Respondent's Name	Address of Record (City/County)	Action	Effective Date	Page
Circuit Court				
Thomas Marshall James	Charlottesville, Va.	Three-Month Suspension	September 1, 2007	2
Disciplinary Board				
Andrew Ira Becker	Virginia Beach, Va.	Two-Year Suspension	September 17, 2007	5
Jeffrey Frederick Bradley	Harrisonburg, Va.	Suspension	August 24, 2007	5
Ellen Frances Ericsson	South Bend, Ind.	Revocation	August 21, 2007	n/a
Thomas Marshall James	Charlottesville, Va.	Five-Year Suspension w/Terms	September 30, 2007	7
Victor Mba-Jonas	Adelphia, Md.	Suspension	September 5, 2007	n/a
Brian Lee Leslie	Alexandria, Va.	Revocation	August 17, 2007	n/a
James Bryan Pattison	Sterling, Kans.	Suspension	September 5, 2007	n/a
Claude Michael Scialdone	Virginia Beach, Va.	Impairment Suspension	September 11, 2007	16
Simon Herbert Scott III	Norfolk, Va.	Public Reprimand w/Terms	September 7, 2007	16
District Committees				
Michael James George	Fredericksburg, Va.	Public Admonition w/Terms	July 19, 2007	19
Interim Suspensions — Failure to Comply with Subpoena				
Myles Talbert Hylton	Roanoke, Va.	Interim Suspension	July 30, 2007	n/a
Joseph Louis Tantoh Tibui	Arlington, Va.	Interim Suspension	July 25, 2007	n/a

**Respondent has noted an appeal with the Virginia Supreme Court.*

***Virginia Supreme Court granted stay of suspension pending appeal.*

****Virginia Supreme Court decision pending*

VIRGINIA:
IN THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE

VIRGINIA STATE BAR *EX REL*
SEVENTH DISTRICT COMMITTEE,
Complainant,
v.
THOMAS MARSHALL JAMES, Respondent
Case No. CL2007-165
VSB DOCKET NUMBERS 06-070-3981
07-070-0013

ORDER OF SUSPENSION

This matter came before the Three-Judge Court telephonically empanelled on August 30, 2007, by designation of the Chief Justice of the Supreme Court of Virginia, pursuant to § 54.1-3935 of the 1950 Code of Virginia, as amended. A fully endorsed Agreed Disposition, dated the 30th day of August, 2007, was tendered by Alfred L. Carr, Assistant Bar Counsel, Respondent Thomas Marshall James, by and through his counsel, Bernard J. DiMuro, Esq., and was considered by the Three-Judge Court, consisting of the Honorable Ernest P. Gates, Retired Judge of the Twelfth Judicial Circuit, the Honorable John E. Clarkson, Retired Judge of the Fourth Judicial Circuit and by the Honorable Richard D. Taylor, Jr., Judge of the Thirteenth Judicial Circuit and Chief Judge of the Three-Judge Court. The hearing was transcribed by Donna Chandler, Court Reporter, of Chandler and Halasz, P.O. Box 9349, Richmond, VA 23227, (804) 730-1222.

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

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

VSB DOCKET NUMBER 06-070-3981

2. On June 6, 2006, Respondent overdrew his lawyer's trust account by $90.43.

VSB DOCKET NUMBER 07-070-0013

3. On July 3, 2006, Respondent overdrew his trust account by $583.76. On July 13, 2006, after he received notice that his trust account had a negative balance of $583.76, he withdrew another $250.00 from his lawyer's trust account resulting in an ending balance of negative $833.76.

4. On July 28, 2006, during an interview with Virginia State Bar Investigator James W. Henderson, Respondent admitted that an automatic withdrawal he authorized for a personal transaction caused the June 6, 2006, Non Sufficient Funds notice from SunTrust Bank. Respondent had authorized monthly automatic withdrawals in November of 2005 to repay a personal loan to the Sallie Mae Corporation. In July of 2006, Respondent again authorized another payment in the same amount and for the same personal purpose and caused the negative balance of $583.76 on July 3, 2006, in his trust account. Respondent had set up two additional automatic electronic withdrawals from his lawyer's trust account to pay personal bills.

