is not such a case. Unlike the decision to be made in LEO 1816, the present situation is addressed expressly on the face of the rule. Rule 1.2 (a) highlights the decision "whether to waive a jury trial" as incontrovertibly one to be made by the client. It is outside the scope of an attorney's authority to decide that constitutional right for his client; the attorney must consult with the client as to the client's choice regarding a jury trial versus a bench trial.

When the attorney in the present scenario assumed her client would like to waive a jury trial, failed to consult with him prior to informing the court on the issue, and failed to consult with her client even *after* informing the court of the jury trial waiver, this attorney was acting outside the scope of her authority. Such unilateral action regarding the right to a jury trial was in violation of Rule 1.2.

Your second question asks, in light of the Rule 1.2 violation, whether the attorney's remarks to the court constituted an impermissible misrepresentation under Rule 3.3(a)(1). That provision establishes the following prohibition: "An attorney shall not knowingly make a false statement of fact or law to a tribunal." Similarly, Rule 8.4(c) prohibits an attorney from engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law."

FOOTNOTES

1 Pursuant to Rule 1.16(4), the Committee notes that the appropriate course of conduct for an attorney when faced with the failure of the client to cooperate by failing to maintain contact is to move the Court for permission to withdraw. The facts presented in the hypothetical do not provide sufficient information for an opinion on that course of conduct.

In the present scenario, the attorney states to the court that she wishes to have the client's case set for a bench trial. On its face and with no context, the statement does not seem to be false or involve misrepresentation; she does in fact wish to have a bench trial. However, the remark must be considered in context. The following authorities, among others, each contribute to the common understanding by the criminal bar that a client can only waive the constitutional right to a jury trial through voluntary, intelligent consent:

1) Rule 1.2, as discussed above;

2) *Jones v. Commonwealth*, 24 Va. App. 636, 484 S.E.2d 618 (1997)(noting that an attorney may not, without client authorization, surrender an accused's right to a jury trial);

3) Virginia Code Section 19.2-257 (allowing for bench trials for felony cases only where the accused consents after being advised by counsel); and

4) Rules of the Virginia Supreme Court, Rule 3A:13(b) (allowing for a bench trial in Circuit Court only after the court determines that the accused's consent was voluntarily and intelligently given).

The Committee opines that is unlikely that this defense attorney, employed as a public defender, was ignorant of this established legal principle. Assuming, therefore, that the attorney was cognizant of the requirement for proper consent from the client, the Committee opines that the attorney was presenting a falsehood, a misrepresentation to the court when she elected the bench trial on behalf of her client. The Committee notes Comment 2 to Rule 3.3, stating in pertinent part that "there are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The Committee considers the present scenario to present such circumstances. When this defense attorney elected a bench trial on behalf her client, the prosecutor and the court would each have reasonably relied upon that statement as indicating that she had consulted with her client to make that election, as such consultation is a prerequisite to electing against the right to a jury trial. Thus, election of a bench trial together with a failure to disclose the lack of client consent means that this representation to the court may, under certain circumstances, constitute an affirmative misrepresentation.

The only other, less likely, explanation for this attorney's statement, despite no consent from her client, would be that she in fact was completely ignorant of the requirement that the client must provide voluntary, intelligent consent. The Committee finds such ignorance of this established principle unlikely in an attorney whose practice is exclusively criminal defense, such as a public defender. If that nonetheless were the case, there could be no knowing falsehood or misrepresentation. However, such ignorance of the constitutional rights of a criminal defendant would raise serious question as to whether the attorney had met her duty of competence under Rule 1.1.[2] The limited facts provided of course do not establish conclusively whether this attorney was operating out of ignorance or if instead she was knowingly making a false representation. If she knew that proper consent was required, that she did not have it, and that her election statement would convince the court and the prosecutor that she *did* have that consent, then her failure to disclose that she had not discussed the matter with her client was an impermissible, affirmative misrepresentation in violation of both Rules 3.3 and 8.4.

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

Committee Opinion
January 10, 2006

FOOTNOTES

2 Rule 1.1 states as follows, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

LEGAL ETHICS OPINION 1824
CONFLICT OF INTEREST – ATTORNEY TO SERVE AS COMMISSIONER IN CHANCERY IN LIGHT OF PRIOR REPRESENTATIONS.

You have presented a hypothetical in which an attorney has been appointed to serve as Commissioner in Chancery in a suit brought by a homeowner's association to enforce its lien for unpaid assessments. The lot owner ("Defendant A") and several creditors are defendants. The lot owner's daughter, ("Defendant B"), who is one of the defendants by virtue of being a beneficiary of a deed of trust, has alleged a conflict in the Commissioner's appointment based upon the following two incidents:

> Incident #1: Two years prior to the Commissioner's appointment, the Commissioner's law partner represented a realtor in connection with a real estate ethics complaint filed by Defendant B. The realtor worked for the realty company associated with the development where Defendant's A's lot is located. A letter of reprimand was issued against the realtor for failing to provide Defendant B with a copy of the ratified contract of purchase and commission reduction agreement upon signing or initialing. All other allegations of wrongdoing by the realtor were dismissed. The representation was concluded two to three weeks prior to the Commissioner's association with the law partner and the formation of their law firm. The Commissioner was unaware of the representation prior to Defendant B's allegations of a conflict.
>
> Incident #2: Several years ago (the exact date is unknown), Defendant B consulted with one of the other defendants, an attorney then in private practice, regarding a possible fraud claim against Defendant A. The alleged basis of the fraud claim is unknown. Defendant B believes that the attorney with whom she consulted, in turn, contacted the Commissioner's law partner about her case. The law partner has no recollection of the matter.

With regard to this hypothetical, you have asked the following question:

> Is it a conflict of interest for this attorney to serve as Commissioner in Chancery in this case or would it be impermissible as involving the appearance of impropriety?

The governing provision for this question is Rule 1.11[1], which in pertinent part, addresses attorneys serving in public roles and their potential conflicts from private practice. Specifically, Rule 1.11(d)(1) states as follows:

> Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not: (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter.

An application of this provision to this attorney serving as Commissioner in Chancery means that the attorney could not work as Commissioner on the unpaid assessments matter if he participated "personally and substantially" in that assessment case in his private practice.

The hypothetical presents two possible sources of conflict under Rule 1.11(b). First is Incident #1, which involves work done by a partner of the Commissioner on behalf of one of the defendants in the assessment case. The partner assisted that defendant in bringing a complaint against a realtor, who was associated with the development where the lot in the assessment case is located. Rule 1.11(b) only creates a conflict where the attorney in the public role himself had worked on the matter in question; hence, the descriptor "personally." This is not a provision imputing work done by other members of the government officer's firm to that officer; the conflict is personal to him. As this Commissioner did not at any time work on this assessment collections matter either personally or substantially, Incident #1 does not create a conflict for his service as Commissioner.

Similarly, Incident #2 is also not the source of a conflict of interest here. That incident is the not the subject matter of the Commissioner's service: the assessments case. Rather, the second incident involved fraud charges brought by one person against another, both of whom are now defendants in the assessment case. Even if the fraud case and the assessments case are somehow so inextricably linked as to count as the same "matter", the Commissioner never worked on the fraud case.[2] Again, the Commissioner never worked personally or substantially on the assessment case in private practice; accordingly, he does not have a conflict of interest under Rule 1.11.

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

Committee Opinion
January 10, 2006

FOOTNOTES ——————————

1 Note that under the current Rules of Professional Conduct, Rule 1.11 is the governing provision for potential conflicts of interest for attorneys in the public sector. That provision, in effect since January 1, 2000, does not contain the phrase "appearance of impropriety" which had been found in the title of the predecessor to Rule 1.11, DR 9-101. As that phrase does not appear in the current rules, this opinion does not use that language to determine whether or not there is a conflict of interest in this Commissioner's service.

2 Note that Rule 1.11 contains the following definition of "matter":

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

While the Committee assumes that the assessment enforcement case is not the same matter as the fraud case or the realtor complaint, the hypothetical lacks sufficient detail to make an unqualified, definitive determination of that point.

FORFEITURE OF LICENSES

The licenses of the following members of the Virginia State Bar are forfeited from the practice of law for failure to comply with Section 54.1-3914, Code of Virginia, Title 54.1, Professionals and Occupations, as indicated below. We have attempted to contact these members at their last address listed with the Virginia State Bar; however, in some instances, this has not been effective. In an effort both to advise the bench and bar of these forfeitures, and to establish contact with those persons to whom our notices may not have been delivered, the names of those whose licenses have been canceled are being published in this issue of the Virginia Lawyer Register. Any member knowing the present location and/or practice status of any person on the list should contact the Virginia State Bar as soon as possible. (These lists were submitted for publication on January 31, 2006, and are current as of January 31, 2006.)

FORFEITURE OF LICENSE FOR FAILURE TO PAY ANNUAL MEMBERSHIP FEES

Section 54.1-3914, Code of Virginia, Title 54.1, Professions and Occupations

Active

Agnes Karen ALEXIS, Upper Marlboro, MD
David P. L. BERRY, Norfolk, VA
David Michael BISHOP, Salt Lake City, UT
Robert C. BLACK, Dunn Loring, VA
Gerald Manly BOWEN, Herndon, VA
Kerri Lynn BOYER, McLean, VA
Paul James DEAN, Alexandria, VA
Susan Paige ELDRIDGE, Reston, VA
Scott Whitfield FANCHER, Tampa, FL
William Ray FORD, Camp Springs, MD
James Sterling GREEN Jr., Danville, VA
Ronald Thomas GREENE, Fairfax, VA
David Alan HORNE, Alexandria, VA
Matthew Dustin HORWITT, Washington, DC
Joseph P. KILGORE, Amherst, VA
Thomas Patrick KRATMAN, Blacksburg, VA
James Roy LONGACRE, Fernandina Beach, FL
Wade Paul LUTHER, Washington, DC
Robert Marshall MERRIMAN Jr., Richmond, VA
Robert William O'BRIEN, Fairfax, VA
Daniel Stephen ORCI Jr., Washington, DC
Anita Meta Jo REDWEIK, Twelve Mile, IN
Carrie Munarin RISATTI, Richmond, VA
John W. RUSSELL, Midlothian, VA
Ryan James STAMPER, Bellevue, WA
Aaron Justin WALKER, Washington, DC

Associate

Guilford Dudley ACKER Jr., Flagstaff, AZ
Kara Eyn ALBERT, Atlanta, GA
Stacey Ann ARTHUR, Fredericksburg, VA
Melissa Ann AUGUSTI, Garwood, NJ
Margaret Louis BASSETT, Charlottesville, VA
Thomas Joseph BEPKO Jr., Westport, CT
Robert Arthur BERNARDON, Waterford, MI
Jessica L. BETTENCOURT, Duxbury, MA
Martin P. BLACK, Arlington, VA
Sanjoy Kumar BOSE, Washington, DC
James Creighton BRASHARES, Vienna, VA
David W. BRINKMAN, York Beach, ME
Kelly Ann BROWN, Washington, DC
Jay Daniel BROWNSTEIN, Tucker, GA
Ronald T. BUCKINGHAM, Jacksonville, FL
John W. CHEYNEY, New York, NY
Susan Jean COPLIN, McLean, VA
Kimber Lee CRAMER, Kalamazoo, MI
Norwood H. DAVIS Jr., Richmond, VA

Associate

Marshall Clark DERKS, APO, AE
Holly Beatrice Kambrod DESMARAIS, Vienna, VA
Eugene M. DESVERNINE, Richmond, VA
Frank Joseph DONATELLI, Alexandria, VA
Patricia May Ridgway DROST, Alexandria, VA
Allan Blakeman EARLY, Alexandria, VA
Robert Kingston EDMUNDS, San Diego, CA
James Kevin EDMUNDSON, Dallas, TX
Teresa Lee M. FLANAGAN, Atlanta, GA
Linda Carrier FRAZEE, Bainbridge Island, WA
Jay P. FRIEDENSON, Morrisville, VT
Bernard L. FRIEDMAN, Columbia, SC
Leo I. GEORGE, Washington, DC
Jon Craig GILLILAND, San Francisco, CA
Joel S. GOLDHAMMER, Rydal, PA
Margaret Mary GROSCUP, Potomac Falls, VA
Barry L. HAASE, Bethesda, MD
Nancy Ellen HALE, Jacksonville, FL
Elizabeth Alricks HANSEN, Burlington, NC
Casby HARRISON III, Providence, RI
Jeffrey Paul HART, Burke, VA
Brian William HEALEY, New York, NY
William D. JACKSON, Dallas, TX
Emily Nicole JOHNSON, Norfolk, VA
John Crane KING, Plano, TX
Christopher Frederick KLINK, Henderson, NV
John L. KLUTTZ, Avalon, NJ
Jon Stanley KUBIAK, Chesapeake, VA
Robert A. LEGGETT III, Cary, NC
Virginia Sutherlin LEWEY, Chicago, IL
Mary German MANLEY, Charlottesville, VA
Dayna Bowen MATTHEW, Lexington, KY
Michael Anthony McKENZIE, McLean, VA
Susan Naomi MEEHLING, Broad Run, VA
Paula Irene MELL, Washington, DC
Erik Scott MEYER, Arlington, VA
John P. MILLIGAN Jr., Fort Myers, FL
Judith King MINTEL, Bloomington, IL
Gerald C. MITCHELL Jr., Springfield, VA
Beth Elise MORROW, Greenbrae, CA
Kathleen Browe MURPHY, Milwaukee, WI
Joann Silliman NOONAN, Charleston, SC
Robert Michael NOTIGAN Jr.,Washington, DC
Douglas E. OLSON, San Diego, CA
Vernon Bernard PARKER, Paradise Valley, AZ
Ray Rushton PAUL Jr., Wynnewood, PA
Mark Baker PEABODY, Neptune, NJ

Robert Lee POFF, Chillicothe, OH
Michelle Herring POOLE, Charlottesville, VA
Seth Brian POPKIN, Bethesda, MD
Sarah POSNER, Alexandria, VA
Shampa Yenumula REDDY, Franklin Park, NJ
Michelle Fasciana RIDER, Newburgh, NY
Colleen Rachel ROBERTSON, Washington, DC
Katherine Nordhoff ROBISON, Richmond, VA
Joseph ROHER, New York, NY
Bruce Frederick RUBIN, Merrick, NY
Dale RUBIN, Grundy, VA
Nancy Cross SCHNEIDER, Winston-Salem, NC
Linda Pendleton SEABORN, San Francisco, CA
John Carroll SHANAHAN, Arlington, VA
Thomas A. SHIELS, Dover, DE
Teresa Mary SHUTE, Voorhees, NJ
Deborah Esther SIEGEL, Randnor, PA
Richard Ian SLIPPEN, Alexandria, VA
Audra Joy SMALL, Washington, DC
Mary Jeanette SMITH, Columbus, OH
Bethany June SPIELMAN, Springfield, IL
Leslie Shanklin SPITALNEY, Alexandria, VA
Kit Jon STRAUSS, Potomac, MD
Michael Andrew SWIM, Clifton, VA
Norihiro TAKEUCHI, Fukui, JAPAN
James Stephen TAYLOR, Valrico, FL
Dudley Eugene THOMPSON Jr., Rockville, MD
Michael R. VAN DER LINDEN, Stamford, CT
William Conrad VON RAAB, Rochelle, VA
Lawrence Thomas ZEHFUSS Jr., Denver, CO
William Arnold ZOLBERT, Bloomfield, MI

Respondent's Name	Address of Record (City/County)	Action	Effective Date	Page
Circuit Court				
Jeffrey Bourke Rice, Esquire	Fairfax County, VA	Revocation	October 19, 2005	2
Disciplinary Board				
Mikre-Michael Ayele	Arlington, VA	12 Month + 1 Day Suspension	December 16, 2005	7
Burman Aaron Berger	Rockville, MD	Revocation	November 18, 2005	11
Patrick Ross Bynum Jr.	Mechanicsville, VA	Public Reprimand	Decmber 21, 2005	12
Kristen Dawn Dean	Norton, VA	5 Year Suspension w/ Terms	December 16, 2005	14
Todd Jay French	Richmond, VA	Revocation	September 23, 2005	19
Walter Franklin Green IV**	Harrisonburg, VA	60 Day Suspension	January 10, 2006	24
Thomas Wesford Kinnane	Arnold, MD	Suspension	January 27, 2006	n/a
Charles Gilman Lowry	Lynchburg, VA	Suspension	January 26, 2006	n/a
James Bryan Pattison	Sterling, KS	1 Year Suspension	December 29, 2005	n/a
Bonar Mayo Robertson	Boyds, MD	90 Day Suspension	November 21, 2005	26
Brian Charles Shevlin	Fairfax, VA	Public Admonition	November 18, 2005	29
Andrew Mark Steinberg	Woodbridge, VA	60 Day Suspension w/Terms	December 28, 2005	n/a
Bernice Marie Stafford Turner	Farmville, VA	Public Reprimand w/Terms	December 27, 2005	34
John Joseph Vavala	Virginia Beach, VA	5 Year Suspension	November 18, 2005	39
District Committees				
Edgar Hampton DeHart Jr.	Galax, VA	Public Reprimand	December 2, 2005	46
David Michael Gammino	Richmond, VA	Public Admonition w/Terms	December 20, 2005	48
Robert John Harris	Leesburg, VA	Public Reprimand w/Terms	December 13, 2005	55
Robert John Harris	Leesburg, VA	Public Reprimand w/Terms	December 13, 2005	61
Robert John Harris	Leesburg, VA	Public Reprimand	December 13, 2005	67
Robert John Harris	Leesburg, VA	Public Reprimand	December 13, 2005	73
Robert John Harris	Leesburg, VA	Public Reprimand w/Terms	December 13, 2005	78
Cost Suspension				
Kenneth Dennis Sisk	Richmond, VA		February 3, 2006	n/a
Interim Suspensions—Failure to Comply w/Subpoena				
Kahlil Wali Latif	Midlothian, VA	Suspended January 23, 2006	Lifted February 16, 2006	n/a
Kenneth Paul Mergenthal	Fredericksburg, VA	Suspended December 28, 2005	Lifted January 9, 2006	n/a
Dion Francis Richardson	Lynchburg, VA	Suspended December 28, 2005	Lifted January 25, 2006	n/a
Impairment Suspension				
Timothy Everett Miller	Suffolk, VA	Disciplinary Board	January 12, 2006	n/a

**Respondent has noted an appeal with the Virginia Supreme Court.*
***Virginia Supreme Court granted stay of suspension pending appeal.*

VIRGINIA :
IN THE CIRCUIT COURT OF FAIRFAX COUNTY

VIRGINIA STATE BAR, ex rel.
FIFTH DISTRICT SECTION II COMMITTEE,
Complainant/Petitioner,
v.
JEFFREY BOURKE RICE, ESQUIRE,
Respondent.
Case Number 2005-2470

MEMORANDUM ORDER

ON THE 19th day of October, 2005, this matter came before the Three-Judge Court empanelled on June 23, 2005 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, consisting of the Honorable Benjamin N.A. Kendrick, Judge of the Seventeenth Judicial Circuit and Chief Judge of this Three-Judge Court, the Honorable H. Selwyn Smith, Retired Judge of the Thirty-first Judicial Circuit, and Honorable Joseph E. Spruill, Jr., Retired Judge of the Fifteenth Judicial Circuit of Virginia.

Noel D. Sengel, Senior Assistant Bar Counsel, appeared on behalf of the Virginia State Bar, and the Respondent, Jeffrey Bourke Rice, Esquire, appeared *pro se*.

WHEREUPON, a hearing was conducted upon the Rule to Show Cause issued against the Respondent, which directed him to appear and to show cause why his license to practice law in the Commonwealth of Virginia should not be revoked or suspended. Prior to the presentation of its evidence, the Bar moved the court to dismiss without prejudice VSB No. 04-052-2059 because the complaining witness was unable to appear, which motion was granted.

THEREAFTER, the Bar presented its evidence in the remaining three matters, followed by the Respondent's presentation of his evidence in those matters. At the conclusion of all of the evidence, the Court heard argument, retired to deliberate, and returned to issue its rulings and findings in open court.

The Court unanimously found by clear and convincing evidence as follows:

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

As to VSB Docket Number 04-052-0575

2. From 1997 through 2001, the Respondent failed to pay his Business Professional and Occupational License (BPOL) taxes to the City of Fairfax, Virginia. On February 26, 2002, the Complainant, Kyle E. Skopic, Esq., attorney for the City of Fairfax, sent the Respondent a letter demanding that the Respondent pay his delinquent BPOL taxes. The Respondent failed to respond and on March 29, 2002, Ms. Skopic filed a warrant-in-debt against the Respondent on behalf of the Treasurer of the City of Fairfax, demanding payment. A judgment against the Respondent was entered on May 2, 2002.

3. On August 13, 2002, Ms. Skopic filed a Summons to Answer Interrogatories against the Respondent, returnable to September 10, 2002. The Respondent received personal service of the Summons on August 28, 2002.

4. On or about September 9, 2002, the Respondent left a voice mail message for Ms. Skopic, informing her that he was unable to appear in court on September 10, 2002, and requesting that she continue the interrogatories. Ms. Skopic appeared in court on September 10, 2002 and continued the interrogatories to October 8, 2002. She called the Respondent and advised him of the new date and memorialized the phone conversation in a letter. Ms. Skopic also filed a Notice with the Court, setting forth the new date as October 8, 2002. The Respondent received personal service of this Notice on September 30, 2002.

5. On October 8, 2002, the Respondent did not appear in court. A Rule to Show Cause was authorized by the Court and on October 9, 2002, Ms. Skopic filed a Show Cause Summons, returnable on November 7, 2002. The Respondent received personal service of this Summons on October 22, 2002.

6. On November 7, 2002, the Respondent again did not appear in court. The Court authorized a capias and on November 8, 2002, Ms. Skopic filed it. On December 2, 2002, the Respondent was arrested and released by the Magistrate on a $1,000.00 personal recognizance bond.

7. The capias against the Respondent had a return date of January 9, 2003. On that date, the Respondent again failed to appear in court, and on January 13, 2003, Ms. Skopic filed another capias, returnable on February 5, 2003.

8. On January 21, 2003, the Respondent called Ms. Skopic and claimed that he had forgotten the return date of the first capias. Ms. Skopic informed him that there was a second capias outstanding. The Respondent was arrested that day on the second capias. He was released after a bonding company paid a secured bond of $2,000.00.

9. On February 5, 2003, the Respondent and Ms. Skopic appeared in court on the second capias and the underlying interrogatories. During the interrogatories, the Respondent gave Ms. Skopic a check in the amount of $1,000.00 as partial payment of his overdue tax bill. The account holder on the check was "Jeffrey B. Rice, Debtor in Possession." Ms. Skopic asked the Respondent if he was in bankruptcy and, if so, whether or not her acceptance of his payment would violate any provisions of his pending bankruptcy. The Respondent, while still under oath taken for the interrogatories, assured her that his bankruptcy had been dismissed. The judge continued sentencing on the capias until February 19, 2003. The interrogatories were dismissed as satisfied.

10. The Respondent's check in the amount of $1,000.00 for payment of his delinquent taxes was returned for insufficient funds. Ms. Skopic notified the Respondent and, at his request, redeposited the check, which then cleared.

11. On February 19, 2003, the Court ordered the Respondent to pay Ms. Skopic $400.00 in attorney's fees, and continued the case until April 30, 2003 for dismissal if the Respondent paid the remainder of the overdue taxes. On April 29, 2003, the Respondent paid the balance of the taxes and the judgment was marked satisfied. On April 30, 2003, despite the fact that the Respondent again failed to appear, the Court dismissed the capias against him.

12. Subsequently, Ms. Skopic checked the website of the United States Bankruptcy Court, Eastern District of Virginia, Alexandria Division, and found that, in fact, the Respondent's bankruptcy, Docket Number 01-10552RGM, was still pending. A Notice of Rescheduled Meeting of Creditors had been entered on February 4, 2003, the day before the Respondent had, under oath, informed Ms. Skopic that his bankruptcy had been dismissed.

The Court finds that such conduct constitutes misconduct in violation of the following Rules of Professional Conduct:

RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

RULE 4.1 Truthfulness In Statements To Others

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

(a) Make a false statement of fact or law.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer.

(c) engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation.

As to VSB Docket Number 04-052-3042:

13. In 2003, the Respondent as retained counsel represented Steve Kraig Bratcher on grand larceny and embezzlement charges in the Circuit Court of Loudoun County. Mr. Bratcher was convicted and sentenced to incarceration. Pursuant to Mr. Bratcher's request, the Respondent filed a Notice of Appeal in December of 2003.

14. The Respondent did not file the transcript of Mr. Bratcher's trial or a statement of facts with the Court of Appeals of Virginia. On March 15, 2004, the Court of Appeals ordered the Respondent, by March 30, 2004, to show cause why Mr. Bratcher's appeal should not be dismissed by stating any questions which could be considered without resort to a transcript or statement of facts. The Respondent failed to respond to this Show Cause, and the Court of Appeals dismissed Mr. Bratcher's appeal on April 6, 2004.

15. The Respondent states that the friend of Mr. Bratcher who was supposed to pay the Respondent's fee never paid the fee and therefore, the Respondent did not go forward with Mr. Bratcher's appeal. However, the Respondent never informed Mr. Bratcher that he was not going forward with the appeal, and never filed a motion with the Court to withdraw from the case. Mr. Bratcher could have sought court-appointed counsel had he known that the Respondent had abandoned his appeal.

The Court believes that such conduct constitutes misconduct in violation of the following Rules of Professional Conduct.

RULE 1.3 Diligence

(b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

RULE 1.16 Declining Or Terminating Representation

(c) In any court proceeding, counsel of record shall not withdraw except by leave of court after compliance with notice requirements pursuant to applicable rules of court. In any other matter, a lawyer shall continue representation notwithstanding good cause for terminating the representation, when ordered to do so by a tribunal.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).

As to VSB Docket Number 05-052-1543

16. In late 2002, the Complainant, Danielle C. Douglas, hired the Respondent to represent her six-year-old daughter in a personal injury claim stemming from a school bus accident, which occurred on November 18, 2002 and in which Ms. Douglas's daughter sustained a broken nose. Ms. Douglas faxed all the documents regarding her daughter's injury to the Respondent at his request, and the Respondent informed her that he would resolve the matter shortly. Months passed and Ms. Douglas did not hear from the Respondent. Upon occasion, Ms. Douglas called the Respondent to check on the status of her daughter's case. Ms. Douglas was frequently unable to reach the Respondent by telephone and usually had to leave messages on his answering machine which he rarely returned.

17. In June of 2004, the Respondent called Ms. Douglas and informed her that he had settled her case for $2,000.00, and had received a check for reimbursement of her daughter's medical expenses in the amount of $562.00. The Respondent asked Ms. Douglas to come to his office to sign both checks. The settlement check was payable to the Respondent and Ms. Douglas jointly. The medical reimbursement check was payable to Ms. Douglas only. Ms. Douglas went to the Respondent's office and signed the checks and a settlement and release form. The Respondent gave Ms. Douglas the medical reimbursement check and informed her that he would mail to her the portion of the settlement check for her daughter after he paid himself

his one-third fee, to which they had orally agreed. There was no written fee agreement in the case. Ms. Douglas never received the check from the Respondent in the mail.

18. Thereafter, Ms. Douglas called the Respondent weekly to inquire about the check. The Respondent told her repeatedly that he would mail the check to her. Approximately six weeks after she signed the settlement and release form, Ms. Douglas again reached the Respondent by telephone and informed him she was coming by his office to pick up the check rather than waiting for him to fulfill his promise to mail it. She picked up the check at the Respondent's office. The check was dated July 23, 2004, made out for the amount of $1,146.00, and drawn on the Respondent's office operating account. The check should have been drawn on the Respondent's trust account and made out for the amount of $1,333.33, representing two-thirds of the settlement check. In addition to taking one-third of the settlement as a fee, the Respondent had taken one-third of the medical reimbursement funds as well, though collecting them was a mere ministerial act. The Respondent did not present Ms. Douglas with a disbursement sheet showing how the funds were to be disbursed or how his fee had been calculated at that time or any other.

19. Ms. Douglas deposited the check from the Respondent's operating account into her account and on August 4, 2004, the check was returned for insufficient funds. Ms. Douglas deposited the check a second time and it cleared on September 13, 2004. In the meantime, however, Ms. Douglas's checking and saving accounts were frozen and she was unable to use her accounts because of the deficits caused by the Respondent's dishonored check. In addition, she incurred bank charges because of the dishonored check.

20. Ms. Douglas filed her complaint with the Bar on October 8, 2004. On October 25, 2004, the Bar issued a subpoena requiring the Respondent to appear in the Bar's office on November 16, 2004 with copies of his file in Ms. Douglas's case and his relevant bank records. The Respondent received personal service of the subpoena on October 28, 2004. The Respondent sent the copies of the file but no bank records as required. Beginning on November 22, 2004 and continuing until January 31, 2005, the Bar Investigator and Bar Counsel contacted the Respondent repeatedly to obtain copies of the relevant bank records. The Respondent repeatedly promised to send the records. On January 31, 2005, the Respondent finally produced the relevant bank records which had been subpoenaed for November 22, 2004.