5. Respondent also admitted that he made the following payments from his lawyer's trust account toward personal bills, completely unrelated to his law practice, during the period of January 1, 2006, through June 30, 2006:

   a. an automobile insurance premium in the amount of $155.00 for his personal vehicle, paid electronically after Respondent had set up automatic withdrawals;

   b. payments in the amounts of $155.35, $26.00, and $100.00 toward a personal Texaco credit card;

   c. $200.00 towards a personal Bank of America Visa credit card;

   d. payments in the amounts of $30.00 and $46.00 for a Dell computer for Respondent's own personal use;

   e. $163.00 to Bank of America;

f. payments in the amounts of $425.00 and $340.00 to Chase Bank for a personal transaction, paid electronically after Respondent had set up automatic withdrawals;

g. $37.50 toward a personal Chevron credit card;

h. $125.00 toward his personal Bank of America credit card;

6. Respondent also informed Investigator Henderson that he had made the following deposits of his own personal funds, not related to his law practice, into his lawyer's trust account:

a. a personal loan from his wife in the amount of $1,000.00;

b. a deposit of $10,000.00 representing the insurance medical payments Respondent received after his fall down the courthouse steps in July of 2005.

7. During Respondent's July 28, 2006, interview with Investigator Henderson for these instant bar complaints, Investigator Henderson asked Respondent whether he recalled their conversation about his trust account activity during the February 8, 2006, interview regarding his improper use of his attorney trust account to conduct his personal transactions unrelated to the practice of law. Respondent stated that he did remember that Investigator Henderson had told him to stop using his trust account to conduct personal business. Investigator Henderson again reminded Respondent that the continued practice of depositing personal funds in his lawyer's trust account and his continued use of the attorney trust account as a personal checking account was an ongoing violation of the Rules of Professional Conduct. In response, Respondent stated to Investigator Henderson that he understood and recognized the impropriety of his continued use of his attorney trust account for personal use, but he had to do what he had to do. The Virginia State Bar does not allege that Respondent James inappropriately used client funds.

THE THREE-JUDGE COURT finds by clear and convincing evidence that such conduct on the part of the Respondent, Thomas Marshall James, Esquire, constitutes a violation of the following provisions of the 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;

(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 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) 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;

UPON CONSIDERATION WHEREOF, the Three-Judge Court hereby ORDERS as follows:

The Respondent shall receive a **three (3) month suspension** of his license to practice law in the Commonwealth of Virginia, effective **September 1, 2007.**

ORDERED that pursuant to the provisions of Part Six, § IV, ¶ 13.M. of the Rules of the Supreme Court of Virginia, the Respondent shall forthwith give notice by certified mail of his suspension to all clients for whom he is currently handling matters and to all opposing attorneys and the presiding judges in pending litigation. The Respondent also shall make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his clients. The Respondent shall give such notice within fourteen (14) days of the effective date of his suspension and make such arrangements as are required herein within forty-five (45) days of the effective date of the suspension. Respondent also shall furnish proof to the Bar within sixty (60) days of the effective date of his suspension that such notices have been timely given and such arrangements made for the disposition of matters. The Virginia State Bar Disciplinary Board shall decide all issues concerning the adequacy of the notice and arrangements required herein, and the Board may impose a sanction of revocation or additional suspension for failure to comply with Part Six, § IV, ¶ 13.M. of the Rules of the Supreme Court of Virginia; and it is further

ORDERED that four (4) copies of this Order be certified by the Clerk of the Circuit Court of City of Charlottesville, Virginia, 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 at his address of record with the Virginia State Bar, Respondent's Counsel, Mr. Bernard J. DiMuro, Esquire, and Bar Counsel consistent with the rules and procedures governing the Virginia State Bar Disciplinary System.

ENTERED this 5th day of September, 2007.

RICHARD D. TAYLOR JR.
Chief Judge of Three-Judge Court

VIRGINIA:
BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
ANDREW IRA BECKER
VSB DOCKET NUMBERS: 04-021-2662
04-021-3554
06-021-1176

ORDER OF SUSPENSION

It appearing that the license of Andrew Ira Becker to practice law in the Commonwealth of Virginia was suspended for two years, effective June 1, 2007, by Order of the Virginia State Bar Disciplinary Board; and

It appearing further that the Respondent appealed the suspension to the Supreme Court of Virginia and filed a petition to stay the suspension, which petition was granted by the Supreme Court of Virginia effective May 23, 2007; and