21. When questioned about this matter by the Bar Investigator, the Respondent admitted that he placed Ms. Douglas's settlement check in his operating account, not his trust account. The Respondent's operating account records showed that on numerous occasions, the Respondent's bank balance fell well below the $1,333.33 that the Respondent owed Ms. Douglas.

The Court finds that such conduct constitutes misconduct in violation of the following Rules of Professional Conduct.

RULE 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

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) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall state in writing the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

RULE 1.15 Safekeeping Property

(a) All funds received or held by a lawyer or law firm on behalf of a client, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution may be deposited therein; or

(2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(c) A lawyer shall:

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; and

(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

RULE 8.1 Bar Admission And Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application, in connection with any certification required to be filed as a condition of maintaining or renewing a license to practice law, in connection with a disciplinary matter, shall not:

(c) fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6; or

(d) obstruct a lawful investigation by an admissions or disciplinary authority.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(c) engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation;

FOLLOWING the Court's announcement of its findings of fact and of misconduct, the Court received evidence as to the Respondent's prior record and as to the ABA Standards for Imposing Lawyer Discipline and heard argument from both the Bar and Respondent as to the appropriate sanction to be imposed. After due deliberation, based upon the Respondent's lengthy prior record and the nature of the misconduct proved, the Court by unanimous decision

ORDERED that the Respondent's license to practice law in the Commonwealth of Virginia be revoked; and it is further

ORDERED that the terms and provisions of the Summary Order entered by this Court at the conclusion of the hearing conducted on October 19, 2005, be, and the same hereby are, merged herein; and it is further

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

ORDERED that in compliance with Rule 1:13 of the Rules of the Virginia Supreme Court shall be dispensed with by this Court as allowed by Rule 1:13 in this Court's discretion; and it is further

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

AND THIS ORDER IS FINAL.
ENTERED this 21st day of , 2005.

Benjamin N.A. Kendrick,
Chief Judge of the Three-Judge Court

H. Selwyn Smith,
Judge, Retired

Joseph E. Spruill, Jr.
Judge, Retired

VIRGINIA:
BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
MIKRE-MICHAEL AYELE
VSB DOCKET NO. 06-041-0284

ORDER OF SUSPENSION

THIS MATTER came on to be heard on December 16, 2005, before a panel of the Virginia State Bar Disciplinary Board (the "Board") composed of James L. Banks, Chair, V. Max Beard, lay member, Sandra L. Havrilak, Robert E. Eicher, and Bruce T. Clark.

The Virginia State Bar ("VSB") was represented by Seth M. Guggenheim, Assistant Bar Counsel. Mikre-Michael Ayele (the "Respondent") appeared pro se. Donna Chandler, Registered Professional Reporter, of Chandler & Halasz, P. O. Box 9349, Richmond, Virginia 23227, (804) 730-1222, having been duly sworn by the Chair, reported the hearing and transcribed the proceedings.

The Chair inquired of the members of the panel whether any of them had any personal or financial interest or any bias which would preclude, or could be perceived to preclude, their hearing the matter fairly and impartially. Each member of the panel and the Chair answered the inquiry in the negative.

The matter came before the Board on a District Committee Determination (Certification) of the Fourth District – Section I Committee of the VSB.

Bar Counsel and the Respondent stated that they were prepared to proceed and waived the Chair's explanation of the hearing procedure. Bar Counsel and the Respondent presented opening statements.

VSB Exhibits 1 through 6 were admitted without objection.

Bar Counsel stated that, in accordance with the provisions of the Subcommittee's Private Reprimands in VSB Docket No. 05-041-0381 and in VSB Docket No. 05-041-0524, respectively, the Respondent had stipulated the Findings of Fact and admitted the violations of the Rules of Professional Conduct as alleged in the Certification to the Board. Bar Counsel presented no further evidence. The Respondent presented his own testimony. Bar Counsel and the Respondent presented closing argument.

As to VSB Docket No. 05-041-0381:

I. Findings of Fact

Upon consideration of the evidence presented and arguments of Bar Counsel and the Respondent, the Board finds that the following facts have been proved by clear and convincing evidence, to wit:

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

2. After having engaged the Respondent for other immigration matters in 1998, Tigist T. Debebe (hereafter "Complainant") again retained the Respondent on March 16, 2000. According to a written retainer agreement of that date, Respondent was to "process a relative petition for Complainant and her children by Complainant's husband, a motion for remand with the Board of Immigration Appeals and an adjustment application with the Immigration Court."

3. At a hearing conducted in Complainant's matter before an immigration judge on September 9, 2003, the Respondent was instructed by the judge to file a "waiver" document within the following ten days. The judge also noted in writing on a notice in the file: "212i waiver application due 9/19/03".

4. Notwithstanding the oral directive and written notation of the judge the Respondent failed to file the required document, as required. Such failure led to entry of a deportation order, denial of Complainant's application to adjust status, and cancellation of a scheduled hearing. Subsequent to these rulings adverse to the Complainant, she telephoned the Respondent repeatedly, but he failed to return her calls.

5. The Respondent filed a "Motion to Reopen," together with the required waiver, and representation was assumed by successor counsel.

6. During the course of an investigation conducted by the Virginia State Bar, the Respondent attributed his failure to respond to Complainant's calls to stress and depression.

II. Misconduct

The Certification to the Board alleges, and the Respondent admitted in the Subcommittee's Private Reprimand, a violation of the following Rules of Professional Conduct, to wit:

RULE 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

RULE 1.16 Declining Or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client[.]

III. Disposition

Upon consideration of the foregoing, following deliberation in closed session, the Board reconvened in open session, and the Chair announced the Board found that the VSB had proved by clear and convincing evidence a violation of Rule 1.3(a), Rule 1.4 (a), and Rule 1.16(a) as alleged in the Certification.

As to VSB Docket No. 05-041-0524:

IV. Findings of Fact

Upon consideration of the evidence presented and argument of Bar Counsel and the Respondent, the Board finds that the following facts have been proved by clear and convincing evidence, to wit:

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

2. On March 16, 2003, Mr. Asrat A. Cheru (hereafter "Complainant") retained the Respondent to represent him in immigration matters. The Respondent was paid the sum of $3,000.00 for such representation.

3. During the course of the representation before the United States Court of Appeals for the Fourth Circuit, the Respondent failed to file timely a docketing statement, counsel of record form, and disclosure statement, as a consequence of which the Complainant's case was dismissed on May 28, 2003.

4. Subsequently, the Court permitted the Complainant's case to be reopened and he was granted leave to file a docketing statement out of time. However, on January 6, 2004, the Court issued a notice advising that the Complainant had committed a briefing default, and establishing that a brief was due on or before the 15th day thereafter.

5. The Respondent failed to file the required brief on Complainant's behalf, and the Court terminated the case of January 30, 2004, based on the default.

6. The Respondent failed to advise the Complainant in a timely and accurate manner concerning the status of his case; failed to return all but one of Complainant's calls; and failed to notify him that the matter had been dismissed, which fact Complainant only learned by making a personal trip to the Courthouse.

7. The Complainant subsequently engaged new counsel, who succeeded in having the Court reopen the matter.

8. During the course of an investigation conducted by the Virginia State Bar, the Respondent attributed to stress and depression his failures of diligence in attending to the case and his failure to respond to Complainant's calls.

V. Misconduct

The Certification to the Board alleges, and the Respondent admitted in the Subcommittee's Private Reprimand, a violation of the following Rules of Professional Conduct, to wit:

RULE 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

RULE 1.16 Declining Or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client[.]

VI. Disposition

Upon consideration of the foregoing, following deliberation in closed session, the Board reconvened in open session, and the Chair announced the Board found that the VSB had proved by clear and convincing evidence a violation of Rule 1.3(a), Rule 1.4 (a), and Rule 1.16(a) as alleged in the Certification.

VII. Sanction

The Chair called for evidence in aggravation or mitigation of the misconduct found. VSB Exhibits 7, 8 and 9 were admitted without objection, showing the Respondent's disciplinary record of three dismissals with terms. The Respondent presented no evidence. Bar Counsel and the Respondent presented argument.

Bar Counsel argued that, though the misconduct found was not egregious, the Respondent had not complied with the terms of the Subcommittee's Private Reprimands and had exhibited a lax attitude in his failure to (a) comply and, in fact, had continued to represent clients when he represented that he was "taking a break" from practicing law and would place himself on the "Disabled and Retired Members" class of Bar membership, and (b) refund $3,000 to Asrat A. Cheru by the agreed date of payment or thereafter.

The Respondent testified that after the Private Reprimands he undertook two uncontested divorce cases and had only one remaining immigration case that he would transfer. He further testified that, although he had been unable to reimburse $3,000 to his client, as provided in the Private Reprimand, he intended to do so.

The Respondent testified that he had decided on his own to take a break from practicing law because immigration law procedures had been expedited beyond his ability to comply, which had stressed and overwhelmed him. The Board observes that a lawyer who is unable to service his clients' needs does not serve their interests competently and diligently.

The Board notes the testimony of the Respondent before the District Committee that he suffered from depression during the period relevant to his misconduct. In his testimony before the Board, however, the Respondent referred to being "stressed" and his practice being "out of control." He did not present competent evidence of depression or of any condition constituting an impairment in mitigation of the misconduct found.

Following deliberation in closed session, the Board reconvened in open session. The Chair announced the Board's decision that the Respondent should be suspended from the practice of law for one year and one day effective December 16, 2005. Accordingly, it is **ORDERED** that the Respondent's license to practice law in the Commonwealth of Virginia be and hereby is SUSPENDED for one year and one day effective December 16, 2005.

It is further **ORDERED** that Respondent must comply with the requirements of Part Six, § IV, ¶ 13(M) of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the suspension of his license to practice law in the Commonwealth of Virginia, to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his client. Respondent shall give such notice within 14 days of the effective date of the suspension, and make such arrangements as are required herein within 45 days of the effective date of the suspension. The Respondent shall also furnish proof to the Bar within 60 days of the effective day of the suspension that such notices have been timely given and such arrangements made for the disposition of matters.

It is further **ORDERED** that if the Respondent is not handling any client matters on the effective date of suspension, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13(M) shall be determined by the Virginia State Bar Disciplinary Board, unless the Respondent makes a timely request for hearing before a three-judge court.

It is further **ORDERED** that pursuant to Part Six, § IV, ¶ 13.B.8.c. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess all costs against the Respondent.

It is further **ORDERED** that the Clerk of the Disciplinary System shall mail an attested copy of this order to Respondent at his address of record with the Virginia State Bar, being 22 South Old Glebe Road #B5, Arlington, Virginia 22204, by certified mail, return receipt requested, and by regular mail to Seth M. Guggenheim, Assistant Bar Counsel, Virginia State Bar, Suite 310, 100 North Pitt Street, Alexandria, Virginia 22314-3133.

Enter this Order this 30th day of December, 2005.
VIRGINIA STATE BAR DISCIPLINARY BOARD
By: James L. Banks, 2nd Vice Chair
1229098v2

VIRGINIA:
BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
BURMAN AARON BERGER
VSB DOCKET NO. 06-000-1312

ORDER OF REVOCATION

THIS MATTER came on to be heard on November 18, 2005, before a panel of the Disciplinary Board consisting of Joseph R. Lassiter, Jr. Chair Designate, Roscoe B. Stephenson, III, William M. Moffett, Bruce T. Clark, and Werner Q. Quasebarth. Harry M. Hirsch, Deputy Bar Counsel appeared on behalf of the Virginia State Bar. The Respondent, Burman Aaron Berger did not appear, the Clerk having called the case three times in the hallway without response. The Chair polled the members of the Board panel as to whether any of them were conscious of any personal or financial interest or bias which would preclude any of them from fairly hearing this matter and serving on the panel, to which inquiry each member responded in the negative. Victoria V. Halasz, court reporter, Chandler & Halasz, P.O. Box 9349, Richmond, Virginia 23227, phone number 804/730-1222, after being duly sworn, reported the hearing and transcribed the proceedings.

The matter came before the Board on a Rule to Show Cause and Order of Suspension and Hearing entered by the Board on October 21, 2005.

The Board found that all legal notices of the date and time and place of the hearing were timely sent by the Clerk of the Disciplinary System in the manner prescribed by law.

Part Six, §IV, Paragraph 13.I.7 of the Rules of the Supreme Court of Virginia specifies how the Board is to proceed upon receiving notice of disbarment of a Virginia attorney in another jurisdiction. The Rule states that the Board shall impose the same discipline as was imposed in the other jurisdiction unless the Respondent proves by clear and convincing evidence one or more of the following three grounds for an alternative or no sanction being imposed:

(1) That the record of the proceeding in the other jurisdiction clearly shows that such proceeding was so lacking in notice or opportunity to be heard as to constitute a denial of due process;

(2) That the imposition by the Board of the same discipline upon the same proof would result in a grave injustice; or

(3) That the same conduct would not be grounds for disciplinary action or for the same discipline in Virginia.

The following items were admitted into evidence:

1. A certified copy of the order of disbarment by consent, entered by the Court of Appeals of Maryland in the case styled, Attorney Grievance Commission of Maryland v. Burman Aaron Berger, Misc. Docket AG, Nos. 6 & 38, entered September Term, 2005.

2. A copy of the Joint Petition for Disbarment by Consent filed in Court of Appeals of Maryland in the above referenced proceeding.

3. A letter dated November 18, 2005 from the Respondent to Mr. Hirsch.

After hearing the evidence and the argument of counsel, the Board found by clear and convincing evidence that the license of Burman Aaron Berger to practice law in the State of Maryland has been revoked and that such action has become final. The Board also found that Respondent failed to prove by clear and convincing evidence any of the three grounds which would permit this Board to impose any sanction other than revocation.

Accordingly, it is hereby **ORDERED** that Burman Aaron Berger's license to practice law in the Commonwealth of Virginia be, and hereby is, revoked, effective November 18, 2005.

It is further **ORDERED** that Respondent must comply with the requirements of Part Six §IV, Paragraph 13.M of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the revocation of his license to practice law in the Commonwealth of Virginia, to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his clients. Respondent shall give such notice within 14 days of the effective date of the revocation, and shall make such arrangements as are required herein within 45 days of the effective date of the revocation. The Respondent shall also furnish proof to the Virginia State Bar within 60 days of the effective day of the revocation that such notices have been timely given and such arrangements made for the disposition of these matters.

It is further **ORDERED** that if the Respondent is not handling any client matters on the effective date of the revocation, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13.M shall be determined by the Virginia State Bar Disciplinary Board, unless the Respondent makes a timely request for hearing before a three-judge court.

And it further appearing that the Respondent has filed a petition for voluntary bankruptcy relief which is currently pending, the Board takes note that the actions taken herein are not subject to the automatic stay of § 362(a) of the Bankruptcy Code, as provided by § 362(b)(2). However, the Clerk of the Disciplinary System is directed not to assess costs against the Respondent.

It is further **ORDERED** that the Clerk of the Disciplinary System shall mail an attested copy of this order to Respondent at his address of record with the Virginia State Bar, being Burman Aaron Berger, 51 Monroe Street, Suite 1605, Rockville, MD 20850, by certified mail, return receipt requested, with a copy provided to Harry M. Hirsch, Deputy Bar Counsel.

ENTERED this 6 day of December, 2005.
VIRGINIA STATE BAR DISCIPLINARY BOARD
Joseph R. Lassiter, Jr. Chair Designate

VIRGINIA:
BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTERS OF
PATRICK ROSS BYNUM JR.
VSB Docket Nos. 04-033-3260 and 04-033-3261

ORDER

THESE MATTERS came before the Virginia State Bar Disciplinary Board upon certification from the Third District Committee, Section III. On December 19, 2005, a proposed Agreed Disposition was presented via telephone conference call to a duly convened panel consisting of Max V. Beard, lay member, and attorneys Robert E. Eicher, Joseph R. Lassiter, Jr., William H. Munroe, Jr., and Robert L. Freed, Chair. The Respondent, Patrick R. Bynum, Jr., was present, and Barbara Ann Williams, Bar Counsel, represented the Virginia State Bar.

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 ability to be impartial in this proceeding. Each member, including the Chair, verified that he had no conflicts.

Having considered the proposed Agreed Disposition and the representations of counsel, the Disciplinary Board accepted the Agreed Disposition and finds by clear and convincing evidence as follows:

I. Findings of Fact

1. Mr. Bynum was admitted to the practice of law in the Commonwealth of Virginia on September 21, 1972, and at all times relevant to this proceeding was active and in good standing to practice law in Virginia.

2. Mr. Bynum is the holder of escrow account number 0201244829 at SunTrust Bank.

3. On or about April 26, 2004, SunTrust Bank submitted a Notice of Paid/Returned Items to the Virginia State Bar on account number 0201244829 indicating that a check drawn on the account in the amount of $200.00 had been returned for insufficient funds because the account balance was $13.04.

4. The $200.00 overdraft notice gave rise to VSB Docket No. 04-033-3260.

5. On or about April 28, 2004, SunTrust Bank submitted a second Notice of Paid/Returned Items to the Virginia State Bar on account number 0201244829 indicating that a check drawn on the account in the amount of $50.00 had been returned for insufficient funds because the account balance was $13.04.

6. The $50.00 overdraft notice gave rise to VSB Docket No. 04-033-3261.

7. By letters dated May 3 and 4, 2004 Assistant Intake Counsel requested Mr. Bynum to provide a written explanation of the status of his trust account including what caused each overdraft and any steps he had taken to avoid a recurrence.

8. In a letter to Assistant Intake Counsel dated May 7, 2004, Mr. Bynum stated that the overdrafts were the result of a mathematical error and that he had taken steps to ensure that the same problems did not occur again, including an independent audit of his escrow account from 1996 through 2004.

9. An independent audit Mr. Bynum commissioned of his bank statements from 1999 through 2004 disclosed five deficiencies, including poorly documented ledger sheets, failure to allow deposits to clear before issuing funds, failure to deduct service charges and failure to make at least one deposit in a timely manner.

10. When a bar investigator interviewed Mr. Bynum on July 20, 2004, he was unable to produce his escrow account checkbook register or a disbursement journal for the investigator's review at that time.

11. A random audit the bar investigator conducted of Mr. Bynum's escrow account in August 2004 disclosed that in one matter he failed to withdraw fees on deposit in his escrow account promptly after earning them.

12. An audit the bar investigator conducted of Mr. Bynum's trust account records for September 2003 through September 2004 revealed that on two occasions he failed to deposit funds in his escrow account in a timely manner.

B. Findings of Misconduct

The foregoing findings of fact give rise to the following findings of misconduct.

RULE 1.15 Safekeeping Property

(a) All funds received or held by a lawyer or law firm on behalf of a client, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) funds reasonably sufficient to pay for service or other charges or fees imposed by the financial institution may be deposited therein; or

(2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

* * *

(f) Required Escrow Accounting Procedures. The following minimum escrow accounting procedures are applicable to all escrow accounts subject to Rule 1.15(a) and (c) by lawyers practicing in Virginia.

* * *

(4) Periodic trial balance. A regular periodic trial balance of the subsidiary ledger shall be made at least quarter annually, within 30 days after the close of the period and shall show the escrow account balance of the client or other person at the end of each period.

(i) The total of the trial balance must agree with the control figure computed by taking the beginning balance, adding the total of monies received in escrow for the period and deducting the total of escrow monies disbursed for the period; and

(ii) The trial balance shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.

(5) Reconciliations.

(i) A monthly reconciliation shall be made at month end of the cash balance derived from the cash receipts journal and cash disbursements journal total, the escrow account checkbook balance, and the escrow account bank statement balance;

(ii) A periodic reconciliation shall be made at least quarter annually, within 30 days after the close of the period, reconciling cash balances to the subsidiary ledger trial balance;

(iii) Reconciliations shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.

* * * *

III. Disposition

Given that the trust account irregularities in question did not harm any client and Mr. Bynum took proactive steps to ensure that in the future his handling of trust funds and his trust account record keeping practices will comply with the Rules of Professional Conduct, the Disciplinary Board, Mr. Bynum and Bar Counsel agree that a public reprimand is an appropriate disposition of this matter. Therefore it is **ORDERED** that a public reprimand shall be issued to Mr. Bynum.

The court reporter for this hearing on the Agreed Disposition was Donna Chandler of Chandler and Halasz Court Reporters, P.O. Box 9349, Richmond, Virginia 23227, (804) 730-1222.

Pursuant to Part Six, Section IV, Paragraph 13.A.8.c.(1) of the Rules of the Supreme Court, the Clerk of the Disciplinary System shall assess costs.

It is **ORDERED** that a copy teste of this Order shall be mailed by certified mail, return receipt requested, to Mr. Bynum, at his last address of record with the Virginia State Bar, The Lockwood Office Building, Suite 218, 9097 Atlee Station Road, Mechanicsville, Virginia 23116, and hand delivered to Barbara Ann Williams, Bar Counsel, at the Virginia State Bar, 707 E. Main Street, Suite 1500, Richmond, Virginia 23219.

Enter this Order this 21 day of December, 2005.
VIRGINIA STATE BAR DISCIPLINARY BOARD
By: Robert L. Freed, Chair

VIRGINIA:
BEFORE THE DISCIPLINARY BOARD
OF THE VIRGINIA STATE BAR

IN THE MATTER OF
KRISTEN DAWN DEAN, ESQUIRE
VSB Docket Number 04-102-3065

ORDER OF SUSPENSION WITH TERMS

THIS MATTER came to be heard on December 6, 2005, upon an Agreed Disposition between the Virginia State Bar and the Respondent, Kristen Dawn Dean.

A duly convened Panel of the Virginia State Bar Disciplinary Board consisting of William C. Boyce, Jr, Esquire; Bruce T. Clark, Esquire; Robert E. Eicher, Esquire; W. Jefferson O'Flaherty, Lay Member; and James L. Banks, Jr., Second Vice-Chair Presiding, considered the matter by telephone conference. The Respondent, Kristen Dawn Dean, appeared with her counsel, Richard D. Kennedy, Esquire. Scott Kulp, Assistant Bar Counsel, appeared on behalf of the Virginia State Bar.

Pursuant to the Rules of the Supreme Court of Virginia, Part Six, Section IV, Paragraph 13.B.5.c, the Virginia State Bar, Ms. Dean, and Respondent's counsel entered into a written proposed Agreed Disposition and presented the same to the Panel. The Chair swore the Court Reporter and polled the members of the Panel to determine whether any member had a personal or financial interest that might affect or reasonably be perceived to affect his ability to be impartial in this matter. Each member, including the Chair, verified that he had no such conflict.

After hearing from both the Virginia State Bar and the Respondent, by counsel, and upon due deliberation, it is the unanimous decision of the Panel to accept the Agreed Disposition. The Stipulations of Fact, Disciplinary Rule Violations, and Disposition agreed to by the Virginia State Bar and the Respondent are incorporated herein as follows:

I. Stipulations of Fact

1. The Respondent was licensed to practice law in the Commonwealth of Virginia on April 23, 1999 and at all times relevant hereto has been active and in good standing. Respondent has no prior disciplinary record.

2. The Complainant, Geraldine Beverley (hereinafter the "Complainant"), and her daughter, Phyllis Beverley, were involved in a motor vehicle accident in May 2002. The Complainant was treated at Bon Secours St. Mary's Hospital in Norton, Virginia.

3. The Complainant and her daughter entrusted their personal injury cases to the Respondent for handling. No fee agreement was executed, but the Respondent contends that she advised the Complainant that a 35% contingency fee, plus costs, would be deducted from any amounts recovered on her behalf. The Respondent further contends that she advised the Complainant that an hourly rate would apply to all "extra-ordinary matters" that required her services.

4. The Respondent negotiated an insurance settlement that resolved both cases in May 2003. The personal injury settlement was $15,000 for the Complainant and $7,000 for Phyllis Beverley, for a total of $22,000 that was deposited on May 2, 2003 at Farmers & Miners Bank in the IOLTA trust account for the Respondent's then law firm, Baker & Dean, P.C. The Respondent advised her then law partner, Sue Baker Cox (hereinafter "Ms. Baker"), that some funds would remain in the trust account to satisfy Medicare/Medicaid liens. The Complainant understood that she would get half of her settlement up front and the other half after the medical bills/liens were paid.

5. On May 2, 2003, the Respondent wrote Check No. 1011 from the Baker & Dean, P.C. IOLTA account for $5,500 paid to Baker & Dean as a payment toward the contingency fee. Of this amount, the Respondent received $1,375 as an immediate bonus.

6. On May 8, 2003, the Respondent wrote Check No. 1012 from the Baker & Dean, P.C. IOLTA account for $5,231.25 to the Complainant. The Complainant received these funds.

7. On May 27, 2003, the Respondent wrote Check No. 1013 from the Baker & Dean, P.C. IOLTA account for $1,000 paid to Baker & Dean with a memo section stating "Beverley." The Respondent then wrote Check No. 797 for $1,000 from the Baker & Dean operating account to "Cash." The check ledger entry written by the Respondent indicates payment for "Beverly Partial PI Settlement." The Complainant did not receive these funds or any other funds from the Respondent after the initial $5,231.25 distribution.

8. On May 30, 2003, the Respondent wrote Check No. 1014 for $4,309.21 from the Baker & Dean, P.C. IOLTA account to Baker & Dean with a memo section stating "Beverly Phyllis (complete)." The operating account ledger entry indicates Check No. 814 in the same amount was then issued to Phyllis Beverley on the same date. Phyllis Beverley received these funds.

9. Also on May 30, 2003, the Respondent wrote Check No. 1015 for $940.79 from the Baker & Dean, P.C. IOLTA account to Baker & Dean with a memo section stating "Beverly Medicaid lien." The check ledger entry written by the Respondent indicates payment for "Medicaid lien – Bev (Phyllis)." And on May 31, 2003, the Respondent issued Check No. 815 in the same amount from the Baker & Dean, P.C. operating account to "Department of Medical Assistance Services" with a memo section stating "Phyllis Beverly."

10. On September 2, 2003, the Respondent wrote Check No. 1016 for $882.96 from the Baker & Dean, P.C. IOLTA account to Baker & Dean with the memo section stating "Geraldine Beverly." The check ledger entry written by the Respondent

indicates payment for "Medicare lien-Geraldine." Then on September 3, 2003, the Respondent wrote Check No. 1014 for $882.96 from the Baker & Dean, P.C. operating account to herself with a memo section stating "reimburse fees and costs."

11. On September 5, 2003, Respondent received a faxed version of a letter dated September 3, 2003 from Bon Secours St. Mary's Hospital re: Geraldine (Beverley) Beverly informing the Respondent of the absence of a Medicare lien and demanding direct payment of the medical bill from the settlement proceeds.

12. On October 24, 2003, the Respondent wrote Check No. 1017 for $3,650 from the Baker & Dean, P.C. IOLTA account to Baker & Dean. The check ledger entry written by Respondent reflects that the $3,650 payment was for "Baker & Dean Beverley fee/cost."

13. On October 27, 2003, the Respondent wrote Check No. 1137 for $2,720.94 from the Baker & Dean, P.C. operating account to herself. The check ledger entry written by the Respondent indicates payment for "Beverly-S/L SM."

14. The Complainant will testify that the Respondent told her that she had to pay a Medicare lien but that the Complainant should file bankruptcy so she would not have to pay any of her other bills. In this regard, the Complainant understood that approximately $4,900 was being withheld from disbursement to cover the amount of the medical bills owed to St. Mary's Hospital and that she would receive this amount [$4,900] once the bankruptcy was completed.

15. The Complainant agreed to file bankruptcy. After assisting the Complainant to draw up the bankruptcy papers, the Respondent referred the Complainant to her partner, Ms. Baker, who was admitted to practice in the bankruptcy court.

16. Contrary to the Respondent's representations, the Complainant did not receive further distribution after the bankruptcy was completed.

17. Ms. Baker will testify that the attorney's fees associated with the Complainant's bankruptcy ($600) would serve as the Respondent's vacation bonus. Accordingly, on October 27, 2003, the Respondent wrote Check No. 1136 from the Baker & Dean, P.C. operating account in the amount of $600 paid to "petty cash." Respondent cashed this check. The Complainant was never told that she would have to pay for the bankruptcy; rather, she was under the impression that the bankruptcy would be at no charge.

18. Before mailing the bankruptcy petition to the Court, Ms. Baker reviewed the information on the petition and specifically asked the Respondent if any proceeds remained from the personal injury settlement in May 2003. The Respondent advised that all funds had been disbursed and that the Complainant had received her full settlement.

19. On December 3, 2003, the Complainant's bankruptcy petition was mailed to the bankruptcy court. St. Mary's Hospital is listed as an unsecured creditor with $3,000 as the listed amount of the claim.

20. On December 8, 2003, the Respondent wrote Check No. 1027 for $516.20 from the Baker & Dean, P.C. IOLTA account to Baker & Dean with a memo section stating "earned fees." The Respondent negotiated this check on December 9, 2003.