It further appearing that the Supreme Court of Virginia entered an Order dated September 7, 2007, terminating the stay in this case, and instructing the Disciplinary Board to enter an Order fixing the effective date of the suspension and the date Andrew Ira Becker shall comply with the provisions of Part Six, § IV, ¶ 13.M. of the Rules of the Supreme Court of Virginia; and

It further appearing appropriate to do so;

It is ORDERED that the Respondent's license to practice law in the Commonwealth of Virginia will be suspended for a period of two years, effective September 17, 2007; and

It is further ORDERED that pursuant to the provisions of Part Six, § IV, ¶ 13.M. of the Rules of the Supreme Court of Virginia, that Andrew Ira Becker 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. He also shall make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his client. He shall give such notice within fourteen (14) days of the effective date of the disbarment or suspension order, and make such arrangements as are required herein within forty-five (45) days of the effective date of the disbarment or suspension order. He also shall furnish proof to the bar within sixty (60) days of the effective date of the disbarment or suspension order that such notices have been timely given and such arrangements for the disposition of matters made. Issues concerning the adequacy of the notice and arrangements required herein shall be determined by the Disciplinary Board, which may impose a sanction of revocation or suspension for failure to comply with the requirements of this subparagraph.

It is further ORDERED that an attested copy of this Order be mailed to the Respondent by certified mail, return receipt requested, at his address of record with the Virginia State Bar, Law Offices of Andrew Becker, P.L.C., 4164 Virginia Beach Boulevard, Suite 200, Virginia Beach, Virginia 23452, by regular mail to Respondent's Counsel, Michael L. Rigsby, Carrell Rice & Rigsby, Forest Plaza II, Suite 310, 7275 Glen Forest Drive, Richmond, Virginia 23226, and hand delivered to Edward L. Davis, Assistant Bar Counsel, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800.

ENTERED this order this 12th day of September, 2007.

FOR THE VIRGINIA STATE BAR
DISCIPLINARY BOARD

Barbara Sayers Lanier
Clerk of the Disciplinary System

VIRGINIA
BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
JEFFREY FREDERICK BRADLEY
VSB DOCKET NUMBER 07-070-0021

ORDER OF SUSPENSION

THIS MATTER came on to be heard on August 24, 2007, before a panel of the Disciplinary Board consisting of W. Jefferson O'Flaherty, Lay Member, David R. Schultz, Michael S. Mulkey, Sandra L. Havrilak and William H. Monroe Jr., 2nd Vice Chair ("Chair"). Pursuant to a Notice of

Non-Compliance and Request for Suspension of License to Practice Law for Failure to Comply with Subpoena Duces Tecum (issued January 10, 2007), which Notice was sent by certified mail on May 29, 2007, to Jeffery Frederick Bradley ("Respondent").

Assistant Bar Counsel, Alfred L. Carr ("Bar Counsel"), appeared as counsel for the Virginia State Bar ("VSB"). The respondent failed to appear after the clerk called his name three times in the hallway outside the courtroom, nor did any counsel appear on his behalf. The court reporter for the proceeding, Teresa L. McLean, of Chandler & Halasz, P.O. Box 9349, Richmond, Virginia 23227, (804) 730-1222, was duly sworn by the Chair. All required notices of the date and place of the hearing were timely sent by the Clerk of the Disciplinary System in the manner prescribed by law. The Chair polled all members of the Board and determined that no member had a conflict of interest that precluded them from hearing this matter.

One day prior to the hearing, the Respondent filed a motion with the Clerk for a continuance of the hearing. The Board recessed to consider the motion and after due deliberation the motion was denied. Thereafter, Bar Counsel presented the following evidence:

1. The Virginia State Bar ("VSB"), by letter dated July 18, 2006, notified Respondent Bradley at his address of record that he had 21 days to respond to a bar complaint enclosed with the letter. Respondent Bradley did not respond to the letter. On October 5, 2006, Bar Counsel referred this matter to the Seventh District Committee for further investigation.

2. On October 20, 2007, VSB Investigator Donald L. Lange sent Respondent Bradley a letter by certified mail, return receipt requested, to Respondent Bradley's address of record requesting that Respondent Bradley contact him in order to set up a convenient date, time and location to conduct the investigative interview. The United States Postal Service ("USPS") left notices in Respondent Bradley's post office box on October 25 and 30 and November 9, 2006. The USPS returned the certified letter to the sender, Investigator Lange, as unclaimed by the addressee, Respondent Bradley.