21. While Ms. Baker was preparing the Complainant for the creditor's meeting held on January 28, 2004, the Complainant asked when she could expect to receive the remainder of her settlement per the Respondent's representations. Ms. Baker was surprised having previously confirmed with the Respondent that the Complainant had received all the settlement proceeds. When she returned to the office, Ms. Baker asked the Respondent in the presence of two employees, Susannah Wells and Teena Ray, if the Complainant had received all proceeds from the personal injury settlement. The Respondent advised that all funds had been paid to the Complainant and that no funds remained to be disbursed. The Respondent advised that she would contact the Complainant to advise her that she had been paid in full.

22. On or about March 1, 2004, the Respondent and Ms. Baker dissolved their law practice via written agreement. Pursuant to the agreement, the Respondent was to receive the originals of all files in which she had provided legal services for clients. The Respondent maintained a key to the office for the following week in order to remove her furnishings and files.

23. On March 30, 2004, the Complainant's bankruptcy case was discharged. The Complainant then sought to collect the balance of her settlement per the Respondent's representations. The Complainant learned that the Respondent had moved offices and had taken her file with her. After unsuccessful attempts to reach the Respondent by phone, the Complainant went to the Respondent's residence. Despite promising to straighten things out, the Respondent never did so.

24. The Complainant went back to the Respondent's residence several more times and demanded $4,900, the amount she understood was due and owing after the discharge in bankruptcy. Shortly thereafter, the Complainant returned to the Respondent's office with her daughter, and they demanded the Complainant's file. The Respondent could not produce the file; however, she advised the Complainant that the remaining settlement proceeds were billed as fees for work the Respondent performed in connection with the Complainant's case. Notwithstanding, the Respondent advised the Complainant that in the event she was unable to locate the file and justify the time billed and charged, she would be willing to satisfy the amount the Complainant felt she was owed to her, approximately $5,000.00.

25. When Complainant, pro se, later sued the Respondent in the Wise County General District Court for $5,000, rather than pay over the funds as indicated, the Respondent defended the Warrant-in-Debt which was subsequently dismissed on July 15, 2004.

26. On or about April 5, 2004, the Complainant and Phyllis Beverley came to Ms. Baker's office with a copy of the bankruptcy discharge notice and requested payment of the remainder of the Complainant's personal injury settlement. Ms. Baker and Teena Ray, an employee of the firm, examined the operating and trust account ledgers and determined that based on the ledger entries, the Complainant was owed $485.79. Ms. Baker advised the Complainant of her conversation with the Respondent on January 28, 2004, regarding whether the Complainant was owed any proceeds from the personal injury case, and the Complainant advised that she had not received any communication from the Respondent after the creditor's meeting. Later that day, Ms. Baker and Teena Ray determined that check nos. 814, 815, 796, 1014, 1136, and 1137 were missing from bank statements for the Baker & Dean operating account. In an attempt to reconcile the trust and operating accounts, Ms. Baker requested and received microfilm copies of those checks from Farmers and Miners Bank, as well as microfilm copies of all Trust Account checks related to the settlement of the Complainant's personal injury case.

27. On August 2, 2004, Ms. Baker forwarded a certified letter to the Respondent regarding the Complainant's demand for the remainder of her personal injury settlement funds.

28. The Respondent was unable to produce either the Complainant's file or a settlement statement.

29. To date, the Respondent has not reimbursed Complainant or anyone else for the balance of funds owed.

II. Disciplinary Rule Violations

Such conduct by the Respondent constitutes Misconduct in violation of the following provisions of the Virginia Rules of Professional Conduct:

RULE 1.4 Communication

A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

RULE 1.5 Fees

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall state in writing the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

RULE 1.15 Safekeeping Property

(c) A lawyer shall:

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; and

(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

RULE 4.1 Truthfulness in Statements to Others

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

(a) make a false statement of fact or law;

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

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

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

III. Agreed Disposition

In accordance with the Agreed Disposition, it is **ORDERED** that Kristen Dawn Dean's license to practice law in the Commonwealth of Virginia is hereby **SUSPENDED** for a period of five (5) years, effective upon entry of this Order, subject to the following terms and conditions:

1. The Respondent will pay restitution in the principal amount of $4,268.75 and accrued interest in the amount of $554.00 for a total of $4,822.75 by June 1, 2006 in the following manner: $3,500 to Sue Baker Cox, P.C., 120-B Roberts Avenue, Wise, VA 24293, and the balance, $1,322.75, to Ms. Geraldine Beverley, 10722 Maple Grove Road, Wise, VA 24293. Interest will continue to accrue on the principal at the rate of 6% for all amounts unpaid after December 31, 2005. All such accrued interest shall be paid to Ms. Geraldine Beverley.

2. The Respondent will sign a Rehabilitation/Monitoring Agreement with Lawyers Helping Lawyers and comply with all the treatment recommendations, including, but not limited to, continuing care and aftercare. During the term of the Rehabilitation/Monitoring Agreement, Respondent will comply with the Virginia State Bar's requests for information and execute releases necessary for the bar to obtain information from third parties. In no event shall Respondent return to the practice of law in the Commonwealth of Virginia upon expiration of the suspension period without a report from a treating professional approved by Lawyers Helping Lawyers stating that Respondent is fit to resume the practice of law.

Further, and pursuant to the agreement of the parties, Respondent's failure to comply with the Rehabilitation/Monitoring Agreement or one or more of the agreed terms and conditions will result in **REVOCATION** of her license to practice law in the Commonwealth of Virginia. If the Virginia State Bar discovers that Respondent has failed to comply with the Rehabilitation/Monitoring Agreement, or any of the other agreed terms and conditions, it will serve notice requiring Respondent to show cause why the alternate disposition of **REVOCATION** should not be imposed.

It is further **ORDERED** that the five (5) year Suspension with terms shall become part of Respondent's disciplinary record. It is further ORDERED that costs shall be assessed by the Clerk of the Disciplinary System pursuant to the Rules of the Supreme Court of Virginia, Part Six, Section IV, Paragraph 13.B.8.c.

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

It is further **ORDERED** that if the Respondent is not handling any client matters on the effective date of suspension, she shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13 (M) shall be determined by the Virginia State Bar Disciplinary Board, unless the Respondent makes a timely request for hearing before a three-judge court.

It is further **ORDERED** that the Clerk of the Disciplinary System shall send a certified copy of this order by certified mail, return receipt requested, to the Respondent, Kristen Dawn Dean, Esq., at P.O. Box 743, Norton, VA 24273, her last address of record with the Virginia State Bar, and by regular mail to Richard D. Kennedy, 944 Norton Road, P.O. Box 3458, Wise, Virginia 24293, and by hand to Scott Kulp, Assistant Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

Donna Chandler, Chandler and Halasz, Inc. Court Reporters, P.O. Box 9349, Richmond, VA, 23227, (804) 730-1222, was the reporter for the hearing and transcribed the proceedings.

Entered this 16th day of December, 2005.
VIRGINIA STATE BAR DISCIPLINARY BOARD
By: James L. Banks, Jr., Second Vice-Chair Presiding

VIRGINIA:
BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
TODD JAY FRENCH, ESQUIRE
VSB Docket No.s: 05-033-2615
05-033-2803
05-033-3362
05-033-4079
05-033-4131
05-033-4132

ORDER OF REVOCATION

THESE MATTERS came on to be heard on September 23, 2005, before a panel of the Disciplinary Board consisting of James L. Banks, Jr., 2nd Vice Chair, William E. Glover, Robert E. Eicher, V. Max Beard, Lay Member, and William H. Monroe, Jr. The Virginia State Bar was represented by Barbara A. Williams, Bar Counsel. At the direction of the Chair, the case was called three times with a request that all parties report to the hearing room. The Respondent, Todd Jay French, did not respond nor did he attend the hearing. No counsel responded or appeared on behalf of the Respondent. The Chair polled the members of the Board Panel as to whether any of them was conscious of any personal or financial interest or bias which would preclude any of them from fairly hearing this matter and serving on the panel, to which inquiry each member responded in the negative. Ms. Tracy J. Stroh, a Registered Professional Reporter of Chandler & Halasz, P.O. Box 9349, Richmond, Virginia, 23227, (804) 730-1222, after being duly sworn, reported the hearing and transcribed the proceedings.

These matters came before the Board on the District Committee Determinations for Certification by the Third District Committee, Section III. VSB Exhibits 1 thru 51 were placed into evidence by the Bar and were admitted without objection. VSB Exhibit 2(a) was introduced and admitted into evidence without objection. Exhibit 2(a) is a copy of correspondence dated April 18, 2005, sent by the VSB to Respondent as his last address of record in Richmond, Virginia. This correspondence provided Respondent with notice of his administrative suspension as well as a copy of the suspension Order. VSB Exhibit 3(a) was introduced and admitted into evidence without objection showing a United States Postal Service confirmation of delivery of the notice letter (VSB Exhibit 2(a)) to the Respondent in Muskegon, MI, on August 30, 2005 at 2:59 pm. VSB Exhibit 52 was also introduced and admitted into evidence without objection. Exhibit 52 confirmed that the Notice of Hearing dated August 25, 2005, was received and signed for by the respondent, Todd Jay French on August 30, 2005. All required notices were properly sent by the Clerk of the Disciplinary System.

Upon motion by the Bar, Bar Counsel asked that case number 05-033-4131 be removed from the Board's consideration. The Motion was granted and the Bar proceeded to present evidence regarding all other properly noticed matters as stated supra. Complainants in attendance for the hearing included Mr. Charles Baskerville, Ms. Wilma Quesenbery, Mr. Tony George and attorney, Jose ("Jay") A.G. Martelino, Esquire.

After the admission of the aforesaid VSB Exhibits into evidence, Bar Counsel called VSB Investigator, Cam Moffatt, to testify as a witness for the VSB. Ms. Moffatt has been an investigator with the VSB for approximately eleven years. Ms. Moffatt testified that the Respondent had not been cooperative with the Bar's investigation of these complaints. The Respondent had never filed any written answer or explanation to the complaints made against him. Furthermore, the Respondent hindered the Bar's investigation by failing to respond to all subpoenas from the Bar seeking records and trust account information.

Despite numerous telephone calls and emails sent to the Respondent requesting an opportunity to meet with him, the Respondent ignored all but one such request. On or about June 16, 2005 the Respondent was to meet with Ms. Moffatt at 10:00am. The Respondent appeared at 2:00pm instead and failed to bring any of the files and documents requested by the Bar. At the June 16, 2005 meeting, the Respondent admitted to Ms. Moffatt that he failed to notify the Court, counsel or clients of his interim suspension as required by the Rules of the Supreme Court of Virginia and as stated in the Interim Suspension Order of April 18, 2005. Respondent said he thought his law partner would handle these matters. Respondent also failed to advise the Bar of his change of address to Muskegon, Michigan.

It was agreed that the Respondent and Ms. Moffatt would meet the next day, June 17, 2005, to further discuss the complaints at issue and to provide the Respondent with the opportunity to comply with subpoenas issued by the Bar seeking certain files and documentation. The Respondent was additionally asked to provide the Bar with signed releases authorizing the Bar to speak with health care representatives who could confirm Respondent's alleged diagnosis of depression and anxiety. The Respondent refused to provide the Bar with any such authorizations and did not appear for the June 17, 2005 meeting. All efforts to reschedule the meeting were unsuccessful.

The Bar did eventually obtain documents from the Respondent's law partner. They included correspondence from the Bar Association of Maine (VSB Exhibit 53, admitted without objection) advising the Respondent of an incomplete application to sit for the Maine Bar examination. They also included an alleged Final Divorce Decree from the Henrico Circuit Court (VSB Exhibit 54, admitted without objection). This Decree, on its face, indicated a final divorce from the Respondent's spouse. Further investigation revealed that no such Decree had been entered by the Henrico Circuit Court.

Ms. Moffatt testified that he found the Respondent to be rational and coherent in during his meeting of June 16, 2005, even though the Respondent represented that he was on medication at that time.

FINDINGS OF FACT RELEVANT TO ALL CASES

The Board makes the following findings of fact on the basis of clear and convincing evidence:

I. General Factual Allegations

1. Mr. French was admitted to the practice of law in the Commonwealth of Virginia on October 11, 2002.

2. He was active and in good standing to practice law in the Commonwealth of Virginia until April 18, 2005, when the Disciplinary Board administratively suspended him for failing to comply with the subpoena duces tecum served in connection with two of the above-referenced matters, VSB Docket Nos. 05-033-2615 and 05-033-2803.

3. Mr. French's current address of record with the Virginia State Bar is 4209 Fitzhugh Avenue, Richmond, Virginia 23230, but based upon information and belief, he moved to Michigan in July, 2005 and did not change his address of record.

Mr. French has neglected and failed to communicate or respond to the Bar's lawful demands for information in five matters, VSB Docket Nos. 05-033-2615, 05-033-2803, 05-033-3362 and 05-033-4079, and 05-033-4132, by disregarding the order the Disciplinary Board imposed, effective April 18, 2005, administratively suspending him from the practice of law in Virginia

II. VSB Docket Nos. 05-033-2615, 05-033-2803, 05-033-3362 and 05-033-4079

A. Factual Allegations

VSB Docket No. 033-2615—Complainant: Charles L. Baskerville

5. On or about December 13, 2004, Charles L. Baskerville complained to the bar that he had paid Mr. French a $1,000.00 retainer on August 25, 2004, to represent Mr. Baskerville in a divorce action and that Mr. French subsequently failed to communicate with him and respond to his inquiries about the status of the matter.

6. Mr. French did not respond to the bar's efforts to deal with the complaint proactively, failed to submit a written response to the bar complaint and failed to respond to the subpoena duces tecum requiring him to produce the client file and trust account records.

7. Mr. French appealed a default judgment that Mr. Baskerville secured against him in the Henrico County General District Court to recover the $1,000.00 retainer; the Circuit Court dismissed the appeal and entered another default judgment against Mr. French after he failed to appear in Circuit Court on the trial date.

VSB Docket No. 05-033-2803—Complainant: Wilma Jean Quesenberry

8. On or about January 27, 2005, Wilma Jean Quesenberry complained to the bar that Mr. French had failed to file a Chapter 7 petition on her behalf after she paid him $795.00 to do so.

9. Ms. Quesenberry conferred with Mr. French in April 2003, while he was associated with the Affiliated Attorneys law firm; Mr. French advised her that he would file a Chapter 7 bankruptcy petition for her after she paid him $795.00.

10. Ms. Quesenberry made the last of a series of installment payments totaling $795.00 in February 2004.

11. After receiving a call from a collection agency in November 2004, Ms. Quesenberry contacted Affiliated Attorneys and learned that Mr. French had left the firm to go into practice with Keith Pagano.

12. Ms. Quesenberry contacted Mr. French, who assured her that he would take care of her bankruptcy matter.

13. Ms. Quesenberry was ill with cancer and did not follow up with Mr. French again until she was served with a warrant in debt the Virginia Credit Union filed against her in the City of Richmond General District Court.

14. On January 27, 2005, after unsuccessfully attempting to reach Mr. French, Ms. Quesenberry appeared in court pro se to defend the warrant in debt.

15. The court entered a judgment against her after a public defender ascertained that Mr. French had never filed a bankruptcy petition on Ms. Quesenberry's behalf.

16. In March 2005, after the judgment had been entered, Ms. Quesenberry received a letter from Mr. French stating that he had been unable to reach her by telephone to advise that she needed to come to his office and sign the bankruptcy petition.

17. During the same period, Ms. Quesenberry's creditors had no difficulty reaching her.

18. Mr. French failed to submit a written response to the bar complaint and did not respond to the subpoena *duces tecum* requiring him to produce the client file and trust account records.

VSB Docket No. 05-033-3362—Complainant: Angela Bailey-Ghee

19. On or about March 15, 2005, Angela Bailey-Ghee complained to the bar that she paid Mr. French $525.00 to represent her in a civil action for damages her automobile sustained in an accident.

20. Mr. French lost the case in the Henrico County General District Court because he was not well prepared.

21. Ms. Bailey-Ghee appealed the case pro se to Circuit Court after Mr. French failed to do so.

22. The Circuit Court recessed on the day of trial after Mr. French, who was counsel of record, failed to appear to represent Ms. Bailey-Ghee.

23. The bailiff located Mr. French in the courthouse and escorted him to the courtroom.

24. Mr. French was not prepared to try Ms. Bailey-Ghee's case and moved for a continuance.

25. The court denied the motion, the case was tried and there was a defense verdict.

26. Mr. French promised to pay Ms. Bailey-Ghee $2,000.00 in damages she sought to recover for damages to her automobile but has not done so.

27. Mr. French did not submit a written response to the bar complaint and failed to respond to the subpoena duces tecum requiring him to produce the client file and trust account records.

VSB Docket No. 05-033-4079—Complainant: Tony George

28. On or about April 5, 2005, Tony George complained to the bar that on March 23, 2005, he had paid Mr. French $240.00 to represent him in a divorce proceeding but that Mr. French had not responded to Mr. George's inquiries about whether his wife would agree to an uncontested divorce.

29. After Mr. George filed the bar complaint, Mr. Pagano refunded the fee Mr. George had paid Mr. French.

30. Mr. French failed to submit a written response to the bar complaint and did not respond to the subpoena duces tecum requiring him to produce the client file and trust account records.

B. Charges of Misconduct

VSB Docket Nos. 05-033-2615, 05-033-2803, 05-033-3362 and 05-033-4079

The factual allegations set forth in paragraphs 1-30, supra, give rise to the following

Charges of Misconduct:

RULE 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

* * * *

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

* * * *

RULE 8.1 Bar Admission And Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application, in connection with any certification required to be filed as a condition of maintaining or renewing a license to practice law, in connection with a disciplinary matter, shall not:

* * *

(c) fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6

* * * *

III. VSB Docket No. 05-033-4132
Complainant: Jose A. G. Martelino

A. Factual Allegations

31. Mr. French was administratively suspended on April 18, 2005, after he failed to comply with the subpoena duces tecum the Bar issued in VSB Docket Nos. 05-033-2615 and 05-033-2803 and failed to request a hearing on the Notice of Interim Suspension the bar issued.

32. The Bar duly notified Mr. French of the suspension by sending a copy of the Order of Suspension, by certified mail, to Mr. French's last address of record with the bar.

33. On May 11, 2005, attorney, Jose A. G. Martelino, reported that Mr. Pagano had contacted him on May 10, 2005, and asked Mr. Martelino to represent Joseph McFadden, who had retained Mr. French to represent him at a parole hearing the next day.

34. Mr. Martelino subsequently learned that the court date was actually for a felony sentencing and that Mr. French had not advised Mr. McFadden or the court that he could not appear and represent the client.

35. Because Mr. Martelino was not Mr. McFadden's counsel of record, he could not review the pre-sentence report and requested a continuance, which the court granted.

36. Mr. Martelino's report gave rise to VSB Docket No. 05-033-4132.

37. Mr. French knew he was administratively suspended and could not represent Mr. McFadden but contends he thought that Mr. Pagano or another attorney with his former firm would handle the sentencing.

38. Mr. French did not notify Mr. McFadden, the Commonwealth Attorney's Office or the court that his license had been suspended as required by the Suspension Order issued by the Disciplinary Board and the Part Six, Section IV, Paragraph 13 of the Rules of Court.

B. Charges of Misconduct

The factual allegations set forth in paragraphs 1-4, and 31-38, give rise to the following Charges of Misconduct:

RULE 3.4 Fairness to Opposing Party And Counsel

A lawyer shall not:

* * *

(d) Knowingly disobey … a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

* * * *

DISPOSITION

Upon consideration of the foregoing, following deliberation in closed session, the Board reconvened in open session and the acting Chair announced the Board's determination that complaint number 05-033-4131 was dismissed, the Bar having chosen not to proceed on the matter. The acting Chair further announced the Board's determination that the VSB had proven by clear and convincing evidence the Respondent's violation of Rules 1.3, 1.4, 8.1 and 3.4 of the Virginia Rules of Professional Conduct, as charged in the Certifications.

SANCTION

The Board called for evidence in aggravation or in mitigation of the misconduct found. Bar Counsel presented Respondent's prior disciplinary record (VSB Exhibit 55, admitted without objection), consisting of the Interim Suspension Order of April 18, 2005..

Following deliberation in closed session, the Board reconvened in open session and the acting Chair announced the Board's decision that the Respondent's license to practice law in the Commonwealth of Virginia should be **REVOKED**, effective immediately.

Accordingly, it is **ORDERED** that the license of the Respondent to practice law in the Commonwealth of Virginia be and hereby is **REVOKED**, effective September 23, 2005.

It is further **ORDERED** that Respondent must comply with the requirements of Part Six, § IV, ¶ 13(M) of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the revocation of

his license to practice law in the Commonwealth of Virginia, to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his clients. Respondent shall give such notice within 14 days of the effective date of the revocation, and make such arrangements as are required herein within 45 days of the effective date of the revocation. The Respondent shall also furnish proof to the Bar within 60 days of the effective day of the revocation that such notices have been timely given and such arrangements made for the disposition of matters.

It is further **ORDERED** that if the Respondent is not handling any client matters on the effective date of revocation, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13 (M) shall be determined by the Virginia State Bar Disciplinary Board, unless the Respondent makes a timely request for hearing before a three-judge court.

It is further **ORDERED** that pursuant to Part Six, § IV, ¶ 13.B.8.c. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess all costs against the Respondent.

It is further **ORDERED** that the Clerk of the Disciplinary System shall mail an attested copy of this Order of Revocation to Respondent at 621 Waterstone Drive, Muskegon, MI, 49441 and to his address of record with the Virginia State Bar, being 4209 Fitzhugh Avenue, Richmond, Virginia, 23230, each by certified mail, return receipt requested, and by regular mail to Barbara A. Williams, Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

ENTERED the 7th day of December, 2005
VIRGINIA STATE BAR DISCIPLINARY BOARD
James L. Banks, Jr., Chair Designate

(**Editor's Note:** *Respondent has noted an appeal with the Virginia Supreme Court. Virginia Supreme Court has granted stay of suspension pending appeal.*)

VIRGINIA:
BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
WALTER FRANKLIN GREEN, IV
VSB DOCKET NO. 03-070-3720

ORDER OF SUSPENSION

THIS MATTER first came on to be heard on Friday, November 19, 2004, before a panel of the Virginia State Bar Disciplinary Board convening at the State Corporation Commission, Courtroom B, Tyler Building, 1300 East Main Street, Second Floor, Richmond, Virginia, 23219. The Board was comprised of Robert L. Freed (Chair),V. Max Beard (Lay Member), Bruce T. Clark, Russell W. Updike, and Ann N. Kathan. Proceedings in this matter were transcribed by Tracy J. Stroh, a registered professional reporter, P.O. Box 9349, Richmond, Virginia, 23227, telephone number (804) 730-1222. The court reporter was sworn by the Chair, who then inquired of each member of the panel as to whether any member had any personal or financial interest or bias which would interfere with or influence that members determination of the matter. Each member, including the Chair, answered in the negative; the matter proceeded. The Respondent, Walter Franklin Green, IV, was present and represented himself. The Virginia State Bar appeared by its counsel, Edward L. Davis, Esquire.

The findings of fact found at the hearing on November 19, 2004, were set forth in the Order of the Disciplinary Board entered December 21, 2004. The Board determined that the Bar proved, by clear and convincing evidence, that Respondent violated Rules 1.3(a) and 8.4(b). Based upon its findings that Respondent was in violation of the rules set forth above , the Disciplinary Board suspended Respondent's license to practice law in the Commonwealth of Virginia for a period of sixty (60) days effective January 15, 2005.

Respondent filed a Motion for Reconsideration on November 29, 2004. The Virginia State Bar filed its Response on December 2, 2004. A telephone hearing was held on January 20, 2005, to consider the Respondent's Motion for Reconsideration. Respondent's Motion was denied by Order dated January 27, 2005. The Respondent appealed to the Supreme Court of Virginia.

The Supreme Court of Virginia rendered its Opinion on September 16, 2005. The Court's opinion upheld the findings of the Disciplinary Board that Respondent violated Rules 8.4(b) and 1.3(a), in part. Specifically, the Supreme Court of Virginia found that Respondent's failure to obtain a reduction of a client's sentence supported the Disciplinary Board's finding of a violation of Rule 1.3(a). However, the Supreme Court of Virginia found that the record did not support a violation of 1.3(a) based upon a "pattern" of failing to appear in court. Accordingly, the Supreme Court remanded the matter back to the Disciplinary Board to reconsider the sixty (60) day suspension imposed upon Respondent.

Respondent filed a Petition for Rehearing with the Supreme Court of Virginia on October 11, 2005. The Supreme Court denied the Petition by Order dated November 11, 2005.

On January 10, 2006, this matter came to be heard solely upon the issue of what sanction to impose upon Respondent for the violations affirmed by the Supreme Court of Virginia. The members of the Disciplinary Board consisted of Robert L. Freed (Chair), V. Max Beard (Lay Member), Bruce T. Clark, Russell W. Updike, and Ann N. Kathan. The court reporter in the proceeding was Donna T. Chandler, a registered professional reporter, P.O. Box 9349, Richmond, Virginia, 23227, telephone number (804) 730-1222. The court reporter was sworn by the Chair, who then inquired of each member of the Board as to whether any member had any personal or financial interest or bias which would interfere with or influence that members determination of the matter. Each member, including the Chair, answered in the negative; the matter proceeded. The Respondent, Walter Franklin Green, IV, was present and represented himself. The Virginia State Bar appeared through its counsel, Edward L. Davis.

On January 9, 2006, Respondent filed a Motion to Vacate the January 10, 2006, Setting of a Telephone Conference as a Procedurally Inadequate Substitute for a Hearing under Supreme Court Rule, Part 6, §IV, Par. 13 I 2 f (2). Said Motion was overruled by the Chair, with all other Board members concurring in the decision.

On January 10, 2006, Respondent filed a Motion to Expand the Scope of the Evidentiary Hearing Relative to Determination of Sanctions. Said Motion was overruled by the Chair, with all other Board members concurring in the decision.

On January 10, 2006, Respondent objected to Board member Ann N. Kathan participating in the hearing on the basis that she is no longer an active member of the Board. Said objection was overruled by the Chair, with all other Board members concurring in the decision.

The remand being for the determination of sanctions only, no additional evidence was received by the Board. The Board heard arguments from the Bar and Respondent, and then recessed to deliberate what sanction to impose upon its findings of misconduct by Respondent for his violation of Rules 1.3(a) and 8.4(b). After due deliberation during which the Board considered that the seriousness of the two charges of misconduct affirmed by the Supreme Court of Virginia merited, at a minimum, the previously imposed sanction and the Respondent's extensive disciplinary record, upon which the Board placed great emphasis, the Board unanimously determined that the rule violations still merited a sixty (60) day suspension of Respondent's license to practice law in the Commonwealth of Virginia, effective January 10, 2006.

Accordingly, it is **ORDERED** that the license to practice law in the Commonwealth of Virginia of Respondent, Walter Franklin Green, IV, shall be suspended for a period of sixty (60) days effective January 10, 2006.

It is further **ORDERED** that the Clerk of the Disciplinary System shall mail an attested copy of this Order to Respondent at his address of record with the Virginia State Bar, being 77 North Liberty Street, P.O. Box 512, Harrisonburg, Virginia, 22803-0512, by certified mail, return receipt requested, and by regular mail to Edward L. Davis, Esquire, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia, 23219.

It is further **ORDERED** that pursuant to Part Six, §IV, Paragraph 13(B)(8)(C) of the Rules of the Supreme Court of Virginia the Clerk of the Disciplinary System shall assess all costs against the Respondent.

It is further **ORDERED** that Respondent must comply with the requirements in Part Six, §IV, ¶ 13(M) of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the sixty (60) day loss of license to practice law in the Commonwealth of Virginia, to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters in his care in conformity with the wishes of his clients. Respondent shall give such notice within fourteen (14) days of the effective date of the suspension, and make such arrangements which are required within forty-five (45) days of the effective date of the suspension. The Respondent shall also furnish proof to the bar within sixty (60) days of the effective date of the suspension that such notices have been timely given and such arrangements made for the disposition of matters.

It is further **ORDERED** that if the Respondent is not handling any client matters on the effective date of suspension, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System of the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13(M) shall be determined by the Virginia State Bar Disciplinary Board which may impose a sanction of revocation or further suspension for failure to comply with the requirements of this subparagraph.

ENTERED this 24 day of January, 2006
Robert L. Freed, Chair
VIRGINIA STATE BAR DISCIPLINARY BOARD

VIRGINIA:
BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
BONAR MAYO ROBERTSON, ESQUIRE
VSB DOCKET NUMBER 06-000-1650

OPINION ORDER

THIS MATTER came before the Virginia State Bar Disciplinary Board on December 8, 2005 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 November 21, 2005. A duly convened panel of the Virginia State Bar Disciplinary Board consisting of Werner H. Quasebarth, lay member, Carl A. Eason, Esquire, William Hanes Monroe, Jr., Esquire, Rhysa Griffith South, Esquire, and Robert L. Freed, Esquire, Chair, heard the matter. Noel D. Sengel, Senior Assistant Bar Counsel, appeared as Counsel to the Virginia State Bar (AVSB@). The Respondent Bonar Mayo Robertson, Esquire appeared pro se. Donna Chandler, Chandler and Halasz, Inc., Court Reporters, P.O. Box 9349, Richmond, Virginia 23227, (804) 730-1222, was the reporter for the hearing.

Having considered the Agreed Disposition to impose reciprocal discipline, the Board finds by clear and convincing evidence as follows:

STIPULATIONS OF FACTS

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

2. The Respondent was suspended from the practice of law in the state of Maryland for a period of ninety (90) days, effective May 1, 2005, by a consent order entered by the Court of Appeals of Maryland based upon the facts outlined in paragraphs three through six below.

3. The Respondent represented Karen Woodbury in a personal injury case. The Respondent settled the case and then kept settlement funds in his trust account for more than four months without informing Ms. Woodbury or her medical providers that he had their funds.

4. The Respondent had told Ms. Woodbury that he would attempt to negotiate reductions in her medical bills, but made minimal effort to do so.

5. Soon after depositing the settlement check and before making any other disbursements, the Respondent withdrew his own fee, which caused the balance in his trust account to fall below the amount needed to pay the liens of Ms. Woodbury's medical providers.

6. In a case that the Respondent handled for Mavis LaBule, he made little effort to settle Ms. LaBule's case, failed to file suit on her behalf for a period of a year, and then failed to terminate the representation properly.

STIPULATIONS OF MISCONDUCT

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

RULE 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

RULE 1.2 Scope of Representation

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the objectives of the representation if the client consents after consultation.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

(d) A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

RULE 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.

(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

RULE 1.15 Safekeeping Property

(a) All funds received or held by a lawyer or law firm on behalf of a client, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution may be deposited therein; or

(2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(b) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(c) A lawyer shall:

(1) promptly notify a client of the receipt of the client's funds, securities, or other properties;

(2) identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; and

(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

RULE 1.16 Declining Or Terminating Representation

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(d) state or imply an ability to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

Upon consideration of the Agreed Disposition to impose 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, Bonar Mayo Robertson, Esquire, to practice law in the Commonwealth of Virginia shall be, and is hereby, suspended for a period of ninety (90) days, commencing November 21, 2005.

IT IS FURTHER **ORDERED** that, as directed in the Board's Order of November 21, 2005 in this matter, a copy of which was served on the Respondent by certified mail, the Respondent must comply with the requirements of Part 6, ' IV, & 13(M) of the Rules of Virginia Supreme Court. The time for compliance with said requirements runs from November 21, 2005, the effective date of the Rule to Show Cause and Order of Suspension. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the suspension of his license to practice law in the Commonwealth of Virginia, to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his client. Respondent shall give such notice within 14 days of the effective date of the suspension, and make such arrangements as are required herein within 45 days of the effective date of the suspension. The Respondent shall also furnish proof to the Bar within 60 days of the effective day of the suspension that such notices have been timely given and such arrangements made for the disposition of matters.

It is further **ORDERED** that if the Respondent is not handling any client matters on the effective date of suspension, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13(M) shall be determined by the Virginia State Bar Disciplinary Board, unless the Respondent makes a timely request for hearing before a three-judge court.

It is FURTHER **ORDERED** that the Clerk of the Disciplinary System shall send an attested and true copy of this opinion order by certified mail, return receipt requested, to Respondent, Bonar Mayo Robertson, Esquire at his address of record, 1 Ivy Leaf Court, Boyds, MD 20841, and at 9308 Annapolis Rd., Lanham, MD 20706, and by regular mail to Noel D. Sengel, Senior Assistant Bar Counsel, 100 North Pitt St., Suite 310, Alexandria, VA 22314.

The Clerk of the Disciplinary System shall assess costs pursuant to Part 6, § IV, ¶ 13(B)(8) of the *Rules of Virginia Supreme Court*.

SO **ORDERED**, this 14 day of December, 2005.
By: Robert L. Freed, Chair

VIRGINIA:
BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
BRIAN CHARLES SHEVLIN
VSB DOCKET NO. 04-041-2338

ORDER OF PUBLIC ADMONITION

THIS MATTER came on to be heard on November 18, 2005, before a panel of the Virginia State Bar Disciplinary Board (the "Board") composed of Peter A. Dingman, Chair, William E. Glover, Glenn M. Hodge, Robert E. Eicher, and W. Jefferson O'Flaherty, lay member.

The Virginia State Bar ("VSB") was represented by Seth M. Guggenheim, Assistant Bar Counsel. Brian Charles Shevlin (the "Respondent") appeared and was represented by Michael L. Rigsby. Jennifer L. Hairfield, Registered Professional Reporter, of Chandler & Halasz, P. O. Box 9349, Richmond, Virginia 23227, (804) 730-1222, having been duly sworn by the Chair, reported the hearing and transcribed the proceedings.

The Chair inquired of the members of the panel whether any of them had any personal or financial interest or any bias which would preclude, or could be perceived to preclude, their hearing the matter fairly and impartially. Each member of the panel and the Chair answered the inquiry in the negative.

The matter came before the Board on a Subcommittee Determination (Certification) of the Fourth District Committee – Section I of the VSB and upon the Respondent's answer thereto.

At the outset, counsel for the Respondent renewed for the record his previously overruled objection to the Board hearing the matter, which the Chair again overruled. On motion, the Chair excluded all persons who would testify, and they withdrew from the hearing room to the hall.

Bar Counsel and counsel for the Respondent stated that they were prepared to proceed and waived the Chair's explanation of the hearing procedure. Bar Counsel and counsel for the Respondent presented opening statements.

VSB Exhibits 1 through 24 were admitted without objection. Respondent's Exhibits 1 through 17 and 19 through 27 were admitted without objection. The Chair had previously overruled the Bar's objection to Respondent's Exhibit 18, and that Exhibit was admitted subject to such ruling. Stipulations of Fact between Bar Counsel and counsel for the Respondent were received. The Chair overruled Bar Counsel's pre-hearing motion in limine with respect to the Respondent's witnesses.

Bar Counsel called Daniel L. Winand to testify. Counsel for the Respondent conducted cross-examination, and Bar Counsel conducted re-direct examination. Bar Counsel called Earl C. Walts to testify. Counsel for the Respondent had no cross-examination. Bar Counsel called the Respondent to testify, and counsel for the Respondent conducted cross-examination.

During the course of the cross-examination of Daniel L. Winand, he testified that he had looked at his notes to refresh his memory of a conversation with the Respondent. Counsel for the Respondent moved that those notes be produced to him for his review. The Chair instructed Mr. Winand to retrieve those notes, and he subsequently did. Counsel for the Respondent reviewed the notes and had no further questions for Mr. Winand.

Members of the Board addressed questions to Mr. Winand and to the Respondent following their examination by counsel.

Bar Counsel rested following the testimony of Messrs. Winand, Walts, and the Respondent. Counsel for the Respondent moved to strike the Bar's evidence. The Chair overruled the motion.

Counsel for the Respondent called Edward J. Sullivan to testify, and Bar Counsel conducted cross-examination. Counsel for the Respondent called Constance S. Bennie to testify; Bar Counsel did not conduct cross-examination. Counsel for the Respondent called the Respondent to testify, and Bar counsel conducted cross-examination. Members of the Board addressed questions to the Respondent.

Counsel for the Respondent called Robert T. Hall to testify and Bar Counsel conducted cross-examination. Members of the Board addressed questions to Mr. Hall.

Counsel for the Respondent called Bernard J. DiMuro to testify. Counsel for the Bar had no cross-examination. Counsel for the Respondent then rested, and Bar Counsel re-called Daniel L. Winand in rebuttal.

VSB Exhibits 25 and 26 were admitted without objection. Respondent's Exhibit 28 was admitted without objection.

Bar Counsel rested. Bar counsel and counsel for the Respondent presented closing argument.

I. Findings of Fact

Upon consideration of the foregoing, the Board finds that the following facts have been proved by clear and convincing evidence, to wit:

1. At all relevant times, the Respondent has been a lawyer duly licensed to practice law in the Commonwealth of Virginia since 1970, and his address of record with the Virginia State Bar has been Suite 610, 1655 North Fort Myer Avenue, Arlington, Virginia 22209, but currently the address of his law practice is 4084 University Drive, Suite 102, Fairfax, Virginia 22030.

2. The Respondent was properly served with notice of this proceeding as required by Part Six, § IV, ¶ 13(E) and (I)(a) of the Rules of the Supreme Court of Virginia.

3. The Respondent represented Edward J. Sullivan, administrator of the estate of his wife, Donna J. Sullivan, in a wrongful death action in the Circuit Court of Fairfax County, Virginia (Case No. 196237) against Carl T. Brown, M.D., *et al.*, arising from alleged medical malpractice committed by Dr. Brown in surgery he performed on Donna J. Sullivan in August of 1999.

4. Following the surgery forming the alleged medial malpractice, Donna J. Sullivan received care and treatment from J.W. Carlson, D.O., a board-certified gynecological oncologist at Walter Reed Army Medical Center ("WRAMC") in Washington, D.C. The care and treatment of Mrs. Sullivan at WRAMC related to medical conditions resulting from the alleged medical malpractice.

5. Donna J. Sullivan husband, Edward J. Sullivan, was a military retiree, which made her eligible for care and treatment at WRAMC without expense to them except for a nominal per diem charge.

6. Mrs. Sullivan died in January of 2002 under the care of Dr. Carlson at WRAMC, allegedly in consequence of Dr. Brown's medical malpractice in his surgery on Mrs. Sullivan.

7. By letter dated April 18, 2001, to WRAMC, the Respondent sent Mrs. Sullivan's medical authorization and requested release of medical bills for care at WRAMC.

8. By letter dated January 22, 2002, to WRAMC, the Respondent sent Mrs. Sullivan's medical authorization and requested copies of her medical records for care at WRAMC.

9. By letter dated March 1, 2002, to the Respondent, the Recovery Attorney for the Department of the Army at WRAMC acknowledged receipt of the Respondent's requests for medical treatment and/or billing records for Donna J. Sullivan and advised that, under the Federal Medical Care Recovery Act, the United States had the right to recover the reasonable cost of medical care provided to her at government expense. The Recovery Attorney also advised that (a) the government had an independent cause of action but preferred to coordinate with the patient's attorney to permit him to present WRAMC's bills as an item of special damages and to access WRAMC physicians to provide expert testimony, (b) any communication to WRAMC physicians must be channeled through the Recovery Attorney, and (c) the government's investigation of the events leading to the request for records was in its early stages. The Recovery Attorney enclosed a Statement of Incident form to be completed and returned.

10. The Respondent returned the completed Statement of Incident form to WRAMC's Recovery Attorney by letter dated March 20, 2002.

11. On May 14, 2002, the Respondent had a telephone conversation with Daniel L. Winand, a civilian lawyer with the Department of the Army's claims division at WRAMC who reported to the WRAMC Recovery Attorney. According to Mr. Winand, he explained to the Respondent that WRAMC had its own cause of action for the expense of the care provided to Mrs. Sullivan, that WRAMC did not send bills to patients and had to arrive at bills for the charges for care provided, and that, unlike private hospitals, there was not a central repository of medical records, which were kept in different locations.

12. Mr. Winand's testimony was that, in his telephone conversation with the Respondent on May 14, 2002, the Respondent did not advise him of a timetable for the case or the trial date, and merely stated that the Respondent was under a "tight time frame." Mr. Winand's testimony was that he asked the Respondent to send a copy of the scheduling order in the case, and that he never received it from the Respondent.

13. At the time of the telephone conversation between Mr. Winand and the Respondent, a trial date of July 22, 2002, previously had been set.

14. The Respondent's letter of May 14, 2002, to Mr. Winand stated that it was "further to our telephone conversation earlier today" and did not contain any deadlines in the case except to say that there was "some urgency" in the Respondent speaking with Dr. Carlson, whom he intended to use as an expert witness. The Respondent's letter confirmed that he "would be happy to represent the interests of the United States…."

15. On May 17, 2002, the Respondent's secretary sent medical records of Mrs. Sullivan and deposition transcripts of witnesses to Mr. Winand's legal assistant. On May 21, 2002, the Respondent's secretary sent Mr. Winand's legal assistant Mrs. Sullivan's in-patient medical records and a copy of the pleadings.

16. Since Dr. Carlson was a WRAMC doctor, Mr. Winand was responsible for his preparation to testify as an expert. However, on June 21, 2002, the Respondent wrote Dr. Carlson alerting him "to the issues" presented by the three experts for the defense.

17. On June 21, 2002, the Respondent signed an Attorney Representation Agreement in which, *inter alia*, he agreed to represent the United States Government under the Federal Medical Care Recovery Act in a recovery of the reasonable value of care and treatment that Mrs. Sullivan had received at WRAMC, and the United States Government agreed to provide medical records and medical billing and to cooperate in reasonable efforts to provide access to government witnesses and make them available for testimony. The Agreement provided that either party could terminate it for failure to abide by its terms.

18. Dr. Carlson's deposition was taken by defendant's counsel on June 28, 2002. Mr. Winand arranged for Dr. Carlson to arrive an hour and a half early so that the Respondent could work with him. The Respondent arrived approximately 45 minutes late because of traffic delays.

19. The Respondent testified that Dr. Carlson's testimony at his deposition was harmful to the wrongful death case because Mr. Winand had prepared Dr. Carlson to express opinions, and he did, on the standard of care and causation when, armed with other experts, the Respondent needed Dr. Carlson to testify only as a fact witness on care provided and damages. The Respondent's Designation of Expert Witnesses, dated April 23, 2002, states, however, that Dr. Carlson will testify on the issue of causation.

20. On the occasion of, but before, Dr. Carlson's deposition on June 28, 2002, the Respondent asked Mr. Winand about WRAMC's medical bill, and Mr. Winand said he did not yet have it and could not have it the following week when the Respondent said there would be a mediation in the case. According to Mr. Winand, he had checked with the WRAMC Casualty Section clerks who handle billing and told the Respondent that the bill would be "really big, six figures." According to the Respondent, Mr. Winand told him that $75,000 was a ballpark estimate of the amount of the bill. With respect to the conflict in testimony, the Board notes the Respondent's letter to Mr. Winand, dated July 26, 2002, in which the Respondent said that he estimated the WRAMC cost of care at approximately $75,000. The Respondent did not write that $75,000 was an estimate given him by Mr. Winand.

21. On July 23, 2002, Mr. Winand faxed to the Respondent WRAMC's final bill for care provided Mrs. Sullivan in the amount of $187,119.30 and requested the Respondent to let him know "where we stand on a settlement of this case." Mr. Winand testified that he did not learn until the Respondent's letter to him of July 26, 2002, that the Respondent already had settled the case in mediation before the trial date of July 22, 2002. The Respondent testified, however, that he called Mr. Winand on July 12, 2002, and reported that the Respondent had settled Mr. Sullivan's case, and that the United States Government was on its own.

22. The Respondent did not have the WRAMC bill when he entered into a monetary settlement. The Respondent testified that he represented Mr. Sullivan but not the United States Government at the mediation resulting in the settlement. The Respondent had not theretofore notified Mr. Winand that the Respondent had terminated or withdrawn from his representation of the United States Government with respect to its claim for the value of the care provided Mrs. Sullivan at WRAMC, nor had the Respondent given notice of his termination of the Attorney Representation Agreement.

23. The settlement of the case was presented to Fairfax County Circuit Court in the Respondent's Confidential Memorandum of Settlement for review in camera, dated July 12, 2002, which recites $150,000 to the U.S. Government in satisfaction of its lien ("to be held in escrow").

24. A Joint Petition for approval of the settlement was filed in Fairfax County Circuit Court on July 12, 2002. The Joint Petition stated that the statutory beneficiary had agreed, *inter alia*, to a distribution to the United States Government in the amount specified in the Respondent's Confidential Memorandum of Settlement, which was $150,000, and petitioned the Court, *inter alia*, to "approve the payment of the United States Government lien."

25. On July 19, 2002, the Fairfax County Circuit Court entered a Final Order Approving Compromise Settlement in which it directed the plaintiff, through counsel, to distribute the proceeds "to the Plaintiff's attorney, the beneficiary, and to the United States Government for its lien in the amounts set forth in Plaintiff's Memorandum of Settlement."

26. According to the Respondent's testimony, he represented to the Court at the hearing on the Joint Petition on July 17, 2002, that the United States Government had a claim, not then determined, that might be asserted against Mr. Sullivan, that the Respondent had doubled his estimated $75,000 for the claim, and that he would hold the $150,000 in escrow and work it out with the United States Government. The Court's Final Order is unqualified, however, in its direction of distribution to the United States Government in accordance with the Confidential Memorandum of Settlement, i.e., $150,000 (to be held in escrow).

27. On August 1, 2002, Mr. Sullivan signed a Settlement Statement agreeing to a deduction from the settlement proceeds of $150,000 "To Be Held In Escrow For The U.S. Government Lien." The $150,000 was received by the Respondent and placed in his escrow account. Mr. Winand testified that the Respondent never mentioned to him that the Respondent was holding $150,000, or that the Court had ordered the distribution thereof.

28. By letter to Mr. Winand, dated July 26, 2002, the Respondent challenged WRAMC's bill for $187,119.30 and concluded that because of the Government's failure of cooperation, "we do not agree to be bound by your claim."

29. On October 9, 2002, the Respondent wrote to Mr. Sullivan regarding the "$150,000 in escrow pending resolution of the lien issue" and presented three alternatives: (1) attempt to negotiate the lien with the United States Government, (2) continue to hold the $150,000 in escrow and write letters threatening to release the money to Mr. Sullivan if Mr. Winand did not respond, or (3) contest the lien in its entirety in litigation.

30. On November 7, 2002, the Respondent wrote to Mr. Winand regarding the lack of response to the Respondent's letter of July 26, 2002, and stated that he would disburse the escrowed funds to Mr. Sullivan unless the matter was resolved within 30 days. Mr. Winand testified that he called the Respondent once or twice but did not reach him, and that the Respondent did not call back.

31. In December of 2002, Mr. Winand, a reserves Army officer, was mobilized to active duty and left WRAMC. His legal assistant was left with pending claims.

32. By letter dated December 12, 2002, the Respondent enclosed a $150,000 check drawn on his escrow account payable to Mr. Sullivan, stating that the Government had asserted a lien but not responded to his letters regarding its amount. The Respondent confirmed Mr. Sullivan's agreement to indemnify the law firm for whatever costs might be incurred if the Government asserted its lien holder rights against the law firm. Mr. Sullivan testified that he invested the $150,000, and that it is available to him.

33. Throughout correspondence and in the settlement documents, the Respondent referred to the United States Government's "lien" for care provided Mrs. Sullivan at WRAMC. In point of fact, there was no lien, as Mr. Winand testified. Moreover, paragraph C of Section I of the Attorney Representation letter states that the claim of the United States Government is an independent cause of action against a tortfeasor rather than a lien on any settlement or judgment obtained by the injured party. See McCotter v. Smithfield Packing Co., Inc., 868 F.Supp. 160 (E.D. Va. 1994).

34. The Respondent established an attorney-client relationship with the United States on May 14, 2002, when he wrote Mr. Winand to "confirm the fact that I would be happy to represent the interests of the United States Government in collecting its costs" for care provided Mrs. Sullivan. The Attorney Representation Agreement, signed by the Respondent on June 21, 2002, memorialized the attorney-client relationship. That attorney-client relationship between the Respondent and the United States Government continued to exist when the Respondent struck a settlement of the case in mediation.

35. The Bar Investigator, Earl W. Walts interviewed the Respondent on October 1, 2004, and asked the Respondent why he had not gone back to the Court regarding the $150,000 in escrow. The Respondent answered that he did not consider it.

36. The delays in response to the Respondent's requests for documentation from Mr. Winand disrupted the Respondent's orderly preparation of his case. Even so, a lawyer's professional obligations to clients uniformly apply whether the client is cooperative or not. The Respondent's remedy was a timely withdrawal from representation of the United States Government, and this the Respondent failed to do.

37. The lack of response to the Respondent's letters regarding the WRAMC bill and the escrowed money was exasperating for the Respondent. Even so, the Respondent had escrowed the $150,000 because he apparently believed the United States Government had a lien, or, in any event, might have a claim in an amount not then determined. The Respondent's remedy was to reinstate the case on the docket and request judicial instruction, or to file an interpleader paying the $150,000 into Court and joining the United States Government and Mr. Sullivan for an adjudication of their interests. This the Respondent failed to do.

II. Misconduct

The certification of the Fourth District – Section I Committee of the Virginia State Bar charges that the Respondent engaged in misconduct in violation of the following Rules of Professional conduct, to wit:

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.15

(c) A lawyer shall:

(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer.

(c) engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation[.]

III. Disposition

Upon consideration of the foregoing, following deliberation in closed session, the Board reconvened in open session, and the Chair announced that (1) the VSB had failed to prove by clear and convincing evidence a violation of Rule 1.1 and Rule 8.4(b) and (c) of the Rules of Professional Conduct, and (2) the VSB had proved by clear and convincing evidence a violation of Rule 1.3(a), Rule 1.15(c)(4),and Rule 3.4(d) of the Rules of Professional Conduct as charged in the certification.

IV. Sanction

The Board called for evidence in aggravation or in mitigation of the misconduct found. Bar Counsel presented the VSB's certification that the Respondent had no disciplinary record.

Counsel for the Respondent presented testimony from Robert T. Hall, a prominent lawyer in medical malpractice and products liability; Bernard J. Dimuro, a former president of the Virginia State Bar; and the Respondent, and presented letters from Stephen L. Altman, Gary W. Brown, John M. Fitzpatrick, Gary A. Godard, and Brian H. Rhatigan—all being Virginia lawyers. Bar Counsel and counsel for the Respondent presented argument.

Following deliberation in closed session, the Board reconvened in open session. The Chair announced the Board's decision that the Respondent should be given a **PUBLIC ADMONITION**, and it is **ORDERED** that a **PUBLIC ADMONITION** be and hereby is issued to the Respondent effective November 18, 2005, the Board finding that misconduct was established but that no substantial harm was done the complainant or the public and that no further disciplinary action is necessary.

It is **ORDERED** that the Clerk of the Disciplinary System shall assess all costs against the Respondent pursuant to Part Six, § IV, ¶ 13.B.8.c of the Rules of the Supreme Court of Virginia.

It is further **ORDERED** that the Clerk of the Disciplinary System shall mail an attested copy of this order to the Respondent at his address of record with the Virginia State Bar, Suite 102, 4084 University Drive, Fairfax, Virginia 22030, by certified mail, return receipt requested, and to Michael L. Rigsby, 7275 Glen Forest Drive, Forest Plaza II, Suite 309, Richmond, Virginia 23226, and by regular mail to Seth M. Guggenheim, Assistant Bar Counsel, Virginia State Bar, 100 North Pitt Street, Suite 310, Alexandria, Virginia 22314-3133.

Enter this Order this 1 day of December, 2005.
VIRGINIA STATE BAR DISCIPLINARY BOARD
By: Peter A. Dingman, 1st Vice Chair
1221275v1

VIRGINIA:
BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTERS OF
BERNICE MARIE STAFFORD TURNER
VSB DOCKET NOS. 02-032-3876 [Harris]
03-032-1259 [Hertz]

Order of Public Reprimand with Terms

THESE MATTERS came on to be heard on December 14, 2005, upon the Agreed Disposition of the Virginia State Bar and the Respondent, based upon the Certification of a Third District, Section Two, Subcommittee. The Agreed Disposition was considered by a duly convened panel of the Virginia State Bar Disciplinary Board consisting of Thaddeus T. Crump, Lay Member; Janipher W. Robinson, Esq.; Robert E. Eicher, Esq.; Glenn M. Hodge, Esq.; and Joseph R. Lassister, Jr., Esq., Acting Chair.

The Respondent, Bernice Marie Stafford Turner, appeared with her counsel, Thomas H. Roberts. Deputy Bar Counsel Harry M. Hirsch appeared on behalf of the Virginia State Bar.

Upon consideration of the Agreed Disposition, the prior record of the Respondent and the argument of counsel, the Board deemed it appropriate to approve the Agreed Disposition and impose a Public Reprimand with Terms. Accordingly, the Board finds by clear and convincing evidence the following:

1. At all times relevant hereto the Respondent, Bernice Marie Stafford Turner [Turner] has been an attorney licensed to practice law in the Commonwealth of Virginia.

VSB Docket No. 02-032-3876 [Harris]:

I. FINDINGS OF FACT

2. On or about January 18, 2002, Complainant Shakisha Harris [Harris] engaged Turner to represent her in a bankruptcy. The stated fee for the representation was $500.00 plus filing fees and costs of $200.00.

3. On January 18, 2002, Harris paid Turner $250.00 in cash and received a receipt for the payment. Turner considered the $250.00 as earned fees upon payment and did not deposit the funds into a trust account. If this matter were to go to trial, Turner would testify that Turner spent approximately 3 hours with Harris, *inter alia*, reviewing bills and the like, explaining bankruptcy law and forms, and began to prepare bankruptcy forms.

4. On or about February 1, 2002, Harris paid Turner another $250.00 in cash. Harris did not receive a receipt for the payment. Turner considered the $250.00 as earned fees upon payment and did not deposit the funds into a trust account. Turner's file reflects an entry on an activity log indicating the payment as "earned." If this matter were to go to trial, Turner would testify that on or about February 1, 2002, Harris returned to Turner's office, bringing with her additional bills related to previously undisclosed creditors. Turner again spent time with Harris related to her bankruptcy.

5. On March 8, 2002, Harris paid Turner $200.00 in cash for filing fees and costs and received a receipt for the payment. Turner did not deposit the $200.00 into a trust account. If this matter were to go to trial, Turner would testify that she safely maintained the cash separately from her own moneys.

6. It was Turner's policy during the time frame of the Harris complaint to receive filing fees and costs from a client in cash or a money order payable to the clerk at the bankruptcy court and pay them over to the clerk directly without depositing said funds into a trust account.

7. On March 5, 2002, April 1, 2002 and April 15, 2002, Turner tried repeatedly to contact Harris by telephone, but received no answer. From about March 8, 2002 until sometime in April of 2002, Harris called Turner about her case almost weekly using a cell phone number, but did not reach Turner. Harris claimed she had only a cell number for Turner. When the two connected by telephone, Turner promised Harris that she would bring the bankruptcy papers to Harris' home that night for signature; however, Harris did not answer her door. Harris contended that Turner did not appear at Harris' home that night as promised.

8. In or about late May of 2002, Harris reached Turner at the cell phone number and told Turner, *inter alia*, that Harris was upset at the delay and was seriously considering asking for a full refund in order to obtain the services of another attorney. The night of the phone call, Turner came to Harris' home with papers regarding the bankruptcy for Harris' signature. If this matter were to go to trial, Turner would testify that on May 16, 2002, Turner met with Harris and reviewed the bankruptcy documents, and was advised by Turner that more information was needed to complete her schedules. Turner followed that meeting with a letter to the client.

9. Turner filed a Chapter 7 bankruptcy petition on June 7, 2002, in the Clerk's Office of the U. S. Bankruptcy Court, Eastern District of Virginia, Richmond Division in case number 02-64912-DOT. With the filing, Turner paid the $200.00 filing fees and costs. The filing was a permissible partial filing without all necessary lists, schedules and statements.

10. On June 12, 2002, the Clerk of the Bankruptcy Court issued a Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors & Deadlines which noted, *inter alia*, that a Section 341 meeting of creditors in the case was scheduled for July 11, 2002.

11. Turner wrote Harris a letter dated June 13, 2002, informing Harris of the bankruptcy court case number and the July 11, 2002 court date. In the letter Turner referred Harris to the cell phone number as the means to contact Turner with any questions.

12. On June 14, 2002, Turner filed additional statements and schedules in the bankruptcy court.

13. On June 17, 2002, the Virginia State Bar received a bar complaint from Harris, contending that Turner had not filed a bankruptcy for Harris.

14. Both Turner and Harris attended the Section 341 meeting of creditors on July 11, 2002.

15. On July 9, 2002, Harris provided an additional list of creditors that Turner had previously requested and needed to file complete and accurate schedules in Bankruptcy. On July 25, 2002, Turner filed a notice and an amended schedule with the bankruptcy court adding creditors to the case.

16. On August 1, 2002, Turner filed a required "perjury statement" signed by Harris.

17. On September 20, 2002, the bankruptcy court entered a discharge order.

18. Turner forwarded a letter to Harris dated October 1, 2002, addressed to Harris, which purports, *inter alia*, to end the representation by closing her file, to enclose the discharge order and copies of the bankruptcy filings. Harris denies ever receiving the letter. If this matter were to go to trial, Turner would testify that the bankruptcy court customarily forwards a notice of discharge to the debtor.

19. Harris contends that she was not able to contact Turner about her bankruptcy case after the Section 341 meeting of creditors on July 11, 2002, despite making phone calls to Turner in attempts to reach her.

20. According to Harris, she did not know the result of her bankruptcy case until she contacted the clerk's office of the bankruptcy court on or about March 21, 2003 and learned that a discharge had been entered and the case had been closed. If this matter were to go to trial, Turner would argue that Harris offers no explanation for her alleged failure to receive both the notice of discharge from the bankruptcy court or from Turner's office.

21. The bar asserts the two $250.00 sums paid by Harris to Turner for attorney fees constituted unearned fees upon payment and should have been deposited into a trust account. If this matter were to go to trial, Turner would testify that the two $250.00 sums constituted earned fees upon payment.

22. The $200.00 sum paid by Harris to Turner as filing fees and costs for the bankruptcy constituted funds belonging to Harris, to be held by Turner in trust until utilized for the purpose of filing the bankruptcy. Three months elapsed between the payment of the $200.00 to Turner and the use of the funds for the filing of the bankruptcy. During that three month period, Turner failed to maintain said funds in a trust account until disbursement.

23. One time (February 4, 2002), during the pendency of the representation of Harris, Turner changed her mailing address of record with the Virginia State Bar in compliance with the requirements for doing so.

II. NATURE OF MISCONDUCT

Such conduct on the part of Bernice Marie Stafford Turner constitutes misconduct in violation of the following provisions of the Virginia Rules of Professional Conduct:

RULE 1.15 Safekeeping Property

(a) All funds received or held by a lawyer or law firm on behalf of a client, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution may be deposited therein; or

(2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved. …

(f) Required Escrow Accounting Procedures. The following minimum escrow accounting procedures are applicable to all escrow accounts subject to Rule 1.15(a) and (c) by lawyers practicing in Virginia.

(2) Deposits. All receipts of escrow money shall be deposited intact and a retained duplicate deposit slip or other such record shall be sufficiently detailed to show the identity of each item;

VSB Docket No. 03-032-1259 [Hertz]:

I. FINDINGS OF FACT

24. In or about August of 2001, Complainant Richard Hertz, Sr. [Hertz] was represented by Darryl Parker, Esq. [Parker] in federal litigation involving allegations of fraud, conspiracy and racketeering (Transition, Inc., et al v. Austin, et al, 3:01-cv-00103-RLW), when Hertz asked Parker to represent him in a bankruptcy. Unable to do so, Parker referred Hertz to Turner. Hertz paid

$600.00 to Parker for a bankruptcy. At Hertz's direction, Parker paid the $600.00 to Turner by his trust account check number 2901, dated August 15, 2001. If this matter were to go to trial, Turner would testify that Parker also delivered to Turner a copy of the civil file including extensive pleadings and other documents.

25. Turner cashed the $600.00 check on August 16, 2001. Subsequently, at the request of Hertz, Turner gave Hertz a receipt for said funds. If this matter were to go to trial, Turner would testify Turner immediately reviewed the extensive file, and conducted legal research at the University of Richmond Law School. Hertz informed Turner that he had an impending foreclosure that he wanted to prevent by filing of a bankruptcy petition. Turner advised Hertz that due to the nature of the civil claims, that he may not be able to succeed in his bankruptcy petition to discharge the debts he incurred as a result of a Ponzi scheme he disclosed to Turner and further that the bankruptcy would only forestall the impending foreclosure(s) under Chapter 7 of the Bankruptcy Code. Turner also advised Hertz that due to the complexities and the likelihood of the motions for relief of stay and the adversary proceedings she required him to pay for research before she agreed to file a bankruptcy petition for him. She advised Hertz that her research fee would be a minimum of $600.00 for the initial research at a rate of $200/hour. Turner spent an initial 3 hours of research and subsequently another 3 hours in research. She advised him that in addition to the research, she would charge him a separate $600.00 to handle the filing of his bankruptcy in addition to $200 required for the filing fee.

26. In or about August of 2001, Turner met with Hertz about the bankruptcy. Hertz informed Turner about the litigation which was ongoing against him involving allegations of fraud, conspiracy and racketeering. Turner agreed to file a Chapter 7 bankruptcy on Hertz's behalf. Hertz understood that Turner was going to file the bankruptcy on his behalf as his attorney. If this matter were to go to trial, Turner would testify that she agreed to file the bankruptcy provided that Hertz pre-paid the bankruptcy legal and filing fee of $600 and $200 respectively, and that Hertz agreed to do so, but did not forward that money to Turner.

27. On August 20, 2001, Hertz met Turner at the bankruptcy court for the purpose of filing a voluntary bankruptcy petition which Turner had prepared. Hertz had the $200.00 filing fees with him. If this matter were to go to trial, Turner would testify that on August 19, 2001, Hertz spoke with Turner by telephone. Turner advised Hertz that he needed to pay to her the fees owing as well as the bankruptcy fee and cost that Turner had quoted to him before she would file the petition of bankruptcy for him. Hertz promised that he would meet Turner the next day and that he would bring the money, informing Turner that "I am a man of the cloth" and that Turner should therefore trust him to bring the money. On August 20, 2001, Hertz met Turner at her office on Grace Street, but failed to bring the money he promised. Turner informed Hertz that she would not file his petition that she had prepared for him and would not make an appearance as his counsel without the money he promised. Hertz told Turner that it was imperative that his petition be filed immediately to prevent an immediate foreclosure. Turner advised Hertz that without the fee, she would not file, but that she would release the file to him, namely the bankruptcy petition, and he could sign and file the petition himself and that Turner would make an appearance when he presented her with the fee required. Turner went with Hertz to the bankruptcy court, and into the clerk's office where the petition was filed without endorsement by Turner. Hertz paid the $200 filing fee. Turner did not sign the petition as attorney for Hertz or otherwise indicate that she was counsel for Hertz. There is no place on the petition form for the signature of an attorney who prepared the petition form but is not entering an appearance on behalf of the petitioner. Although Hertz had not paid for the petition prepared by Turner, Turner believed that she was required to provide the same to him so as not to prejudice his case.

28. It was Turner's policy during the time frame of the Hertz complaint to receive filing fees and costs from a client in cash immediately before filing or a money order payable to the clerk at the bankruptcy court and pay them over to the clerk directly without depositing said funds into a trust account.

29. Turner took no further action in the bankruptcy case for Hertz.

30. The bankruptcy petition included the following names for the debtor: Richard Hertz, Sr.; Richard A. Hertz, Sr.; Abby Fund, LLC; Remnant Fund, LLC; Dunumis Fund, LLC; Resourse Fund, LLC [sic]; and Koinonia Fund, LLC. If this matter were to go to trial, Turner would testify that the multiple names were as required in the petition form under the heading "ALL OTHER NAMES used by the debtor in the last 6 years (including married, maiden and trade names)"

31. According to Hertz, the bankruptcy court clerk's office contacted him subsequent to the filing about the necessity to correct the petition as filed, which he did, by striking through the trade names previously listed.

32. The bankruptcy petition as filed included the names of corporate entities as additional names for the debtor. Pursuant to Local Rules of Practice of the U.S. Bankruptcy Court for the Eastern District of Virginia [Local Rules] 5005-1(D)(1) a voluntary petition cannot include a listing of more than one entity as the debtor.

33. The bankruptcy petition filed also included Hertz's signature as the attorney for the petitioner.

34. Turner maintains that she had earned the $600.00 received by check from Parker, by performing research on behalf of Hertz on an emergency basis as a prelude to filing the bankruptcy petition and that Hertz failed to pay another $600.00 as attorney fees for representation in the bankruptcy in addition to the outstanding balance of fees owing for the research of an additional $600.00.

35. The bar asserts that the $600.00 payment to Turner in the form of Parker's check constituted the payment of unearned fees to Turner. If this matter were to go to trial, Turner would testify that the $600.00 payment constituted earned fees upon payment.

36. During the pendency of the representation of Hertz, from August 15, 2001 until August 20, 2001, prior to the date and time of the filing of the petition by Hertz, Turner did not change her address of record with the Virginia State Bar.

II. NATURE OF MISCONDUCT

Such conduct by Bernice Marie Stafford Turner constitutes misconduct in violation of the following provisions of the Virginia Rules of Professional Conduct:

RULE 1.5 Fees

(b) The lawyer's fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

III. PUBLIC REPRIMAND WITH TERMS

Accordingly, it is **ORDERED** that the Respondent shall receive a Public Reprimand with Terms upon the entry of this Order. It is further **ORDERED** that the terms, compliance with which is a predicate for the disposition of the Public Reprimand with Terms, shall be met by the dates and time frames herewith stated and the terms are as follows:

1. Limitations on Bankruptcy Practice - Within ten days of the issuance of the Board's order resulting from this agreed disposition, the Respondent shall certify in writing to the Office of Bar Counsel a list of all bankruptcy cases in which the Respondent is currently representing a client and shall not undertake to represent any clients in any new bankruptcy cases until she has completed the twenty (20) hours of Continuing Legal Education (CLE) described below. Nothing herein shall limit the ability of Turner to continue to represent the clients, who are so listed, in their bankruptcy cases to conclusion

2. Continuing Legal Education - By June 30, 2006, the Respondent shall attend and complete ten (10) hours of continuing legal education in the practice area of bankruptcy law; four (4) hours of continuing legal education in law office management; four (4) hours of continuing legal education in ethics/trust accounting, and two (2) hours in malpractice avoidance/ethics and Respondent shall certify in writing to the Office of Bar Counsel that she has done so pursuant to this term. Said courses shall be approved for mandatory continuing legal education in Virginia. Respondent shall receive credit for said attendance toward her annual Virginia mandatory continuing legal education requirements in the total amount of 10 hours.

3. PC Law training: Respondent shall forthwith register, attend and complete the January 19 and 20, 2006 training in the use of PC Law billing/trust accounting software at a cost of $599.00 paid by Respondent, and shall further receive individualized onsite (at the training center) and remote training in trust accounting and reconciliation, etc. through Marilyn King, of HMU Consulting (http://www.hmuconsulting.com/), formerly the Columbus Bar IT Director and a vendor for PCLAW (http://www.pclaw.com/training/) at a cost of $145/hour. Respondent shall receive from Marilyn King monitoring and further instruction as needed at the following minimum intervals, monthly for three months beginning February 2006, and then quarterly for four quarters. Respondent shall authorize and direct Marilyn King to report to the Virginia State Bar, any failure to comply with training, practices and procedures recommended to the Respondent by Marilyn King.

4. Law Office Management Consultant: The Respondent shall forthwith engage the services of a law office management consultant approved by the Virginia State Bar to review and make written recommendations concerning the Respondent's law practice policies, methods, systems and procedures.

5. The Respondent shall institute and thereafter follow with consistency any and all recommendations made to her by Marilyn King, of HMU Consulting. Additionally, the Respondent shall institute and thereafter follow with consistency any and all recommendations made to her by the law office management consultant following the law office management consultant's

evaluation of the Respondent's practice. The Respondent shall grant the law office management consultant reasonable access to her law practice from time to time, at the consultant's request, for purposes of ensuring that the Respondent has instituted and is complying with the law office management consultant's recommendations. In evaluating the Respondent's law office management policies and procedures, the law office management should, *inter alia*, consult with Respondent initially to organize and to set practices and procedures into place and thereafter may provide three quarterly checkups to adjust and/or to insure that the practices and procedures are working.

6. The engagement of the law office management consultant's services shall specifically include the authorization and directive by the Respondent to the law office management consultant, upon the Respondent's failure to comply with any of the law office management consultant's recommendations, that the law office management consultant shall provide the Virginia State Bar with access, by telephone conferences and/or written reports detailing the failure to comply with the findings and recommendations of the law office management consultant by the Respondent.

7. The Respondent shall be obligated to pay when due the fees and costs of Marilyn King of HMU Consulting, as well as the fees and costs of the law office management consultant including, but not limited to, the provision to the Bar of information described above concerning this matter.

8. Terms in paragraphs 3, 4, 5, 6 and 7 shall end no later than one year after the entry of the Board order resulting from this agreed disposition.

Upon satisfactory proof that such terms and conditions have been met, these matters shall be closed. If, however, the terms and conditions are not met by the dates and time frames as stated, the Board shall impose a Four (4) Month Suspension upon a finding by the Board in a show cause proceeding that the Respondent failed to fulfill the terms and conditions in any respect.

It is further **ORDERED** that the Clerk of the Disciplinary System shall impose costs upon the Respondent pursuant to Paragraph 13.B.8.c.

The court reporter for this hearing was Donna T. Chandler, Chandler & Halasz, P.O. Box 9349, Richmond, VA 23227, telephone number 804-730-1222.

It is further **ORDERED** that a copy teste of this Order shall be mailed by certified mail, return receipt requested, to the Respondent at her last address of record at the Virginia State Bar, and by first class mail to Thomas H. Roberts, counsel for the Respondent; and a copy of this Order shall be furnished to Deputy Bar Counsel Harry M. Hirsch.

Enter this Order this 27 day of December, 2005
Virginia State Bar Disciplinary Board
By: Joseph R. Lassiter Jr., Acting Chair

VIRGINIA:
BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
JOHN JOSEPH VAVALA, ESQUIRE
VSB Docket Numbers: 04-021-2543
04-021-3102

On November 18, 2005 this matter came before a duly convened panel of the Virginia State Bar Disciplinary Board consisting of Joseph R Lassiter, Jr., Chair Designate, William M. Moffett, Roscoe B. Stephenson, III, Bruce T. Clark and Werner H. Quasebarth, lay member. The Bar was represented by Edward L. Davis, Assistant Bar Counsel. The Respondent appeared and was represented by John E. Pappas.

At the outset of the hearing, the Chair polled the members of the panel to determine whether any member had any business or financial interests or any personal bias that would impair or could be perceived to impair his or her ability to hear the matters to come before the panel fairly and impartially. Each member, including the Chair, responded in the negative.

By agreement between the Bar and the Respondent, the following Stipulations of Fact were submitted to the Panel:

I. STIPULATION OF FACTS

1. During all times relevant hereto, the Respondent, John Joseph Vavala, was an attorney licenced to practice law in the Commonwealth of Virginia, having been admitted to the Bar in June of 1982.

04-021-2543
Complainants: Ernest H. and Jennie H. Palacios

2. In October 2003, the complainants, Ernesto H. and Jennie H. Palacios, paid Mr. Vavala $2,500 to investigate some stock certificates from the Occidental Oil Corporation dating back to the 1920's.

3. The Palacios' wanted to know if the certificates were of any value, and to have them titled in their names if they were.

4. Mr. Vavala confirmed the engagement by letter, dated October 22, 2003. His fee arrangement provided for a fee of twenty percent of the value of the stock, with a ceiling of $3,500. The agreement also provided for a sliding scale refund of the fee to the Palacios, less $150, if the stock was worth less than $12,500.

5. On October 20, 2003, Mr. Vavala received some information about Occidental from Stephen A. Johnson. The same day, Mr. Vavala wrote to Mellon Investor Services requesting information about the stock.

6. By letter, dated October 29, 2003, Mellon replied that it was unable to find any information about the company, and that it did not have any accounts in the names of the persons named on the stock certificates.

7. Mellon advised Mr. Vavala further that the shares may have been replaced, or that they may have escheated to the government. Mellon recommended that Mr. Vavala contact four possible depositories where the stock may have escheated.

8. According to the Palacios', Mr. Vavala advised them that the stock had escheated to the government. The Palacios' then asked him for a refund in accordance with the terms of the fee agreement.

9. Despite repeated promises to do so, Mr. Vavala never issued the refund. The Palacios' eventually obtained a judgment against him in May 2004.

10. Mr. Vavala paid the judgment to the Palacios' in the following manner: $400 on or about October 14, 2004, $500 on or about October 22, 2004, $500 on or about October 29, 2004, $500 on or about November 25, 2004, and $1,011.11 on or about September 17, 2005.

11. By letter, dated March 5, 2004, the Virginia State Bar issued a formal complaint to Mr. Vavala at his last address of record with the Virginia State Bar setting forth the Palacios' allegations of misconduct and requesting a response within 21 days. Mr. Vavala failed to respond to the complaint.

12. On April 15, 2004, the bar issued a subpoena duces tecum returnable on or before May 6, 2004, for the complete client file of the Palacios', as well as his escrow account records concerning these clients. Service was obtained on Mr. Vavala when he or his office signed for the subpoena duces tecum.

13. Notwithstanding personal service of process of the subpoena duces tecum and a subsequent written reminder of his duty to comply, Mr. Vavala failed to respond, comply, or object to the subpoena duces tecum, resulting in the interim suspension of his license to practice law on June 15, 2004.

14. On May 24, 2004, during an interview with Virginia State Bar Investigator Eugene L. Reagan, Mr. Vavala advised that he never placed the Palacios' fee into an attorney trust account, but that he placed it into an operating account.

15. By electronic mail (e-mail) on July 31, 2004, Mr. Vavala advised the bar that he did not have an attorney trust account at the time, and had no time records for this case.

16. Mr. Vavala also admitted to not responding to the Palacios' numerous inquiries.

04-021-3102
Complainant: Roderick E. Johnson

17. During 2003, Roderick E. Johnson and NiColette Jackson were partners in a business known as TETRA IT Services, LLC, in Virginia Beach, Virginia.

18. In May 2003, the partners chose to dissolve the business. Mr. Johnson hired Mr. Vavala to assist him. Ms. Jackson hired attorney Kris Cardwell to represent her interests.

19. On June 7, 2003, Mr. Johnson paid Mr. Vavala $400 with a check drawn on the TETRA company account.

20. Mr. Vavala agreed to prepare articles of dissolution for Mr. Johnson, and to negotiate a settlement for the early termination of the office lease with the leasing company, Pembroke Office Park, L.P.

21. Mr. Vavala prepared the articles of dissolution, and negotiated a settlement with Pembroke in the amount of $12,000 with no additional costs.

22. Mr. Vavala and Ms. Cardwell reached an agreement for their respective clients to pay $6,000 each toward the settlement, contingent upon an acceptable division of business equipment between Mr. Johnson and Ms. Jackson.

23. Toward this end, on June 9, 2003, Mr. Johnson paid Mr. Vavala $5,500 by money order, and on an unknown date, paid him an additional $1,000 (prior to October 2003). Six Thousand Dollars ($6,000) of the funds were to be used to pay Mr. Johnson's share of the settlement with Pembroke.

24. Instead of paying the money directly to Pembroke, on Mr. Vavala's instructions Mr. Johnson paid the money to Mr. Vavala instead.

25. Mr. Johnson thought that the matter was concluded.

26. In October 2003, having received no payment toward the settlement, Pembroke's attorney filed a warrant in debt against TETRA for unpaid rent, serving the warrants on Mr. Johnson and Ms. Jackson.

27. Pembroke's attorney agreed to continue the case several times to allow the settlement to occur. Each time, Mr. Johnson would contact Mr. Vavala to ascertain why the case had not been closed. Having received no response from Mr. Vavala, he tried to visit him at his office only to find that Mr. Vavala had moved without notifying him.

28. After several continuances, the warrants in debt were scheduled for hearing on February 9, 2004.

29. On Friday, February 6, 2004, Mr. Vavala met with Ms. Cardwell and reached an agreement for the division of the business equipment. The same day, Ms. Cardwell made a check in the amount of $6,000 to Pembroke, representing her client's share of the settlement.

30. The same day, by e-mail, Mr. Vavala advised Pembroke's attorney:

meeting with Ms. Cardwell right now
one problem has arisen

she can attest to the fact that I am "quite busted up" (she will explain)

i have his money ($6,000) we have settled the "other matters" (pending her client's approval)

i have to go home now for the rest of the day
ms cardwell will explain
i should be well enough by wed to fund the thing — kris will explain that the reason is quite obvious
please call kris — i will be available by cell phone — after about 1:00 today

31. Likewise, during his meeting with Ms. Cardwell, Mr. Vavala said that he was sure that he had paid Johnson's money into his escrow account, and that he would pay the money to Pembroke, but that he did not have his checkbook with him. Ms. Cardwell confirmed this conversation in a letter to Mr. Vavala, dated March 8, 2004.

32. On the assurances that the settlement would be paid, Pembroke's attorney continued the case to March 1, 2004.

33. On March 1, 2004, Ms. Cardwell and her client appeared in court and paid the $6,000 share of the settlement.

34. Mr. Vavala, however, failed to appear in Court on March 1, 2004, and failed to pay the $6,000 to Pembroke.

35. Thinking that the matter was concluded, Mr. Johnson knew nothing about a court appearance on March 1, 2004, and did not appear.

36. On March 1, 2004, Pembroke obtained a judgment against Mr. Johnson in the amount of $9,854.56, representing the principal sum of $12,476 plus interest, costs and attorney's fees, less a $6,000 credit for the share paid by Cardwell on behalf of Jackson.

37. Pembroke then served Mr. Johnson with a garnishment summons. Alarmed about the turn of events, Mr. Johnson hired another attorney, who had the matter dismissed from the docket upon Mr. Johnson's payment of $9,854.46 to Pembroke. Mr. Johnson had to mortgage his home to raise the money.

38. Pembroke's attorney advised the bar that she would have accepted the $6,000 from Johnson as earlier agreed, but that interest and costs over time made that prohibitive.

39. By paying $6,000 to Mr. Vavala and $9,854.46 to Pembroke to dismiss the garnishment summons, Mr. Johnson paid a total of $15,854.46 to resolve a matter that would have been resolved for only $6,000 had Mr. Vavala paid the money to Pembroke as agreed.

40. Mr. Vavala did not deposit any of the money that Johnson paid to him into an attorney escrow or trust account. Instead, he deposited the funds into what he called a "general" account. Upon further inquiry by the bar, he said that his main business was investment banking, and that the funds would have been paid into the account of one of those companies.

41. Mr. Vavala never paid the $6,000 to Pembroke as directed, never refunded any to Mr. Johnson until on or about September 16, 2005, when he issued a cashier's check in the amount of $9,900 to Mr. Johnson, who executed a release of all claims against Mr. Vavala.

42. Mr. Vavala said that his problems were occasioned in part by his bout with a severe case shingles that rendered him unable to move about at times.

43. Mr. Vavala advised the Virginia State Bar investigator that the problem encountered by Mr. Johnson in this matter was, in all honesty, due to Mr. Vavala's neglect. He also acknowledged that Mr. Johnson tried to call him and he did not return those calls. Further, he did not send letters to clients notifying them about the move of his office because his primary business was investment banking which did not lend itself to writing letters to clients for whom he sold businesses.

44. By letter, dated May 4, 2004, The Virginia State Bar issued a formal complaint to Mr. Vavala at his last address of record with the Virginia State Bar setting forth Mr. Johnson's allegations of misconduct and requesting a response within 21 days. Mr. Vavala failed to respond to the bar complaint.

45. On November 4, 2995 (sic) Roderick Johnson executed the attached appendage to the Stipulation of Fact requesting that his complaint against John Joseph Vavala not be pursued.

The above stipulation was admitted into evidence as a joint exhibit. VSB Exhibits 1 through 17 in the Palacios case and 1 - 17 in the Johnson case were preadmitted into evidence without objection at a prehearing, and were marked as group exhibits, VSB Exhibits 1 and 2, respectively. The Respondent offered four exhibits, which were admitted into evidence without objection. The Respondent declined to testify or to offer any witnesses on his behalf.

The panel then retired to determine whether one or more ethical violations had occurred. Based upon the evidence and stipulations presented, the Board, following due deliberation, found that the Respondent was in violation of the following disciplinary rules:

II. RULE VIOLATIONS
(Palacios Complaint)

RULE 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

RULE 1.15 Safekeeping Property

(a) All funds received or held by a lawyer or law firm on behalf of a client, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

RULE 1.15 Safekeeping Property

(c) A lawyer shall:

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; and

(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

RULE 8.1 Bar Admission And Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application, in connection with any certification required to be filed as a condition of maintaining or renewing a license to practice law, in connection with a disciplinary matter, shall not:

(c) fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6;

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer;

II. RULE VIOLATIONS
(Johnson Complaint)

RULE 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.

(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

RULE 1.15 Safekeeping Property

(a) All funds received or held by a lawyer or law firm on behalf of a client, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

RULE 1.15 Safekeeping Property

(c) A lawyer shall:

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; and

(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

RULE 8.1 Bar Admission And Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application, in connection with any certification required to be filed as a condition of maintaining or renewing a license to practice law, in connection with a disciplinary matter, shall not:

(c) fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6;

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(c) engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation;

III. SANCTIONS

The panel then heard evidence as to the sanctions phase of the proceedings. The Bar admitted into evidence the Respondent's prior disciplinary record, noting that in 25 years of practicing law the Respondent had had only two violations, which arose from his loss of his license administratively, which subsequently resulted in a charge of practicing law without a license.

There are few matters which come before the Board which raise such serious concerns as the mishandling of a clients funds by an attorney. In both of these cases, the Respondent violated the trust of his clients by failing to properly segregate his client's funds in

a trust account as required by the rules, failing to properly apply such funds as clearly agreed upon and ultimately failing to return such funds to their rightful owners in a timely fashion following demands for the same.

To his credit, the Respondent did ultimately make his clients financially whole, but only after causing them serious inconvenience and difficulty, and only shortly before trial of these charges of ethical violations. Moreover, the Panel appreciates the fact that while the Respondent at first failed to comply with the rightful inquiries of the Bar, he did in the end cooperate in the preparation and submission of stipulations in which he clearly acknowledged his wrongdoing. The Panel is also not unmindful that the Respondent has had a long career as an attorney in Virginia with a record which, while not spotless, in no manner reflects any prior hints of dishonesty or impropriety in the handling of client funds.

Nevertheless, the charges against Respondent are troubling. In the Johnson case, Respondent received over $6,000.00 in funds from his client which were clearly designated as client funds to settle threatened litigation. Nevertheless, the funds were not deposited into a trust account. Following months of negotiation with counsel for his client's former partner, who was jointly and severally liable for the claims, Respondent expressly confirmed to counsel that he had the $6,000.00 in funds necessary to fund Johnson's share of the settlement. Notwithstanding, Respondent failed to satisfy his client's share of the settlement, either in October, 2003 when Johnson was first served with a warrant in debt, or prior to March 1, 2004, when judgment was taken on a refiled warrant in debt. Respondent offers no evidence or testimony to explain why the money was not paid prior to judgment, or for that matter prior to September, 2005, other than unsubstantiated representations that the money was always available and that the Respondent was suffering from undisclosed medical problems.

The issues in Palacios are similar. Respondent accepted a $2,500.00 fee to attempt to recover the value of certain stock no longer listed on the exchange. Once again the funds were not deposited to a trust account. According to Respondent's written fee agreement, the bulk of the fee was to be refunded if the stock proved to be worthless. Notwithstanding being advised that the stock may have escheated to the government, Respondent took no action to see if the value could be recovered, and instead informed his clients that the stock was worthless. Despite prompt demand and the clear language of the fee agreement, Respondent failed to refund the unearned portion of the fee. As late as November, 2004, Respondent was contending to bar counsel that he should not have to refund the fee. The full refund was not made until September, 2005, following a prehearing in this matter.

Having considered the above, the Panel hereby **ORDERS** that the licence of the Respondent to practice within this Commonwealth be and hereby is **SUSPENDED** for a period of five years beginning on the 18th day of November, 2005, effective immediately.

It is further **ORDERED** that, as directed in this Order, Respondent must comply with the requirements of Part Six, ß IV, 13(M) of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the suspension of his license to practice law in the Commonwealth of Virginia, to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his client. The Respondent shall also furnish proof to the Bar that such notices have been timely given and such arrangements made for the disposition of matters.

Pursuant to Part 6, Sec. IV, Para. 13.B.8.c. of the Rules, the Clerk of the Disciplinary System shall assess costs.

It is further **ORDERED** that a copy teste of this Order shall be mailed by Certified U.S. Mail, return receipt requested, to the Respondent, John Joseph Vavala, 124 South Lynhaven Road #103, Virginia Beach, Virginia 23452 his address of record with the Virginia State Bar; by First Class U.S. Mail, postage prepaid, to his counsel of record, John E. Pappas, Esquire, P.O. Box 1398, Portsmith, Virginia 23705 and to Edward L. Davis, Esquire, Assistant Bar Counsel, Virginia State Bar,707 East Main Street, Suite 1500, Richmond, Virginia 23219.

Victoria V. Halasz, Chandler and Halasz, Inc., Court Reporters, P.O. Box 9349, Richmond, Virginia 23227, 804/730-1222, was the reporter for the hearing and transcribed the proceedings.

ENTERED this 6 day of December, 2005.
VIRGINIA STATE BAR DISCIPLINARY BOARD
By: JOSEPH R. LASSITER, JR., CHAIR DESIGNATE

VIRGINIA:
BEFORE THE TENTH DISTRICT COMMITTEE, SECTION I
OF THE VIRGINIA STATE BAR

IN THE MATTER OF
EDGAR HAMPTON DEHART, JR.
VSB Docket No. 04-101-3621

DISTRICT COMMITTEE DETERMINATION
(PUBLIC REPRIMAND)

On November 4, 2005, a hearing in this matter was held before a duly convened Tenth District Committee, Section I, panel consisting of Charles Roscoe Beller, III, Esq., Chair Presiding; Max Jenkins, Esq.; Frederick Marlin Kellerman, Jr., Esq.; Hugh G. Campbell, Jr., Esq.; Barbara Lou Rich Long, Esq; and Dean Ray Manor, Esq. Without objection from Respondent, the Committee proceeded with the hearing without a lay member pursuant to Part 6, Section IV, Paragraph 13.B.2.b.3.

Respondent appeared in person *pro se*. Scott Kulp appeared as counsel for the Virginia State Bar.

Pursuant to Part 6, Section IV, Paragraph 13.H.2.l.2.d of the Rules of the Virginia Supreme Court, the Tenth District Committee, Section I, of the Virginia State Bar hereby serves upon the Respondent the following Public Reprimand:

I. Findings Of Fact

1. At all times relevant to this matter, Respondent Edgar Hampton DeHart, Jr. (hereinafter "the Respondent") was an attorney licensed to practice law in the Commonwealth of Virginia.

2. Complainant Nancy D. Montgomery-Salcido (hereinafter "Complainant") purchased a mobile home from Pilot Homes on September 1, 1994 for just over $19,000.

3. Complainant claimed that the home had problems that Pilot Homes would not fix. She met with the Respondent on or about March 22, 1995, and he agreed to take her case against Pilot Homes.

4. Thereafter, Complainant met with the Respondent on several occasions in an attempt to ensure that the Respondent filed a warrant-in-debt before September 1995 so as not to run afoul of the limitation for filing a breach of contract action set forth in the purchase contract.

5. On or about September 19, 1995, Complainant met with the Respondent. The Respondent informed Complainant that she did not have a case because he believed that she had waived her warranty.

6. Notwithstanding, Complainant determined that a lawsuit could be filed against the manufacturer of the mobile home up to four years after purchase.

7. The Respondent filed a Warrant-in-Debt in Carroll County General District Court on October 31, 1996 against Clayton Homes (the manufacturer) and against Pilot Homes for $8,000.

8. The general district court hearing set for Jan. 15, 1997 was reset for February 19, 1997, and again postponed for March 19, 1997.

9. After the hearing on March 19, 1997, the district court dismissed the matter on the defendants' motion for plea of the statute of limitations.

10. Respondent appealed the March 19, 1997 dismissal on Complainant's behalf to the Carroll County Circuit Court.

11. By letter to the Carroll County Circuit Court Clerk, the Respondent confirmed that the Motions hearing originally scheduled for July 9, 1997 was rescheduled to August 14, 1997.

12. There is no record that the August 14, 1997 Motions hearing ever occurred.

13. On or about July 27, 1999, the Deputy Clerk of Carroll County Circuit Court sent the Respondent a letter advising him that Complainant's case would be dismissed because it had been pending more than two years and no proceeding had been taken except to continue it.

14. On or about August 12, 1999, the Respondent sent a letter to the Court Clerk, requesting that pursuant to Va. Code § 8.01-335 the case remain on the active docket, stating: "It is my understanding that Ms. Salcido is attempting to resolve the issues and controversy directly with Clayton Homes." The Complainant denied this statement, contending instead that Respondent was handling all aspects of the case.

15. On or about July 26, 2000, the Clerk's office sent the Respondent another letter stating that the case would be dismissed pursuant to Va. Code § 8.01-335 on August 21, 2000 because it had been pending without substantive activity for more than two years, unless by said date there was a showing as to why it should be retained on the docket.

16. On or about August 21, 2000, the Carroll County Circuit Court, by order, struck the case from the docket pursuant to Va. Code § 8.01-335.

17. The Respondent represented to Complainant that he would try to get the matter back on the court's docket, but if not, he would buy Complainant's mobile home.

18. By handwritten note, the Respondent agreed to pay Complainant $35,000 for Complainant's mobile home.

19. By three checks in August 2001, the Respondent has paid Complainant a total of $11,000.

II. Nature Of Misconduct

RULE 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

III. Public Reprimand

Accordingly, it is the decision of the Tenth District Committee, Section I, to impose a Public Reprimand and the Respondent is hereby so reprimanded.

Pursuant to Part Six, Section IV, Paragraph 13.B.8.c.1 of the Rules of the Virginia Supreme Court, the Clerk of the Disciplinary System shall assess costs.

TENTH DISTRICT COMMITTEE, SECTION I
OF THE VIRGINIA STATE BAR
By Charles Roscoe Beller, III, Chair

CERTIFICATE OF SERVICE

I certify that on 2nd day of December, 2005, I mailed by Certified Mail, Return Receipt Requested, a true copy of the District Committee Determination (Public Reprimand) to Edgar Hampton DeHart, Jr., Respondent, at P.O. Box 1613, Galax, VA 24333, Respondent's last address of record with the Virginia State Bar.

Scott Kulp
Assistant Bar Counsel

VIRGINIA:

BEFORE THE THIRD DISTRICT, SECTION TWO, SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

IN THE MATTERS OF
DAVID MICHAEL GAMMINO
VSB DOCKET NOS. 05-032-2612 [Neal]
05-032-2481 [VSB/VaCtApp]
05-032-2483 [VSB/VaCtApp]
05-032-2493 [VSB/VaCtApp]
05-032-2484 [VSB/VaCtApp]

SUBCOMMITTEE DETERMINATION
(PUBLIC ADMONITION WITH TERMS)

On December 5, 2005, a meeting in these matters was held before a duly convened Third District, Section Two, Subcommittee consisting of Judith G. Napier, Lay Member; Randall G. Johnson, Jr., Esq.; and William J. Viverette, Esq., Chair, presiding. Pursuant to Part 6, ' IV, & 13.G.1.d.(1) of the Rules of the Supreme Court, the Third District, Section Two, Subcommittee of the Virginia State Bar hereby serves upon the Respondent, David Michael Gammino, the following Public Admonition with Terms:

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

VSB Docket No. 05-032-2612 [Neal]:

I. FINDINGS OF FACT

2. In or about March of 2004, Gammino was retained by Willie Mae Lyons [Willie] and Kenny Lyons [Kenny] to represent Complainant Kelvin Neal [Kelvin] on charges of robbery, armed burglary and malicious wounding [representation]. Willie is Kelvin's mother and Kenny is Kelvin's brother. Gammino told the family he would charge a "flat rate" of between $2,500.00 and $5,000.00 depending upon what needed to be done in the case.

3. Willie paid Gammino a total of $3,010.00 in three payments as attorney fees for the representation [funds].

4. According to Gammino, each payment was deposited into his operating account at the end of the week in which payment was made [Gammino's statement].

5. Willie paid Gammino $500.00 on Thursday, March 25, 2004 [first payment]. In accordance with Gammino's statement, the first payment was deposited by or on behalf of Gammino into his operating account on Friday, March 26, 2004.

6. Willie paid Gammino $1,000.00 on Friday, March 26, 2004 [second payment]. In accordance with Gammino's statement, the second payment was deposited by or on behalf of Gammino into his operating account on Friday, March 26, 2004.

7. Willie paid Gammino $1,510.00 on Friday, April 16, 2004 [third payment]. In accordance with Gammino's statement, the third payment was deposited by or on behalf of Gammino into his operating account on Friday, April 16, 2004.

8. Gammino considered the funds earned upon his first appearance on behalf of Kelvin.

9. On April 16, 2004, Gammino filed a motion for discovery and a request for a certificate of analysis, thus making his first appearance in the case. A preliminary hearing occurred on May 12, 2004. Kelvin was convicted in August of 2004 on pleas of no contest to robbery and statutory burglary. The malicious wounding charge was nolle prossed.

10. The funds constituted advanced legal fees. Advanced legal fees must be deposited into a trust account until earned.

11. Gammino failed to deposit the funds into a trust account until earned.

12. Gammino does not maintain subsidiary ledgers for his clients and their funds.

II. NATURE OF MISCONDUCT

Such conduct by David Michael Gammino constitutes misconduct in violation of the following provisions of the Virginia Rules of Professional Conduct:

RULE 1.15 Safekeeping Property

(a) All funds received or held by a lawyer or law firm on behalf of a client, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution may be deposited therein; or

(2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(e) Record Keeping Requirements, Required Books and Records. As a minimum requirement every lawyer engaged in the private practice of law in Virginia, hereinafter called "lawyer," shall maintain or cause to be maintained, on a current basis, books and records which establish compliance with Rule 1.15(a) and (c). Whether a lawyer or law firm maintains computerized records or a manual accounting system, such system must produce the records and information required by this Rule.

(1) In the case of funds held in an escrow account subject to this Rule, the required books and records include:

(iii) subsidiary ledger. A subsidiary ledger containing a separate account for each client and for every other person or entity from whom money has been received in escrow shall be maintained. The ledger account shall by separate columns or otherwise clearly identify escrow funds disbursed, and escrow funds balance on hand. The ledger account for a client or a separate subsidiary ledger account for a client shall clearly indicate all fees paid from trust accounts;

VSB Docket No. 05-032-2481 [VSB/VaCtApp]:

I. FINDINGS OF FACT

13. Gammino was court-appointed to represent Sherman White [White] in the appeal to the Virginia Court of Appeals [Court] of his criminal convictions for possession with intent to distribute narcotics [representation].

14. On November 27, 2001, Gammino filed in the Court a motion for an extension of time to file an opening brief and an appendix. On November 30, 2001, the Court entered an order granting the extension until December 4, 2001.

15. On December 14, 2001, Gammino filed another motion to extend the filing deadline for an opening brief and an appendix stating, *inter alia*, "Due to an oversight, counsel was unaware that such extension was granted and therefore failed to file within the extended deadline."

16. On January 14, 2002, the Court entered an order denying the second motion for an extension to file an opening brief and appendix because the motion was not timely filed, and dismissed the appeal.

17. Pursuant to Rule 5A:19(d) of the Rules of the Supreme Court of Virginia [individual rules referred to as "Rule," hereafter], the time for filing any brief in the Court may be altered by agreement of all counsel and with the permission of a judge of the Court. An opening brief must be filed in a criminal case within forty days after the date of the certificate of appeal issued by the clerk of the Court. The certificate of the clerk was issued in White's appeal on October 18, 2001. Rule 5A:19(c)(1). An appendix must be filed by the appellant no later than the filing of his opening brief. Rule 5A:25.

18. White successfully pursued a writ of habeas corpus based upon the failure to file an opening brief and appendix timely. Gammino was appointed again to represent White in the appeal.

19. On May 22, 2003, the Court issued a show cause order requiring a response by June 1, 2003, why the second appeal should not be dismissed for failure to file an appendix. The Court also ordered that a replacement opening brief be filed within the same time frame.

20. Gammino filed a response to the show cause on June 2, 2003. In the response, Gammino told the Court he failed to file an appendix as required. He stated, "having originally filed an appendix and brief … albeit late, Counsel inadvertently neglected to file the same documents again." Gammino also stated that he mistakenly filed a petition rather than a brief. Gammino enclosed with the response a brief and appendix.

21. The Court treated Gammino's response as a motion for an extension of time to file an appendix and granted same until June 2, 2003, thus considering the appendix properly filed.

22. The Court affirmed the judgment of the trial court by order entered October 28, 2003.

23. Gammino did not appeal White's convictions to the Virginia Supreme Court.

24. Gammino did inform White of the denial of his appeal by the Court of Appeals. White wanted Gammino to appeal to the Virginia Supreme Court and believes that Gammino did so, resulting in a second denial.

25. The Supreme Court of Virginia has no record of an appeal having been filed on behalf of White by Gammino.

26. A court-appointed attorney is required to pursue the appeal of a criminal case to the Supreme Court of Virginia unless his client does not wish to do so. Dodson v. Director, 233 Va. 303 (1987); Kuzminski v. Commonwealth, 8 Va. App. 106 (1989); Brown v. Warden, 238 Va. 551 (1989).

27. Gammino failed to pursue the representation competently, with reasonable diligence and promptness. He failed to keep White reasonably informed about the status of the appeal and failed to explain the case sufficiently to permit White to make informed decisions about the representation.

II. NATURE OF MISCONDUCT

Such conduct by David Michael Gammino constitutes misconduct in violation of the following provisions of the Virginia Rules of Professional Conduct:

RULE 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

RULE 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

VSB Docket No. 05-032-2483 [VSB/VaCtApp]:

I. FINDINGS OF FACT

28. Gammino was court-appointed to represent Eric Alexander [Alexander] in an appeal of a May 8, 2003, criminal conviction.

29. On August 8, 2003, the Court of Appeals [Court] received the trial court record. Gammino filed a notice of appeal in the Court on the same date.

30. A petition for appeal was due on September 17, 2003, forty days after the filing of the record with the Court. Rule 5A:12(a).

31. Gammino filed a petition for appeal in the Court on behalf of Alexander on September 22, 2003.

32. On September 26, 2003, the Court entered an order dismissing the appeal because neither the petition for appeal nor a motion for extension of time to file a petition for appeal had been timely filed.

33. Gammino and his office staff miscalculated the due date for the filing of the petition for appeal. The petition was filed on the date which he and his office staff had incorrectly calculated as the due date.

34. Upon receiving the bar complaint, Gammino reviewed the Alexander file and realized that the client had not been informed of the dismissal of the appeal. Gammino wrote Alexander a letter dated March 11, 2005 informing him of the dismissal and forwarding him a writ of *habeas corpus* to complete.

35. Gammino failed to pursue the appeal on behalf of Alexander competently and with reasonable diligence and promptness. He failed to keep Alexander reasonably informed about the status of the case. He failed to make reasonable efforts to ensure that his firm had in effect measures giving reasonable assurance that the conduct of nonlawyer assistants in his office was compatible with Gammino's professional obligations.

II. NATURE OF MISCONDUCT

Such conduct by David Michael Gammino constitutes misconduct in violation of the following provisions of the Virginia Rules of Professional Conduct:

RULE 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

RULE 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

RULE 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

VSB Docket No. 05-032-2493 [VSB/VaCtApp]:

I. FINDINGS OF FACT

36. On July 19, 2004, Raymond Watson [Watson] was sentenced to five years with three and one-half years suspended. Watson had entered a guilty plea conditioned on his retention of a right to appeal the denial of a motion to suppress.

37. Gammino was court-appointed to represent Watson in the appeal, having served as retained counsel in the trial court.

38. During the appeal, Watson was free on an appeal bond.

39. On July 19, 2004, Gammino filed a notice of appeal in the Circuit Court of the City of Richmond and the Virginia Court of Appeals [Court]. In the notice of appeal Gammino stated that the trial transcript will be prepared. In the accompanying certificate Gammino represented that he had ordered the trial transcript.

40. On or about October 15, 2004, Gammino received notice from the Court of the receipt of the trial record.

41. On October 19, 2004, the Court entered an order of show cause requiring a response by November 3, 2004 on the failure of Gammino to file a transcript or a statement of facts.

42. Upon his receipt of the show cause order, Gammino learned that the trial transcript was not included in the record filed with the Court.

43. Neither Gammino, nor anyone from his law firm, had ordered the trial transcript.

44. Gammino did not respond to the show cause order. In his opinion there were no questions which could have been considered without resort to the transcript.

45. On November 17, 2004, the Court dismissed the appeal due to the lack of response to the show cause order.

46. When Virginia State Bar Investigator Cam Moffatt [Moffatt] interviewed Gammino on April 26, 2005, regarding this bar complaint, he stated, *inter alia*:

    a. that his secretary in July of 2004, Ms. Sadowski, was unaware that the trial transcript needed to be ordered when a notice of appeal was filed;

    b. that Ms. Dawson, his office manager, was responsible for training Ms. Sadowski and he assumed that Ms. Dawson had advised Ms. Sadowski to order the transcript;

    c. that he accepted responsibility for the failure to order the transcript;

    d. that no motion for a transcript filing extension was submitted because the transcript had never been ordered;

    e. that a petition for *habeas corpus* relief had been filed on behalf of Watson.

47. Moffatt was unable to find any record of the filing of a petition for *habeas corpus* relief for Watson and she reported this to counsel for Gammino. In response, on May 6, 2005, counsel for Gammino reported that Gammino had prepared a petition and sent it to Watson for review and signature but Watson had not yet returned the signed petition.

48. According to the records of the Richmond City Jail, Watson was incarcerated on or about March 18, 2005 and was serving a one year and six month sentence on a revoked bond.

49. Gammino failed to pursue the appeal for Watson competently, with reasonable diligence and promptness. The bar alleges and Gammino denies that he knowingly made a false statement of fact to the City of Richmond Circuit Court and the Court. He failed to make reasonable efforts to ensure that his firm had measures in effect which gave reasonable assurance that the conduct of nonlawyer personnel was compatible with Gammino's professional obligations. The bar also alleges and Gammino denies that he knowingly made a false statement of material fact to the bar investigator in connection with a disciplinary matter. Gammino further states that while he may have made statements to the Court and to the bar that, upon review, were incorrect, he believed his representations were factually accurate when made.

II. NATURE OF MISCONDUCT

Such conduct by David Michael Gammino constitutes misconduct in violation of the following provisions of the Virginia Rules of Professional Conduct:

RULE 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

RULE 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

RULE 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

VSB Docket No. 05-032-2484 [VSB/VaCtApp]:

I. FINDINGS OF FACT

50. Gammino was court-appointed to represent Earnest D. Wright, Jr. [Wright] in an appeal of a May 20, 2003, criminal conviction for felony possession of cocaine, having served as retained trial counsel.

51. On August 8, 2003, the Court of Appeals [Court] received the trial court record.

52. A petition for appeal was due on September 17, 2003, forty days after the filing of the trial court record with the Court. Rule 5A:12(a).

53. Gammino filed a petition for appeal in the Court on September 22, 2003.

54. On September 26, 2003, the Court entered an order dismissing the appeal because neither the petition for appeal nor a motion for extension of time to file a petition for appeal had been timely filed. An extension of thirty days may be granted in the discretion of the Court in order to attain the ends of justice but the motion for an extension must be filed before the original deadline has passed. Rule 5A:12(a).

55. Gammino and his office staff miscalculated the due date for the filing of the petition for appeal. In his interview with Virginia State Bar Investigator Cam Moffatt, Gammino indicated that he did not know who in his office was calculating due dates during the time frame of Wright's appeal since there had been a few secretaries and legal assistants who had worked for the firm throughout the years.

56. Gammino wrote a September 29, 2003 letter to Wright which was addressed to an alias for Wright at an address which was reflected in the pre-sentence report. In the letter Gammino asked Wright to contact his office as soon as possible regarding the appeal. No explanation was given to the client in the letter regarding the dismissal of the appeal. Gammino received no response to the letter and the letter was not returned by the post office.

57. Gammino failed to pursue Wright's appeal competently and with reasonable diligence and promptness. He failed to keep Wright reasonably informed about the status of his appeal. Gammino failed to make reasonable efforts to ensure that his firm had measures in effect which gave reasonable assurance that the conduct of nonlawyer personnel was compatible with Gammino's professional obligations.

II. NATURE OF MISCONDUCT

Such conduct by David Michael Gammino constitutes misconduct in violation of the following provisions of the Virginia Rules of Professional Conduct:

RULE 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

RULE 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

RULE 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

III. PUBLIC ADMONITION WITH TERMS

Accordingly, it is the decision of the subcommittee to offer the Respondent an opportunity to comply with certain terms and conditions, compliance with which will be a predicate for the disposition of a Public Admonition with Terms of the instant cases. The terms and conditions shall be met as stated. The terms with which the Respondent must comply are as follows:

1. The Respondent has advised the bar that he intends to change his Virginia State Bar membership status from Active to Associate upon completion of several cases now outstanding and that he is not accepting new client matters. The Respondent shall change his Virginia State Bar membership status from Active to Associate upon the conclusion of his present cases but no later than June 1, 2006 and certify in writing to the Office of Bar Counsel by June 1, 2006, that he has done so.

2. The Respondent shall not change his Virginia State Bar membership status from Associate to Active, or resume the practice of law in Virginia, unless and until he has first engaged the services of a law office management consultant approved by the Virginia State Bar Office of Bar Counsel to review and make written recommendations concerning the Respondent's law practice policies, methods, systems and procedures. The Respondent shall institute and thereafter follow with consistency any and all recommendations made to him by the law office management consultant following the law office management consultant's evaluation of the Respondent's intended practice. Upon resuming the practice of law in Virginia, the Respondent shall grant the law office management consultant access to his law practice from time to time, at the consultant's request, for purposes of ensuring that the Respondent has instituted and is complying with the law office management consultant's recommendations. The Virginia State Bar shall have access, by telephone conferences and/or written reports, to the law office management consultant's findings and recommendations, as well as the consultant's assessment of the Respondent's level of compliance with said recommendations. The Respondent shall be obligated to pay when due the consultant's fees and costs, including but not limited to the provision to the Bar of information concerning this matter. The Respondent shall notify the Office of Bar Counsel in writing when he is ready to change his Virginia State Bar membership status from Associate to Active, consistent with these terms; in said writing, the Respondent shall indicate how he has fulfilled this term as it pertains to his preparation for reentry into the practice of law in Virginia, as well as the then current name and address of the law office management consultant. The remainder of this term which pertains to the period of time starting with the Respondent's resumption of the active practice of law shall be completed no later than one year after the effective date of the change of the Respondent's Virginia State Bar membership status from Associate to Active.

3. The Respondent shall complete six (6) hours of continuing legal education in the area of appellate practice. Such hours of continuing legal education may be obtained by attendance at live presentations, video replays or on-line. The continuing legal education attendance obligation set forth in this paragraph shall not be applied toward the Mandatory Continuing Legal Education attendance requirement in Virginia or any other jurisdiction(s) in which the Respondent may be licensed to practice

law. The Respondent shall certify his compliance with this term by submitting to Deputy Bar Counsel Harry Hirsch a written certification that he has completed the term. This term shall be fully completed by March 1, 2006.

Upon satisfactory proof that such terms and conditions have been met, these matters will be closed. If, however, the terms and conditions are not met as stated, the Third District Committee, Section Two, shall impose a Public Reprimand. The Clerk of the Disciplinary System shall impose costs pursuant to Paragraph 13.B.8.c. Third District, Section Two, Subcommittee of the Virginia State Bar

By: William J. Viverette, Chair

CERTIFICATE OF SERVICE

I certify that I have this 20thday of December, 2005, caused to be mailed by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a true and correct copy of the Subcommittee Determination (Public Admonition with Terms) to the Respondent, David Michael Gammino, at 108 East Cary Street, Richmond, VA 23219, his last known address of record with the Virginia State Bar, and by first class mail to Michael L. Rigsby, Esq., counsel for Mr. Gammino.

VIRGINIA:

BEFORE THE SEVENTH DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

IN THE MATTER OF
ROBERT JOHN HARRIS, ESQUIRE
VSB DOCKET NO. 05-070-0364

SUBCOMMITTEE DETERMINATION
(PUBLIC REPRIMAND WITH TERMS)

On the 5th day of December, 2005, a meeting in this matter was held before a duly convened subcommittee of the Seventh District Committee consisting of Frederick W. Payne, Esquire, Steven H. Gordon, Lay Member and Thomas J. Chasler, Esquire, presiding.

Pursuant to Part 6, § IV, ¶ 13(G)(1)(c) of the Rules of Virginia Supreme Court, a subcommittee of the Seventh District Committee of the Virginia State Bar hereby serves upon the Respondent the following Agreed Disposition of a **PUBLIC REPRIMAND WITH TERMS**, as set forth below:

I. FINDINGS OF FACT

1. At all times relevant hereto the Respondent, Robert John Harris (hereinafter the "Respondent"), has been an attorney licensed to practice law in the Commonwealth of Virginia.

2. On or about September 26, 2003, Complainant, Ms. Sharon Smedley, hired Respondent to file a Petition for Bankruptcy on her behalf. She paid Respondent $600.00 in cash. Respondent did not deposit the advanced legal fee into a trust account. He deposited the unearned cash payment of advance legal fees into his operating account. Respondent did not create a client ledger sheet or use any form of billable hour tracking mechanism to record his time spent on Ms. Smedley's bankruptcy petition.

3. On or about August 16, 2004, Ms. Smedley filed the present bar complaint because Respondent did not return her numerous telephone calls requesting an update on the status of her Petition for Bankruptcy.

4. By letter dated August 18, 2004, the Bar notified Respondent of the pending bar complaint and demanded a response to the complaint within twenty-one (21) days pursuant to Rule of Professional Conduct 8.1(c). Respondent responded on or about September 14, 2005, outside of the twenty-one day period.

5. In Respondent's September 14, 2005 letter to the Bar, he states that Ms. Smedley was "exaggerating the situation" and that his lack of communication was due to his ". . . involvement in a number of time-consuming and demanding matters . . ." In

addition, he states that he had completed the Petition for Bankruptcy and will present it to her and await further instructions (Respondent's September 14, 2004 Letter to the Bar).

6. Bar Investigator Earl C. Walts, Jr. states that during an interview on or about December 21, 2004, Respondent admitted that he had not prepared Ms. Smedley's Petition for Bankruptcy as he had claimed to have done in his September 14, 2004 letter to the Bar. Respondent also admitted that he did not communicate with Ms. Smedley, and that he had been slow in responding to the Bar's request for a response.

7. On or about April 15, 2005, the Bar contacted Ms. Smedley to inquire whether Respondent had followed up with her regarding the preparation and filing of her Petition for Bankruptcy. Ms. Smedley stated that Respondent had called her in December of 2004, but he had not contacted her since that instance.

8. On or about July 11, 2005, Bar Investigator, Ronald H. McCall, re-interviewed Respondent to determine whether Respondent had prepared the petition or refunded Ms. Smedley's unearned advanced legal fees. As of that date, Respondent had not prepared the petition or refunded any unearned fees to her. Respondent cannot document any communication with Ms. Smedley since December of 2004. Respondent stated that he had "no good reason for why he had not done [the petition]."

9. Respondent admitted that he does not have an IOLTA, that he deposits unearned advance legal fees into his operating account, and that he does not have any of the $600.00 that Ms. Smedley paid him on September 26, 2003 in his operating account.

II. NATURE OF MISCONDUCT

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

RULE 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.

(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

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) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The lawyer's fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

RULE 1.15 Safekeeping Property

(a) All funds received or held by a lawyer or law firm on behalf of a client, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution may be deposited therein; or

(2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(c) A lawyer shall:

(1) promptly notify a client of the receipt of the client's funds, securities, or other properties;

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; and

(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

(e) Record-Keeping Requirements, Required Books and Records. As a minimum requirement every lawyer engaged in the private practice of law in Virginia, hereinafter called "lawyer," shall maintain or cause to be maintained, on a current basis, books and records which establish compliance with Rule 1.15(a) and (c). Whether a lawyer or law firm maintains computerized records or a manual accounting system, such system must produce the records and information required by this Rule.

(1) In the case of funds held in an escrow account subject to this Rule, the required books and records include:

(i) a cash receipts journal or journals listing all funds received, the sources of the receipts and the date of receipts. Checkbook entries of receipts and deposits, if adequately detailed and bound, may constitute a journal for this purpose. If separate cash receipts journals are not maintained for escrow and non-escrow funds, then the consolidated cash receipts journal shall contain separate columns for escrow and non-escrow receipts;

(ii) a cash disbursements journal listing and identifying all disbursements from the escrow account. Checkbook entries of disbursements, if adequately detailed and bound, may constitute a journal for this purpose. If separate disbursements journals are not maintained for escrow and non-escrow disbursements then the consolidated disbursements journal shall contain separate columns for escrow and non-escrow disbursements;

(iii) subsidiary ledger. A subsidiary ledger containing a separate account for each client and for every other person or entity from whom money has been received in escrow shall be maintained. The ledger account shall by separate columns or otherwise clearly identify escrow funds disbursed, and escrow funds balance on hand. The ledger account for a client or a separate subsidiary ledger account for a client shall clearly indicate all fees paid from trust accounts;

(iv) reconciliations and supporting records required under this Rule;

(v) the records required under this paragraph shall be preserved for at least five full calendar years following the termination of the fiduciary relationship.

(2) in the case of funds or property held by a lawyer or law firm as a fiduciary subject to Rule 1.15(d), the required books and records include:

(i) an annual summary of all receipts and disbursements and changes in assets comparable to an accounting that would be required of a court supervised fiduciary in the same or similar capacity. Such annual summary shall be in sufficient detail as to allow a reasonable person to determine whether the lawyer is properly discharging the obligations of the fiduciary relationship;

(ii) original source documents sufficient to substantiate and, when necessary, to explain the annual summary required under (i), above;

(iii) the records required under this paragraph shall be preserved for at least five full calendar years following the termination of the fiduciary relationship.

(f) Required Escrow Accounting Procedures. The following minimum escrow accounting procedures are applicable to all escrow accounts subject to Rule 1.15(a) and (c) by lawyers practicing in Virginia.

(1) Insufficient fund check reporting.

(i) Clearly identified escrow accounts required. A lawyer or law firm shall deposit all funds held in escrow in a clearly identified account, and shall inform the financial institution in writing of the purpose and identify of such account. Lawyer escrow accounts shall be maintained only in financial institutions approved by the Virginia State Bar, except as otherwise expressly directed in writing by the client for whom the funds are being deposited;

(ii) Overdraft notification agreement required. A financial institution shall be approved as a depository for lawyer escrow accounts if it shall file with the Virginia State Bar an agreement, in a form provided by the Bar, to report to the Virginia State Bar in the event any instrument which would be properly payable if sufficient funds were available, is presented against a lawyer escrow account containing insufficient funds, irrespective of whether or not the instrument is honored. The Virginia State Bar shall establish rules governing approval and termination of approved status for financial institutions. The Virginia State Bar shall maintain and publish from time to time a list of approved financial institutions.

No escrow account shall be maintained in any financial institution, which does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be canceled by the financial institution except upon thirty (30) days notice writing to the Virginia State Bar, or as otherwise agreed to by the Virginia State Bar. Any such agreement may be canceled without prior notice by the Virginia State Bar if the financial institution fails to abide by the terms of the agreement;

(iii) Overdraft reports. The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(a) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors;

(b) in the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account name, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby;

(c) such reports shall be made simultaneously with and within the time provided by law for notice of dishonor to the depositor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five (5) banking days of the date of presentation for payment against insufficient funds;

(iv) Financial institution cooperation. In addition to making the reports specified above, approved financial institutions shall agree to cooperate fully with the Virginia State Bar and to produce any lawyer escrow account or other account records upon receipt of a subpoena therefore.

A financial institution may charge for the reasonable costs of producing the records required by this Rule.

(v) Lawyer cooperation. Every lawyer or law firm shall be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule;

(vi) Definitions. "Lawyer" means a member of the Virginia State Bar, any other lawyer admitted to regular or limited practice in this State, and any member of the bar of any other jurisdiction while engaged, *pro hac vice* or otherwise, in the practice of law in Virginia;

"Lawyer escrow account" or "escrow account" means an account maintained in a financial institution for the deposit of funds received or held by a lawyer or law firm on behalf of a client;

"Client" includes any individual, firm, or entity for which a lawyer performs any legal service, including acting as an escrow agent or as legal representative of a fiduciary, but not as a fiduciary. The term does not include a public or private entity of which a lawyer is a full-time employee;

"Dishonored" shall refer to instruments which have been dishonored because of insufficient funds as defined above;

"Financial institution" and "bank" include regulated state or federally chartered banks, savings institutions and credit unions which have signed the approved Notification Agreement, which are licensed and authorized to do business and in which the deposits are insured by an agency of the Federal Government;

"Insufficient Funds" refers to an overdraft in the commonly accepted sense of there being an insufficient balance as shown on the bank's accounting records; and does not include funds which at the moment may be on deposit, but uncollected;

"Law firm" includes a partnership of lawyers, a professional or nonprofit corporation of lawyers, and a combination thereof engaged in the practice of law. In the case of a law firm with offices in this State and in other jurisdictions, these Rules apply to the offices in this State, to escrow accounts in other jurisdictions holding funds of clients who are located in this State, and to escrow accounts in other jurisdictions holding client funds from a transaction arising in this State;

"Notice of Dishonor" refers to the notice which, pursuant to Uniform Commercial Code Section 3-508(2), must be given by a bank before its midnight deadline and by any other person or institution before midnight of the third business day after dishonor or receipt of notice of dishonor. As generally used hereunder, the term notice of dishonor shall refer only to dishonor for the purpose of insufficient funds, or because the drawer of the bank has no account with the depository institution;

"Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under Uniform Commercial Code Section 4-104, if sufficient funds were available.

(2) Deposits. All receipts of escrow money shall be deposited intact and a retained duplicate deposit slip or other such record shall be sufficiently detailed to show the identity of each item;

(3) Deposit of mixed escrow and non-escrow funds other than fees and retainers. Mixed escrow and non-escrow funds shall be deposited intact to the escrow account. The non-escrow portion shall be withdrawn upon the clearing of the mixed fund deposit instrument;

(4) Periodic trial balance. A regular periodic trial balance of the subsidiary ledger shall be made at least quarter annually, within 30 days after the close of the period and shall show the escrow account balance of the client or other person at the end of each period.

(i) The total of the trial balance must agree with the control figure computed by taking the beginning balance, adding the total of monies received in escrow for the period and deducting the total of escrow monies disbursed for the period; and

(ii) The trial balance shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.

(5) Reconciliations.

(i) A monthly reconciliation shall be made at month end of the cash balance derived from the cash receipts journal and cash disbursements journal total, the escrow account checkbook balance, and the escrow account bank statement balance;

(ii) A periodic reconciliation shall be made at least quarter annually, within 30 days after the close of the period, reconciling cash balances to the subsidiary ledger trial balance;

(iii) Reconciliations shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.

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

RULE 1.16 Declining Or Terminating Representation

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).

RULE 8.1 Bar Admission And Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application, in connection with any certification required to be filed as a condition of maintaining or renewing a license to practice law, in connection with a disciplinary matter, shall not:

(c) fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6; or

(d) obstruct a lawful investigation by an admissions or disciplinary authority.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

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

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

III. PUBLIC REPRIMAND WITH TERMS

Accordingly, it is the decision of the Subcommittee to offer the Respondent an Agreed Disposition of a **PUBLIC REPRIMAND WITH TERMS**. Disposition of this complaint is predicated upon Respondent's compliance with the terms set forth below.

TERMS

1. The Respondent shall promptly refund to the Complainant the $600.00 in advanced legal fees and provide satisfactory evidence to the Assistant Bar Counsel handling this matter that he has done so by April 1, 2006.

2. The terms and conditions shall be met and made known to the Bar by May 15, 2006.

3. Upon satisfactory proof that the above noted terms and conditions have been met, a **PUBLIC RREPRIMAND WITH TERMS** shall then be imposed.

ALTERNATE DISPOSITION

If, however, the terms and conditions have not been met by the 15th day of May, 2006, and in such event, the Committee shall, as an alternative disposition to a **PUBLIC REPRIMAND WITH TERMS**, certify this matter to the Virginia State Bar Disciplinary Board. Upon certification, the parties shall be deemed to have stipulated to the admissibility into evidence by the Board of the "Findings of Fact" appearing above, and the Respondent shall be deemed to have admitted before the Board to a violation of the provisions of the Professional Rules of Conduct as set forth under the above "Nature of Misconduct" section.

COSTS

Pursuant to Part Six, § IV, ¶ 13(B)(8)(c)(1) of the Rules of the Supreme Court, the Clerk of the Disciplinary System shall assess costs.
SEVENTH DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR
By Thomas J. Chasler, Chair/Chair Designate

CERTIFICATE OF SERVICE

I certify that I have this 13th day of December, 2005, mailed a true and correct copy of the Subcommittee Determination (PUBLIC REPRIMAND WITH TERMS) by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the Respondent, Robert John Harris, Esquire, 258 West King Street, Strasburg, VA 22657-0325, his last address of record with the Virginia State Bar.

Alfred L. Carr
Assistant Bar Counsel

VIRGINIA:

BEFORE THE SEVENTH DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

IN THE MATTER OF
ROBERT JOHN HARRIS, ESQUIRE
VSB Docket No. 05-070-0365

SUBCOMMITTEE DETERMINATION
(PUBLIC REPRIMAND WITH TERMS)

On the 5th day of December, 2005, a meeting in this matter was held before a duly convened subcommittee of the Seventh District Committee consisting of Frederick W. Payne, Esquire, Steven H. Gordon, Lay Member and Thomas J. Chasler, Esquire, presiding.

Pursuant to Part 6, § IV, ¶ 13(G)(1)(c) of the Rules of Virginia Supreme Court, a subcommittee of the Seventh District Committee of the Virginia State Bar hereby serves upon the Respondent the following Agreed Disposition of a **PUBLIC REPRIMAND WITH TERMS**, as set forth below:

I. FINDINGS OF FACT

1. At all times relevant hereto the Respondent, Robert John Harris (hereinafter the "Respondent"), has been an attorney licensed to practice law in the Commonwealth of Virginia.

2. On or about March 1, 2004, Complainant, Eva A. Newlin, hired Respondent to file a Bankruptcy Petition on her behalf and paid Respondent Robert J. Harris, Esquire, $400.00 in cash. On or about March 22, 2004, she paid Respondent $150.00 in cash, and on or about May 11, 2005, she paid Respondent $300.00 in cash, for a total advance legal fee of $850.00. Respondent did not deposit any of the advanced legal fee payments into a trust account. Respondent deposited all the unearned advance fees directly into his operating account.

3. Respondent did not use a client ledger or billable hour mechanisms to track his time in order to account for legal fees earned. Respondent did not provide Ms. Newlin with an accounting of the time he spent working on her matter as she requested. Respondent is unable to refund the $850.00 in advanced legal fees because the money is not in his operating account.

4. Ms. Newlin and her husband attempted to contact Respondent by telephone and by stopping by his office. On or about July 2, 2004, when she visited the Respondent's office, she found him in his office and inquired about the status of her Bankruptcy Petition. He promised to check with court and get back to her in two or three days. Respondent did not contact Ms. Newlin until after she filed the present bar complaint on or about August 16, 2004.

5. On or about September 14, 2004, Respondent responded to the Bar's request for a response to Ms. Newlin's complaint. Respondent stated that Ms. Newlin was exaggerating the situation and that he had completed the Bankruptcy Petition. On or about October 1, 2004, this matter was referred to the District Committee and for further investigation.

6. On or about December 21, 2004, Respondent informed Bar Investigator, Earl C. Walts, Jr. that he had completed Ms. Newlin's Bankruptcy Petition. However, on or about July 19, 2005 during a subsequent interview Bar Investigator, Ronald H. McCall, Respondent stated that he could not find the file or the Bankruptcy Petition. He admitted to Investigator McCall that he misled the Bar, but claimed that it was unintentional.

7. On or about June 15, 2005, a Subpoena duces tecum issued to Respondent for a copy of Ms. Newlin's file. Respondent did not respond to the Bar's demand for this file.

II. NATURE OF MISCONDUCT

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

RULE 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.

(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

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) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The lawyer's fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

RULE 1.15 Safekeeping Property

(a) All funds received or held by a lawyer or law firm on behalf of a client, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution may be deposited therein; or

(2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(c) A lawyer shall:

(1) promptly notify a client of the receipt of the client's funds, securities, or other properties;

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; and

(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

(e) Record-Keeping Requirements, Required Books and Records. As a minimum requirement every lawyer engaged in the private practice of law in Virginia, hereinafter called "lawyer," shall maintain or cause to be maintained, on a current basis, books and records which establish compliance with Rule 1.15(a) and (c). Whether a lawyer or law firm maintains computerized records or a manual accounting system, such system must produce the records and information required by this Rule.

(1) In the case of funds held in an escrow account subject to this Rule, the required books and records include:

(i) a cash receipts journal or journals listing all funds received, the sources of the receipts and the date of receipts. Checkbook entries of receipts and deposits, if adequately detailed and bound, may constitute a journal for this purpose. If separate cash receipts journals are not maintained for escrow and non-escrow funds, then the consolidated cash receipts journal shall contain separate columns for escrow and non-escrow receipts;

(ii) a cash disbursements journal listing and identifying all disbursements from the escrow account. Checkbook entries of disbursements, if adequately detailed and bound, may constitute a journal for this purpose. If separate disbursements journals are not maintained for escrow and non-escrow disbursements then the consolidated disbursements journal shall contain separate columns for escrow and non-escrow disbursements;

(iii) subsidiary ledger. A subsidiary ledger containing a separate account for each client and for every other person or entity from whom money has been received in escrow shall be maintained. The ledger account shall by separate columns or otherwise clearly identify escrow funds disbursed, and escrow funds balance on hand. The ledger account for a client or a separate subsidiary ledger account for a client shall clearly indicate all fees paid from trust accounts;

(iv) reconciliations and supporting records required under this Rule;

(v) the records required under this paragraph shall be preserved for at least five full calendar years following the termination of the fiduciary relationship.

(2) in the case of funds or property held by a lawyer or law firm as a fiduciary subject to Rule 1.15(d), the required books and records include:

(i) an annual summary of all receipts and disbursements and changes in assets comparable to an accounting that would be required of a court supervised fiduciary in the same or similar capacity. Such annual summary shall be in sufficient detail as to allow a reasonable person to determine whether the lawyer is properly discharging the obligations of the fiduciary relationship;

(ii) original source documents sufficient to substantiate and, when necessary, to explain the annual summary required under (i), above;

(iii) the records required under this paragraph shall be preserved for at least five full calendar years following the termination of the fiduciary relationship.

(f) Required Escrow Accounting Procedures. The following minimum escrow accounting procedures are applicable to all escrow accounts subject to Rule 1.15(a) and (c) by lawyers practicing in Virginia.

(1) Insufficient fund check reporting.

(i) Clearly identified escrow accounts required. A lawyer or law firm shall deposit all funds held in escrow in a clearly identified account, and shall inform the financial institution in writing of the purpose and identify of such account. Lawyer escrow accounts shall be maintained only in financial institutions approved by the Virginia State Bar, except as otherwise expressly directed in writing by the client for whom the funds are being deposited;

(ii) Overdraft notification agreement required. A financial institution shall be approved as a depository for lawyer escrow accounts if it shall file with the Virginia State Bar an agreement, in a form provided by the Bar, to report to the Virginia State Bar in the event any instrument which would be properly payable if sufficient funds were available, is presented against a lawyer escrow account containing insufficient funds, irrespective of whether or not the instrument is honored. The Virginia State Bar shall establish rules governing approval and termination of approved status for financial institutions. The Virginia State Bar shall maintain and publish from time to time a list of approved financial institutions.

No escrow account shall be maintained in any financial institution, which does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be canceled by the financial institution except upon thirty (30) days notice writing to the Virginia State Bar, or as otherwise agreed to by the Virginia State Bar. Any such agreement may be canceled without prior notice by the Virginia State Bar if the financial institution fails to abide by the terms of the agreement;

(iii) Overdraft reports. The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(a) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors;

(b) in the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account name, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby;

(c) such reports shall be made simultaneously with and within the time provided by law for notice of dishonor to the depositor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five (5) banking days of the date of presentation for payment against insufficient funds;

(iv) Financial institution cooperation. In addition to making the reports specified above, approved financial institutions shall agree to cooperate fully with the Virginia State Bar and to produce any lawyer escrow account or other account records upon receipt of a subpoena therefore.

A financial institution may charge for the reasonable costs of producing the records required by this Rule.

(v) Lawyer cooperation. Every lawyer or law firm shall be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule;

(vi) Definitions. "Lawyer" means a member of the Virginia State Bar, any other lawyer admitted to regular or limited practice in this State, and any member of the bar of any other jurisdiction while engaged, *pro hac vice* or otherwise, in the practice of law in Virginia;

"Lawyer escrow account" or "escrow account" means an account maintained in a financial institution for the deposit of funds received or held by a lawyer or law firm on behalf of a client;

"Client" includes any individual, firm, or entity for which a lawyer performs any legal service, including acting as an escrow agent or as legal representative of a fiduciary, but not as a fiduciary. The term does not include a public or private entity of which a lawyer is a full-time employee;

"Dishonored" shall refer to instruments which have been dishonored because of insufficient funds as defined above;

"Financial institution" and "bank" include regulated state or federally chartered banks, savings institutions and credit unions which have signed the approved Notification Agreement, which are licensed and authorized to do business and in which the deposits are insured by an agency of the Federal Government;

"Insufficient Funds" refers to an overdraft in the commonly accepted sense of there being an insufficient balance as shown on the bank's accounting records; and does not include funds which at the moment may be on deposit, but uncollected;

"Law firm" includes a partnership of lawyers, a professional or nonprofit corporation of lawyers, and a combination thereof engaged in the practice of law. In the case of a law firm with offices in this State and in other jurisdictions, these Rules apply to the offices in this State, to escrow accounts in other jurisdictions holding funds of clients who are located in this State, and to escrow accounts in other jurisdictions holding client funds from a transaction arising in this State;

"Notice of Dishonor" refers to the notice which, pursuant to Uniform Commercial Code Section 3-508(2), must be given by a bank before its midnight deadline and by any other person or institution before midnight of the third business day after dishonor or receipt of notice of dishonor. As generally used hereunder, the term notice of dishonor shall refer only to dishonor for the purpose of insufficient funds, or because the drawer of the bank has no account with the depository institution;

"Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under Uniform Commercial Code Section 4-104, if sufficient funds were available.

(2) Deposits. All receipts of escrow money shall be deposited intact and a retained duplicate deposit slip or other such record shall be sufficiently detailed to show the identity of each item;

(3) Deposit of mixed escrow and non-escrow funds other than fees and retainers. Mixed escrow and non-escrow funds shall be deposited intact to the escrow account. The non-escrow portion shall be withdrawn upon the clearing of the mixed fund deposit instrument;

(4) Periodic trial balance. A regular periodic trial balance of the subsidiary ledger shall be made at least quarter annually, within 30 days after the close of the period and shall show the escrow account balance of the client or other person at the end of each period.

(i) The total of the trial balance must agree with the control figure computed by taking the beginning balance, adding the total of monies received in escrow for the period and deducting the total of escrow monies disbursed for the period; and

(ii) The trial balance shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.

(5) Reconciliations.

(i) A monthly reconciliation shall be made at month end of the cash balance derived from the cash receipts journal and cash disbursements journal total, the escrow account checkbook balance, and the escrow account bank statement balance;

(ii) A periodic reconciliation shall be made at least quarter annually, within 30 days after the close of the period, reconciling cash balances to the subsidiary ledger trial balance;

(iii) Reconciliations shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.

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

RULE 1.16 Declining Or Terminating Representation

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).

RULE 8.1 Bar Admission And Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application, in connection with any certification required to be filed as a condition of maintaining or renewing a license to practice law, in connection with a disciplinary matter, shall not:

(c) fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6; or

(d) obstruct a lawful investigation by an admissions or disciplinary authority.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

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

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

III. PUBLIC REPRIMAND WITH TERMS

Accordingly, it is the decision of the Subcommittee to offer the Respondent an Agreed Disposition of a **PUBLIC REPRIMAND WITH TERMS**. Disposition of this complaint is predicated upon Respondent's compliance with the terms set forth below.

TERMS

1. The Respondent shall promptly refund to the Complainant the $850.00 in advanced legal fees and provide satisfactory evidence to the Assistant Bar Counsel handling this matter that he has done so by April 1, 2006.

2. The terms and conditions shall be met and made known to the Bar by May 15, 2006.

3. Upon satisfactory proof that the above noted terms and conditions have been met, a **PUBLIC RREPRIMAND WITH TERMS** shall then be imposed.

ALTERNATE DISPOSITION

If, however, the terms and conditions have not been met by the 15th day of May, 2006, and in such event, the Committee shall, as an alternative disposition to a **PUBLIC REPRIMAND WITH TERMS**, certify this matter to the Virginia State Bar Disciplinary Board. Upon certification, the parties shall be deemed to have stipulated to the admissibility into evidence by the Board of the "Findings of Fact" appearing above, and the Respondent shall be deemed to have admitted before the Board to a violation of the provisions of the Professional Rules of Conduct as set forth under the above "Nature of Misconduct" section.

COSTS

Pursuant to Part Six, § IV, ¶ 13(B)(8)(c)(1) of the Rules of the Supreme Court, the Clerk of the Disciplinary System shall assess costs.

SEVENTH DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

By Thomas J. Chasler, Chair/Chair Designate

CERTIFICATE OF SERVICE

I certify that I have this 13th day of December, 2005, mailed a true and correct copy of the Subcommittee Determination (PUBLIC REPRIMAND WITH TERMS) by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the Respondent, Robert John Harris, Esquire, 258 West King Street, Strasburg, VA 22657-0325, his last address of record with the Virginia State Bar.

Alfred L. Carr
Assistant Bar Counsel

VIRGINIA:

BEFORE THE SEVENTH DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

IN THE MATTER OF
ROBERT JOHN HARRIS, ESQUIRE
VSB DOCKET NO. 05-070-0550

SUBCOMMITTEE DETERMINATION
(PUBLIC REPRIMAND)

On the 5th day of December, 2005, a meeting in this matter was held before a duly convened subcommittee of the Seventh District Committee consisting of Frederick W. Payne, Esquire, Steven H. Gordon, Lay Member and Thomas J. Chasler, Esquire, presiding.

Pursuant to Part 6, § IV, ¶ 13(G)(1)(c) of the Rules of Virginia Supreme Court, a subcommittee of the Seventh District Committee of the Virginia State Bar hereby serves upon the Respondent the following Agreed Disposition of a PUBLIC REPRIMAND, as set forth below:

I. FINDINGS OF FACT

1. At all times relevant hereto the Respondent, Robert John Harris (hereinafter the "Respondent"), has been an attorney licensed to practice law in the Commonwealth of Virginia.

2. On or about April 9, 2004, the Complainant, Mr. William Bonelli hired Respondent to prepare and file a Petition for Bankruptcy. Mr. Bonelli paid Respondent $550.00 in advance fees, which Respondent deposited into his operating account.

3. On or about June 21, 2004, Mr. Bonelli called Respondent and left him a message requesting an update on the status of his bankruptcy petition. Respondent did not respond to Mr. Bonelli's request for this information. On or about June 24, 2004, he again called Respondent and left another message requesting an update and status of his petition. Respondent again did not respond to his request. Mr. Bonelli made numerous attempts to contact Respondent without any success. In October of 2004,

Mr. Bonelli incurred additional legal fees. He borrowed money to retain another attorney to prepare his Bankruptcy Petition because his creditors were initiating legal actions against him.

4. On or about September 24, 2004, Mr. Bonelli filed a Warrant in Debt against the Respondent in the Small Claims Division of the Winchester General District Court to recover the advance legal fees of $550.00 plus costs that he paid to Respondent in April of 2004.

5. On or about October 8, 2005, Respondent contacted Mr. Bonelli to ask for permission to prepare the petition and that he withdraw the Warrant in Debt. Complainant denied Respondent's requests. The court continued the hearing to November 18, 2004. On or about November 5, 2005, Respondent filed a Grounds of Defense in the Winchester General District Court, stating the following: Mr. Bonelli hired him to file a Bankruptcy Petition for $550.00; he prepared a petition for Mr. Bonelli; Mr. Bonelli hired another attorney to complete the petition; Respondent defended Mr. Bonelli against a creditor, thus exhausting Mr. Bonelli's advance legal fees; and, Respondent did return Mr. Bonelli's phone calls.

6. On or about November 17, 2004, Respondent and Mr. Bonelli settled the Warrant in Debt. Respondent agreed to repay the unearned advanced legal fees in cash plus any court costs as a settlement of the pending November 18, 2004 Warrant in Debt Hearing against Respondent Harris. Mr. Bonelli removed the matter from the docket per the settlement. Respondent did not have an open trust account from which to repay Mr. Bonelli.

7. On or about July 19, 2005 Bar Investigator Ronald H. McCall re-interviewed Respondent. Respondent stated that he refunded the unearned advanced legal fees to Mr. Bonelli because Mr. Bonelli had hired another attorney to complete his bankruptcy petition. Respondent states that he repaid Mr. Bonelli with a money order. Respondent admitted that he did not respond to Mr. Bonelli's requests for status updates on the petition.

II. NATURE OF MISCONDUCT

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

RULE 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.

(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

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) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The lawyer's fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

RULE 1.15 Safekeeping Property

(a) All funds received or held by a lawyer or law firm on behalf of a client, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution may be deposited therein; or

(2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(c) A lawyer shall:

(1) promptly notify a client of the receipt of the client's funds, securities, or other properties;

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; and

(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

(e) Record-Keeping Requirements, Required Books and Records. As a minimum requirement every lawyer engaged in the private practice of law in Virginia, hereinafter called "lawyer," shall maintain or cause to be maintained, on a current basis, books and records which establish compliance with Rule 1.15(a) and (c). Whether a lawyer or law firm maintains computerized records or a manual accounting system, such system must produce the records and information required by this Rule.

(1) In the case of funds held in an escrow account subject to this Rule, the required books and records include:

(i) a cash receipts journal or journals listing all funds received, the sources of the receipts and the date of receipts. Checkbook entries of receipts and deposits, if adequately detailed and bound, may constitute a journal for this purpose. If separate cash receipts journals are not maintained for escrow and non-escrow funds, then the consolidated cash receipts journal shall contain separate columns for escrow and non-escrow receipts;

(ii) a cash disbursements journal listing and identifying all disbursements from the escrow account. Checkbook entries of disbursements, if adequately detailed and bound, may constitute a journal for this purpose. If separate disbursements journals are not maintained for escrow and non-escrow disbursements then the consolidated disbursements journal shall contain separate columns for escrow and non-escrow disbursements;

(iii) subsidiary ledger. A subsidiary ledger containing a separate account for each client and for every other person or entity from whom money has been received in escrow shall be maintained. The ledger account shall by separate

columns or otherwise clearly identify escrow funds disbursed, and escrow funds balance on hand. The ledger account for a client or a separate subsidiary ledger account for a client shall clearly indicate all fees paid from trust accounts;

(iv) reconciliations and supporting records required under this Rule;

(v) the records required under this paragraph shall be preserved for at least five full calendar years following the termination of the fiduciary relationship.

(2) in the case of funds or property held by a lawyer or law firm as a fiduciary subject to Rule 1.15(d), the required books and records include:

(i) an annual summary of all receipts and disbursements and changes in assets comparable to an accounting that would be required of a court supervised fiduciary in the same or similar capacity. Such annual summary shall be in sufficient detail as to allow a reasonable person to determine whether the lawyer is properly discharging the obligations of the fiduciary relationship;

(ii) original source documents sufficient to substantiate and, when necessary, to explain the annual summary required under (i), above;

(iii) the records required under this paragraph shall be preserved for at least five full calendar years following the termination of the fiduciary relationship.

(f) Required Escrow Accounting Procedures. The following minimum escrow accounting procedures are applicable to all escrow accounts subject to Rule 1.15(a) and (c) by lawyers practicing in Virginia.

(1) Insufficient fund check reporting.

(i) Clearly identified escrow accounts required. A lawyer or law firm shall deposit all funds held in escrow in a clearly identified account, and shall inform the financial institution in writing of the purpose and identify of such account. Lawyer escrow accounts shall be maintained only in financial institutions approved by the Virginia State Bar, except as otherwise expressly directed in writing by the client for whom the funds are being deposited;

(ii) Overdraft notification agreement required. A financial institution shall be approved as a depository for lawyer escrow accounts if it shall file with the Virginia State Bar an agreement, in a form provided by the Bar, to report to the Virginia State Bar in the event any instrument which would be properly payable if sufficient funds were available, is presented against a lawyer escrow account containing insufficient funds, irrespective of whether or not the instrument is honored. The Virginia State Bar shall establish rules governing approval and termination of approved status for financial institutions. The Virginia State Bar shall maintain and publish from time to time a list of approved financial institutions.

No escrow account shall be maintained in any financial institution, which does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be canceled by the financial institution except upon thirty (30) days notice writing to the Virginia State Bar, or as otherwise agreed to by the Virginia State Bar. Any such agreement may be canceled without prior notice by the Virginia State Bar if the financial institution fails to abide by the terms of the agreement;

(iii) Overdraft reports. The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(a) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors;

(b) in the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account name, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby;

(c) such reports shall be made simultaneously with and within the time provided by law for notice of dishonor to the depositor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five (5) banking days of the date of presentation for payment against insufficient funds;

(iv) Financial institution cooperation. In addition to making the reports specified above, approved financial institutions shall agree to cooperate fully with the Virginia State Bar and to produce any lawyer escrow account or other account records upon receipt of a subpoena therefore.

A financial institution may charge for the reasonable costs of producing the records required by this Rule.

(v) Lawyer cooperation. Every lawyer or law firm shall be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule;

(vi) Definitions. "Lawyer" means a member of the Virginia State Bar, any other lawyer admitted to regular or limited practice in this State, and any member of the bar of any other jurisdiction while engaged, pro hac vice or otherwise, in the practice of law in Virginia;

"Lawyer escrow account" or "escrow account" means an account maintained in a financial institution for the deposit of funds received or held by a lawyer or law firm on behalf of a client;

"Client" includes any individual, firm, or entity for which a lawyer performs any legal service, including acting as an escrow agent or as legal representative of a fiduciary, but not as a fiduciary. The term does not include a public or private entity of which a lawyer is a full-time employee;

"Dishonored" shall refer to instruments which have been dishonored because of insufficient funds as defined above;

"Financial institution" and "bank" include regulated state or federally chartered banks, savings institutions and credit unions which have signed the approved Notification Agreement, which are licensed and authorized to do business and in which the deposits are insured by an agency of the Federal Government;

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"Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under Uniform Commercial Code Section 4-104, if sufficient funds were available.

(2) Deposits. All receipts of escrow money shall be deposited intact and a retained duplicate deposit slip or other such record shall be sufficiently detailed to show the identity of each item;

(3) Deposit of mixed escrow and non-escrow funds other than fees and retainers. Mixed escrow and non-escrow funds shall be deposited intact to the escrow account. The non-escrow portion shall be withdrawn upon the clearing of the mixed fund deposit instrument;

(4) Periodic trial balance. A regular periodic trial balance of the subsidiary ledger shall be made at least quarter annually, within 30 days after the close of the period and shall show the escrow account balance of the client or other person at the end of each period.

(i) The total of the trial balance must agree with the control figure computed by taking the beginning balance, adding the total of monies received in escrow for the period and deducting the total of escrow monies disbursed for the period; and

(ii) The trial balance shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.

(5) Reconciliations.

(i) A monthly reconciliation shall be made at month end of the cash balance derived from the cash receipts journal and cash disbursements journal total, the escrow account checkbook balance, and the escrow account bank statement balance;

(ii) A periodic reconciliation shall be made at least quarter annually, within 30 days after the close of the period, reconciling cash balances to the subsidiary ledger trial balance;

(iii) Reconciliations shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.

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

RULE 1.16 Declining Or Terminating Representation

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).

(e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.

III. PUBLIC REPRIMAND

Accordingly, it is the decision of the Subcommittee that an Agreed Disposition of a **PUBLIC REPRIMAND** shall be imposed, and this matter shall be closed.

COSTS

Pursuant to Part Six, § IV, ¶ 13(B)(8)(c)(1) of the Rules of the Supreme Court, the Clerk of the Disciplinary System shall assess costs.

SEVENTH DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

By Thomas J. Chasler, Chair/Chair Designate

CERTIFICATE OF SERVICE

I certify that I have this 13th day of December, 2005, mailed a true and correct copy of the Subcommittee Determination (PUBLIC REPRIMAND) by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the Respondent, Robert John Harris, Esquire, 258 West King Street, Strasburg, VA 22657-0325, his last address of record with the Virginia State Bar.

Alfred L. Carr
Assistant Bar Counsel

VIRGINIA:

BEFORE THE SEVENTH DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

IN THE MATTER OF
ROBERT JOHN HARRIS, ESQUIRE
VSB DOCKET NO. 05-070-0550

SUBCOMMITTEE DETERMINATION
(PUBLIC REPRIMAND)

On the 5th day of December, 2005, a meeting in this matter was held before a duly convened subcommittee of the Seventh District Committee consisting of Frederick W. Payne, Esquire, Steven H. Gordon, Lay Member and Thomas J. Chasler, Esquire, presiding.

Pursuant to Part 6, § IV, ¶ 13(G)(1)(c) of the Rules of Virginia Supreme Court, a subcommittee of the Seventh District Committee of the Virginia State Bar hereby serves upon the Respondent the following Agreed Disposition of a **PUBLIC REPRIMAND**, as set forth below:

I. FINDINGS OF FACT

1. At all times relevant hereto the Respondent, Robert John Harris (hereinafter the "Respondent"), has been an attorney licensed to practice law in the Commonwealth of Virginia.

2. On or about April 9, 2004, the Complainant, Mr. William Bonelli hired Respondent to prepare and file a Petition for Bankruptcy. Mr. Bonelli paid Respondent $550.00 in advance fees, which Respondent deposited into his operating account.

3. On or about June 21, 2004, Mr. Bonelli called Respondent and left him a message requesting an update on the status of his bankruptcy petition. Respondent did not respond to Mr. Bonelli's request for this information. On or about June 24, 2004, he again called Respondent and left another message requesting an update and status of his petition. Respondent again did not respond to his request. Mr. Bonelli made numerous attempts to contact Respondent without any success. In October of 2004, Mr. Bonelli incurred additional legal fees. He borrowed money to retain another attorney to prepare his Bankruptcy Petition because his creditors were initiating legal actions against him.

4. On or about September 24, 2004, Mr. Bonelli filed a Warrant in Debt against the Respondent in the Small Claims Division of the Winchester General District Court to recover the advance legal fees of $550.00 plus costs that he paid to Respondent in April of 2004.

5. On or about October 8, 2005, Respondent contacted Mr. Bonelli to ask for permission to prepare the petition and that he withdraw the Warrant in Debt. Complainant denied Respondent's requests. The court continued the hearing to November 18, 2004. On or about November 5, 2005, Respondent filed a Grounds of Defense in the Winchester General District Court, stating the following: Mr. Bonelli hired him to file a Bankruptcy Petition for $550.00; he prepared a petition for Mr. Bonelli; Mr. Bonelli hired another attorney to complete the petition; Respondent defended Mr. Bonelli against a creditor, thus exhausting Mr. Bonelli's advance legal fees; and, Respondent did return Mr. Bonelli's phone calls.

6. On or about November 17, 2004, Respondent and Mr. Bonelli settled the Warrant in Debt. Respondent agreed to repay the unearned advanced legal fees in cash plus any court costs as a settlement of the pending November 18, 2004 Warrant in Debt

Hearing against Respondent Harris. Mr. Bonelli removed the matter from the docket per the settlement. °Respondent did not have an open trust account from which to repay Mr. Bonelli.

7. On or about July 19, 2005 Bar Investigator Ronald H. McCall re-interviewed Respondent. Respondent stated that he refunded the unearned advanced legal fees to Mr. Bonelli because Mr. Bonelli had hired another attorney to complete his bankruptcy petition. Respondent states that he repaid Mr. Bonelli with a money order. Respondent admitted that he did not respond to Mr. Bonelli's requests for status updates on the petition.

II. NATURE OF MISCONDUCT

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

RULE 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.

(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

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) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The lawyer's fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

RULE 1.15 Safekeeping Property

(a) All funds received or held by a lawyer or law firm on behalf of a client, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution may be deposited therein; or

(2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(c) A lawyer shall:

(1) promptly notify a client of the receipt of the client's funds, securities, or other properties;

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; and

(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

(e) Record-Keeping Requirements, Required Books and Records. As a minimum requirement every lawyer engaged in the private practice of law in Virginia, hereinafter called "lawyer," shall maintain or cause to be maintained, on a current basis, books and records which establish compliance with Rule 1.15(a) and (c). Whether a lawyer or law firm maintains computerized records or a manual accounting system, such system must produce the records and information required by this Rule.

(1) In the case of funds held in an escrow account subject to this Rule, the required books and records include:

(i) a cash receipts journal or journals listing all funds received, the sources of the receipts and the date of receipts. Checkbook entries of receipts and deposits, if adequately detailed and bound, may constitute a journal for this purpose. If separate cash receipts journals are not maintained for escrow and non-escrow funds, then the consolidated cash receipts journal shall contain separate columns for escrow and non-escrow receipts;

(ii) a cash disbursements journal listing and identifying all disbursements from the escrow account. Checkbook entries of disbursements, if adequately detailed and bound, may constitute a journal for this purpose. If separate disbursements journals are not maintained for escrow and non-escrow disbursements then the consolidated disbursements journal shall contain separate columns for escrow and non-escrow disbursements;

(iii) subsidiary ledger. A subsidiary ledger containing a separate account for each client and for every other person or entity from whom money has been received in escrow shall be maintained. The ledger account shall by separate columns or otherwise clearly identify escrow funds disbursed, and escrow funds balance on hand. The ledger account for a client or a separate subsidiary ledger account for a client shall clearly indicate all fees paid from trust accounts;

(iv) reconciliations and supporting records required under this Rule;

(v) the records required under this paragraph shall be preserved for at least five full calendar years following the termination of the fiduciary relationship.

(2) in the case of funds or property held by a lawyer or law firm as a fiduciary subject to Rule 1.15(d), the required books and records include:

(i) an annual summary of all receipts and disbursements and changes in assets comparable to an accounting that would be required of a court supervised fiduciary in the same or similar capacity. Such annual summary shall be in sufficient detail as to allow a reasonable person to determine whether the lawyer is properly discharging the obligations of the fiduciary relationship;

(ii) original source documents sufficient to substantiate and, when necessary, to explain the annual summary required under (i), above;

(iii) the records required under this paragraph shall be preserved for at least five full calendar years following the termination of the fiduciary relationship.

(f) Required Escrow Accounting Procedures. The following minimum escrow accounting procedures are applicable to all escrow accounts subject to Rule 1.15(a) and (c) by lawyers practicing in Virginia.

(1) Insufficient fund check reporting.

(i) Clearly identified escrow accounts required. A lawyer or law firm shall deposit all funds held in escrow in a clearly identified account, and shall inform the financial institution in writing of the purpose and identify of such account. Lawyer escrow accounts shall be maintained only in financial institutions approved by the Virginia State Bar, except as otherwise expressly directed in writing by the client for whom the funds are being deposited;

(ii) Overdraft notification agreement required. A financial institution shall be approved as a depository for lawyer escrow accounts if it shall file with the Virginia State Bar an agreement, in a form provided by the Bar, to report to the Virginia State Bar in the event any instrument which would be properly payable if sufficient funds were available, is presented against a lawyer escrow account containing insufficient funds, irrespective of whether or not the instrument is honored. The Virginia State Bar shall establish rules governing approval and termination of approved status for financial institutions. The Virginia State Bar shall maintain and publish from time to time a list of approved financial institutions.

No escrow account shall be maintained in any financial institution, which does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be canceled by the financial institution except upon thirty (30) days notice writing to the Virginia State Bar, or as otherwise agreed to by the Virginia State Bar. Any such agreement may be canceled without prior notice by the Virginia State Bar if the financial institution fails to abide by the terms of the agreement;

(iii) Overdraft reports. The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(a) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors;

(b) in the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account name, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby;

(c) such reports shall be made simultaneously with and within the time provided by law for notice of dishonor to the depositor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five (5) banking days of the date of presentation for payment against insufficient funds;

(iv) Financial institution cooperation. In addition to making the reports specified above, approved financial institutions shall agree to cooperate fully with the Virginia State Bar and to produce any lawyer escrow account or other account records upon receipt of a subpoena therefore.

A financial institution may charge for the reasonable costs of producing the records required by this Rule.

(v) Lawyer cooperation. Every lawyer or law firm shall be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule;

(vi) Definitions. "Lawyer" means a member of the Virginia State Bar, any other lawyer admitted to regular or limited practice in this State, and any member of the bar of any other jurisdiction while engaged, *pro hac vice* or otherwise, in the practice of law in Virginia;

"Lawyer escrow account" or "escrow account" means an account maintained in a financial institution for the deposit of funds received or held by a lawyer or law firm on behalf of a client;

"Client" includes any individual, firm, or entity for which a lawyer performs any legal service, including acting as an escrow agent or as legal representative of a fiduciary, but not as a fiduciary. The term does not include a public or private entity of which a lawyer is a full-time employee;

"Dishonored" shall refer to instruments which have been dishonored because of insufficient funds as defined above; "Financial institution" and "bank" include regulated state or federally chartered banks, savings institutions and credit unions which have signed the approved Notification Agreement, which are licensed and authorized to do business and in which the deposits are insured by an agency of the Federal Government;

"Insufficient Funds" refers to an overdraft in the commonly accepted sense of there being an insufficient balance as shown on the bank's accounting records; and does not include funds which at the moment may be on deposit, but uncollected;

"Law firm" includes a partnership of lawyers, a professional or nonprofit corporation of lawyers, and a combination thereof engaged in the practice of law. In the case of a law firm with offices in this State and in other jurisdictions, these Rules apply to the offices in this State, to escrow accounts in other jurisdictions holding funds of clients who are located in this State, and to escrow accounts in other jurisdictions holding client funds from a transaction arising in this State;

"Notice of Dishonor" refers to the notice which, pursuant to Uniform Commercial Code Section 3-508(2), must be given by a bank before its midnight deadline and by any other person or institution before midnight of the third business day after dishonor or receipt of notice of dishonor. As generally used hereunder, the term notice of dishonor shall refer only to dishonor for the purpose of insufficient funds, or because the drawer of the bank has no account with the depository institution;

"Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under Uniform Commercial Code Section 4-104, if sufficient funds were available.

(2) Deposits. All receipts of escrow money shall be deposited intact and a retained duplicate deposit slip or other such record shall be sufficiently detailed to show the identity of each item;

(3) Deposit of mixed escrow and non-escrow funds other than fees and retainers. Mixed escrow and non-escrow funds shall be deposited intact to the escrow account. The non-escrow portion shall be withdrawn upon the clearing of the mixed fund deposit instrument;

(4) Periodic trial balance. A regular periodic trial balance of the subsidiary ledger shall be made at least quarter annually, within 30 days after the close of the period and shall show the escrow account balance of the client or other person at the end of each period.

(i) The total of the trial balance must agree with the control figure computed by taking the beginning balance, adding the total of monies received in escrow for the period and deducting the total of escrow monies disbursed for the period; and

(ii) The trial balance shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.

(5) Reconciliations.

(i) A monthly reconciliation shall be made at month end of the cash balance derived from the cash receipts journal and cash disbursements journal total, the escrow account checkbook balance, and the escrow account bank statement balance;

(ii) A periodic reconciliation shall be made at least quarter annually, within 30 days after the close of the period, reconciling cash balances to the subsidiary ledger trial balance;

(iii) Reconciliations shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.

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

RULE 1.16 Declining Or Terminating Representation

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).

(e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.

III. PUBLIC REPRIMAND

Accordingly, it is the decision of the Subcommittee that an Agreed Disposition of a **PUBLIC REPRIMAND** shall be imposed, and this matter shall be closed.

COSTS

Pursuant to Part Six, § IV, ¶ 13(B)(8)(c)(1) of the Rules of the Supreme Court, the Clerk of the Disciplinary System shall assess costs.
SEVENTH DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

By Thomas J. Chasler, Chair/Chair Designate

CERTIFICATE OF SERVICE

I certify that I have this 13th day of December, 2005, mailed a true and correct copy of the Subcommittee Determination (PUBLIC REPRIMAND) by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the Respondent, Robert John Harris, Esquire, 258 West King Street, Strasburg, VA 22657-0325, his last address of record with the Virginia State Bar.

Alfred L. Carr
Assistant Bar Counsel

VIRGINIA:

BEFORE THE SEVENTH DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

IN THE MATTER OF
ROBERT JOHN HARRIS, ESQUIRE
VSB DOCKET NO. 04-070-3724

SUBCOMMITTEE DETERMINATION
(PUBLIC REPRIMAND WITH TERMS)

On the 5th day of December, 2005, a meeting in this matter was held before a duly convened subcommittee of the Seventh District Committee consisting of Frederick W. Payne, Esquire, Steven H. Gordon, Lay Member and Thomas J. Chasler, Esquire, presiding.Pursuant to Part 6, § IV, ¶ 13(G)(1)(c) of the Rules of Virginia Supreme Court, a subcommittee of the Seventh District Committee of the Virginia State Bar hereby serves upon the Respondent the following Agreed Disposition of a **PUBLIC REPRIMAND WITH TERMS**:

I. FINDINGS OF FACT

1. At all times relevant hereto the Respondent, Robert John Harris (hereinafter the "Respondent"), has been an attorney licensed to practice law in the Commonwealth of Virginia.

2. On or about April 6, 2004, the Complainant, Malachi A. Thompson hired Respondent to provide legal advice concerning a property distribution matter pursuant to Virginia's intestate succession laws. Complainant paid Respondent an advance legal fee of $600.00 in cash. Complaint did not sign a retainer agreement and Respondent did not discuss with Mr. Thompson his hourly billing rate and compensation for expenses.

3. Respondent did not deposit the advance legal fee in his trust account. Respondent did not have a trust account when Mr. Thompson paid the advance legal fees. As of October 21, 2005, Respondent has not established a trust account to comply with the Virginia State Bar's IOLTA requirements.

4. Respondent did not respond to Mr. Thompson's repeated attempts to contact him by telephone. After Mr. Thompson's efforts to contact Respondent proved unsuccessful, he mailed Respondent a letter to request a refund of the advance legal fees. Respondent did not respond to his letter.

5. On or about June 10, 2004, the Virginia State Bar (hereinafter "the Bar"), proactively contacted Respondent requesting that he contact Mr. Thompson and respond to him. On or about June 22, 2004, the Bar contacted Respondent again regarding his lack of response to the Bar's proactive request and to Mr. Thompson. On or about June 28, 2004, the Bar contacted Respondent and informed him that the complaint would be assigned for further investigation because of his lack of response to the Bar's proactive measures to resolve the complaint.

6. On or about June 29, 2004, the Bar contacted Respondent demanding a response to this bar complaint within twenty-one (21) days pursuant to Rule of Professional Conduct 8.1(c). Respondent did not respond to the Bar's demand for a response. On July 29, 2004, the Bar referred the bar complaint for further investigation because Respondent did not respond to any requests for information.

7. On or about August 6, 2004, Respondent was notified that the bar complaint was being referred to the Seventh District Committee for a more detailed investigation.

8. On or about August 9, 2004, Respondent responded to the Bar's June 29, 2004 letter demand for a response twenty-one days from June 19, 2004. In that response, Respondent admits that he did not return Mr. Thompson's phone calls or perform the legal work for which Complainant had retained him.

9. On or about August 13, 2004, Bar Investigator, Earl C. Walts, Jr. interviewed Mr. Hill regarding the letters and documents Mr. Thompson had delivered to Respondent on April 6, 2004. Mr. Hill stated that Respondent called him once in August of 2004 and left a message, but they never spoke regarding Mr. Thompson's status as an heir. Mr. Hill confirmed that he was the source of the October 27, 2002 letter to Mr. Thompson outlining his status as an heir of the late John Tate.

10. Respondent stated to Mr. Walts that he had earned the legal fees upon payment because his self-education of an unfamiliar area of law prior to their first meeting was legal research performed on behalf of Mr. Thompson. On or about October 15, 2004, Respondent mailed Mr. Thompson a letter stating that he had recently been involved in "demanding and time-consuming matters" and just fell behind in his other work. Respondent stated that to make amends to Complainant for the lack of communication, Respondent would forgo a request for additional funds to cover the current expenses. However, if Mr. Thompson wanted him to continue the representation, Respondent would require a deposit of $1,500.00 at $150.00 per hour. The Bar and Mr. Thompson requested that Respondent provide a bill; however, he did not provide an itemized bill for his legal services to Mr. Thompson or to the Bar.

11. On July 11, 2005, Ronald H. McCall, a Bar Investigator, re-interviewed Respondent. Respondent stated to Mr. McCall, and Mr. Walts that when Mr. Thompson first contacted him, he had to educate himself in the intestate laws of Virginia prior to the first meeting. Respondent admitted that he had deposited the advance legal fees into an operating account because he does not have a trust account. He states that his lack of communication with Mr. Thompson and neglect of this legal matter are due to his office's disorganization and lack of office management procedures.

II. NATURE OF MISCONDUCT

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

RULE 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.

(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

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) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The lawyer's fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

RULE 1.15 Safekeeping Property

(a) All funds received or held by a lawyer or law firm on behalf of a client, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution may be deposited therein; or

(2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(c) A lawyer shall:

(1) promptly notify a client of the receipt of the client's funds, securities, or other properties;

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; and

(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

(e) Record-Keeping Requirements, Required Books and Records. As a minimum requirement every lawyer engaged in the private practice of law in Virginia, hereinafter called "lawyer," shall maintain or cause to be maintained, on a current basis, books and records which establish compliance with Rule 1.15(a) and (c). Whether a lawyer or law firm maintains computerized records or a manual accounting system, such system must produce the records and information required by this Rule.

(1) In the case of funds held in an escrow account subject to this Rule, the required books and records include:

(i) a cash receipts journal or journals listing all funds received, the sources of the receipts and the date of receipts. Checkbook entries of receipts and deposits, if adequately detailed and bound, may constitute a journal for this purpose. If separate cash receipts journals are not maintained for escrow and non-escrow funds, then the consolidated cash receipts journal shall contain separate columns for escrow and non-escrow receipts;

(ii) a cash disbursements journal listing and identifying all disbursements from the escrow account. Checkbook entries of disbursements, if adequately detailed and bound, may constitute a journal for this purpose. If separate disbursements journals are not maintained for escrow and non-escrow disbursements then the consolidated disbursements journal shall contain separate columns for escrow and non-escrow disbursements;

(iii) subsidiary ledger. A subsidiary ledger containing a separate account for each client and for every other person or entity from whom money has been received in escrow shall be maintained. The ledger account shall by separate columns or otherwise clearly identify escrow funds disbursed, and escrow funds balance on hand. The ledger account for a client or a separate subsidiary ledger account for a client shall clearly indicate all fees paid from trust accounts;

(iv) reconciliations and supporting records required under this Rule;

(v) the records required under this paragraph shall be preserved for at least five full calendar years following the termination of the fiduciary relationship.

(2) in the case of funds or property held by a lawyer or law firm as a fiduciary subject to Rule 1.15(d), the required books and records include:

(i) an annual summary of all receipts and disbursements and changes in assets comparable to an accounting that would be required of a court supervised fiduciary in the same or similar capacity. Such annual summary shall be in sufficient detail as to allow a reasonable person to determine whether the lawyer is properly discharging the obligations of the fiduciary relationship;

(ii) original source documents sufficient to substantiate and, when necessary, to explain the annual summary required under (i), above;

(iii) the records required under this paragraph shall be preserved for at least five full calendar years following the termination of the fiduciary relationship.

(f) Required Escrow Accounting Procedures. The following minimum escrow accounting procedures are applicable to all escrow accounts subject to Rule 1.15(a) and (c) by lawyers practicing in Virginia.

(1) Insufficient fund check reporting.

(i) Clearly identified escrow accounts required. A lawyer or law firm shall deposit all funds held in escrow in a clearly identified account, and shall inform the financial institution in writing of the purpose and identify of such account. Lawyer escrow accounts shall be maintained only in financial institutions approved by the Virginia State Bar, except as otherwise expressly directed in writing by the client for whom the funds are being deposited;

(ii) Overdraft notification agreement required. A financial institution shall be approved as a depository for lawyer escrow accounts if it shall file with the Virginia State Bar an agreement, in a form provided by the Bar, to report to the Virginia State Bar in the event any instrument which would be properly payable if sufficient funds were available, is presented against a lawyer escrow account containing insufficient funds, irrespective of whether or not the instrument is honored. The Virginia State Bar shall establish rules governing approval and termination of approved status for financial institutions. The Virginia State Bar shall maintain and publish from time to time a list of approved financial institutions.

No escrow account shall be maintained in any financial institution, which does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be canceled by the financial institution except upon thirty (30) days notice writing to the Virginia State Bar, or as otherwise agreed to by the Virginia State Bar. Any such agreement may be canceled without prior notice by the Virginia State Bar if the financial institution fails to abide by the terms of the agreement;

(iii) Overdraft reports. The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(a) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors;

(b) in the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account name, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby;

(c) such reports shall be made simultaneously with and within the time provided by law for notice of dishonor to the depositor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five (5) banking days of the date of presentation for payment against insufficient funds;

(iv) Financial institution cooperation. In addition to making the reports specified above, approved financial institutions shall agree to cooperate fully with the Virginia State Bar and to produce any lawyer escrow account or other account records upon receipt of a subpoena therefore.

A financial institution may charge for the reasonable costs of producing the records required by this Rule.

(v) Lawyer cooperation. Every lawyer or law firm shall be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule;

(vi) Definitions. "Lawyer" means a member of the Virginia State Bar, any other lawyer admitted to regular or limited practice in this State, and any member of the bar of any other jurisdiction while engaged, *pro hac vice* or otherwise, in the practice of law in Virginia;

"Lawyer escrow account" or "escrow account" means an account maintained in a financial institution for the deposit of funds received or held by a lawyer or law firm on behalf of a client;

"Client" includes any individual, firm, or entity for which a lawyer performs any legal service, including acting as an escrow agent or as legal representative of a fiduciary, but not as a fiduciary. The term does not include a public or private entity of which a lawyer is a full-time employee;

"Dishonored" shall refer to instruments which have been dishonored because of insufficient funds as defined above;

"Financial institution" and "bank" include regulated state or federally chartered banks, savings institutions and credit unions which have signed the approved Notification Agreement, which are licensed and authorized to do business and in which the deposits are insured by an agency of the Federal Government;

"Insufficient Funds" refers to an overdraft in the commonly accepted sense of there being an insufficient balance as shown on the bank's accounting records; and does not include funds which at the moment may be on deposit, but uncollected;

"Law firm" includes a partnership of lawyers, a professional or nonprofit corporation of lawyers, and a combination thereof engaged in the practice of law. In the case of a law firm with offices in this State and in other jurisdictions, these Rules apply to the offices in this State, to escrow accounts in other jurisdictions holding funds of clients who are located in this State, and to escrow accounts in other jurisdictions holding client funds from a transaction arising in this State;

(2) Deposits. All receipts of escrow money shall be deposited intact and a retained duplicate deposit slip or other such record shall be sufficiently detailed to show the identity of each item;

(3) Deposit of mixed escrow and non-escrow funds other than fees and retainers. Mixed escrow and non-escrow funds shall be deposited intact to the escrow account. The non-escrow portion shall be withdrawn upon the clearing of the mixed fund deposit instrument;

(4) Periodic trial balance. A regular periodic trial balance of the subsidiary ledger shall be made at least quarter annually, within 30 days after the close of the period and shall show the escrow account balance of the client or other person at the end of each period.

(i) The total of the trial balance must agree with the control figure computed by taking the beginning balance, adding the total of monies received in escrow for the period and deducting the total of escrow monies disbursed for the period; and

(ii) The trial balance shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.

(5) Reconciliations.

(i) A monthly reconciliation shall be made at month end of the cash balance derived from the cash receipts journal and cash disbursements journal total, the escrow account checkbook balance, and the escrow account bank statement balance;

(ii) A periodic reconciliation shall be made at least quarter annually, within 30 days after the close of the period, reconciling cash balances to the subsidiary ledger trial balance;

(iii) Reconciliations shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.

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

RULE 8.1 Bar Admission And Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application, in connection with any certification required to be filed as a condition of maintaining or renewing a license to practice law, in connection with a disciplinary matter, shall not:

(c) fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6;

III. PUBLIC REPRIMAND WITH TERMS

Accordingly, it is the decision of the Subcommittee to offer the Respondent an Agreed Disposition of **PUBLIC REPRIMAND WITH TERMS**. Disposition of this complaint is predicated upon Respondent's compliance with the terms set forth below.

TERMS

1. The Respondent shall promptly refund to the Complainant the $300.00 in advanced legal fees and provide satisfactory evidence to the Assistant Bar Counsel handling this matter that he has done so by April 1, 2006.

2. Establish an attorney trust account in compliance with the Virginia State Bar's guidelines within seven days of the entry of the Agreed Disposition.

3. The Respondent shall, within thirty (30) days of entry of this Agreed Disposition, engage the services of a law office management consultant to review and make written recommendations concerning the Respondent's law practice policies, methods, systems, and procedures. The Respondent shall institute and thereafter follow with consistency any and all recommendations made to him by the law office consultant following their evaluation of the Respondent's practice. The Respondent shall grant said consultant access to his law practice from time to time, at their request, for purposes of ensuring that Respondent has instituted and is complying with the consultant's recommendations. The Virginia State Bar shall have access (by way of telephone conferences and/or written reports) to consultant's findings and recommendations, as well as their assessment of the Respondent's level of compliance with the recommendations. Respondent shall be obligated to pay when due law office management consultant's fees and costs for the services (including provision to the Bar of information concerning this matter). Respondent will have discharged his obligations respecting the terms contained in this document if he has fulfilled and remained in compliance with all of the terms contained herein through May 31, 2006.

4. The terms and conditions shall be met and made known to the Bar by June 15, 2006.

5. Upon satisfactory proof that the above noted terms and conditions have been met by June 15, 2006, a **PUBLIC REPRIMAND WITH TERMS**, shall then be imposed.

ALTERNATE DISPOSITION

If, however, the terms and conditions have not been met by the 15th day of June, 2006, and in such event, the Committee shall, as an alternative disposition to a **PUBLIC REPRIMAND WITH TERMS**, certify this matter to the Virginia State Bar Disciplinary Board. Upon certification, the parties shall be deemed to have stipulated to the admissibility into evidence by the Board of the "Findings of Fact" appearing above, and the Respondent shall be deemed to have admitted before the Board to a violation of the provisions of the Professional Rules of Conduct as set forth under the above "Nature of Misconduct" section.

COSTS

Pursuant to Part Six, § IV, ¶ 13(B)(8)(c)(1) of the Rules of the Supreme Court, the Clerk of the Disciplinary System shall assess costs.

SEVENTH DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

By Thomas J. Chasler, Chair/Chair Designate

CERTIFICATE OF SERVICE

I certify that I have this 13th day of December, 2005, mailed a true and correct copy of the Subcommittee Determination (PUBLIC REPRIMAND WITH TERMS) by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the Respondent, Robert John Harris, Esquire, Robert John Harris, Esquire, at 258 West King Street, Strasburg, VA 22657-0325, his last address of record with the Virginia State Bar.

Alfred L. Carr
Assistant Bar Counsel