3. On December 7, 2007, at 8:40 p.m., Investigator Lange called Respondent Bradley at his telephone number of record with the Bar and Respondent answered the call. Investigator Lange confirmed that Respondent's address of record with the Bar is correct and that that address is the correct address to mail all correspondence from the Bar. Respondent Bradley, however, was unable to talk and requested Investigator Lange contact him the next day, December 8, 2006, at 3:00 p.m. On December 8, 2006, Investigator Lange called Respondent at the appointed time, but Respondent Bradley did not answer the call. Investigator Lange followed up with a letter to Respondent Bradley dated December 8, 2006, memorializing the chronology of his attempts to schedule an interview with Respondent, as well as confirming his address of record and a second address, 64B Court Square, Harrisonburg, VA 22801, provided by Respondent Bradley as his office address. Respondent Bradley did not respond to Investigator Lange's letter.

4. On January 5, 2007, Investigator Lange, by certified mail, return receipt requested, mailed the December 8, 2006, letter again to Respondent Bradley. However, the USPS again returned the letter because Respondent Bradley again did not claim it.

5. On January 10, 2007, the Virginia State Bar issued a subpoena duces tecum to Respondent Bradley directing him to deliver to the Bar, on or before February 13, 2007, a copy of one of Respondent's client's file, as well as the client's billing records. In the alternative, Respondent Bradley could contact VSB Investigator Donald Lange and make other arrangements to deliver the documents in order to comply with the subpoena. (Copies of the cover letter that accompanied the subpoena and the proof of service were collectively presented as VSB Exhibit 1). The USPS left notice for Respondent Bradley on January 12, 18, and 29, 2007, informing him of the certified letter. The USPS returned the certified letter to the Bar undelivered because Respondent Bradley did not claim it though delivery was attempted at his address of record with the VSB.

6. Investigator Lange attempted to contact Respondent Bradley by telephone on December 13 and 21, 2006, January 5, 2007, and again on February 10, 2007. On February 10, 2007, Investigator Lange left Respondent a voice mail message informing him that the VSB had attempted to contact him and service him with a subpoena duces tecum directing him to comply by February 13, 2007. Investigator Lange states that he has not received any material from Respondent Bradley to comply with the January 10, 2007, subpoena duces tecum, which is deemed to have been served upon him upon mailing pursuant to Part 6, § IV, ¶13(E)(2) of the Rules of the Supreme Court of Virginia.

7. Pursuant to Part 6, § IV, ¶ 13(B)(5)(b)(2) and (3), and ¶ 13(B)(7)(a)(5) and (6) of the Rules of the Supreme Court of Virginia, the Virginia State Bar Disciplinary Board is authorized to suspend Respondent Bradley's license to practice law in the Commonwealth of Virginia pending Respondent's compliance with the subpoena duces tecum under the circumstance set forth above.

The Respondent has the burden of proof by clear and convincing evidence to show cause why the Board should not suspend his license. The Board finds that the Respondent has failed to meet such burden.

Accordingly, it is **ORDERED** that pursuant to the Rules of the Supreme Court of Virginia, as specified in paragraph 7 above, the license of Respondent, Jeffrey Frederick Bradley, to practice law in the Commonwealth of Virginia shall be, and is hereby, suspended for an indefinite period

of time until such time as he complies with the subpoena duces tecum of January 10, 2007, or until such time as he can for good cause show why he can not comply with such subpoena.

It is further **ORDERED** that, pursuant Part Six, § IV, ¶ 13(M) of the Rules of the Supreme Court of Virginia, Respondent shall forthwith give notice, by certified mail, return receipt requested, of this suspension of his license to practice law in the Commonwealth of Virginia to all clients for whom he is currently handling any matters, to all judges and the clerks of the courts before which Respondent may have an pending cases, and to opposing counsel in all such cases. Respondent also shall make appropriate arrangements for the disposition of matters now in his care in conformity with the wishes of his clients.

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, P.O. Box 1355, Harrisonburg, Virginia 22803, by certified mail, return receipt requested, and by regular mail to 64 B Court Square, Harrisonburg, Virginia 22801; and, to Alfred L. Carr, Assistant Bar Counsel, Virginia State Bar, 100 North Pitt Street, Suite 310, Alexandria, Virginia 22314.

ENTERED this 14th day of September, 2007.
VIRGINIA STATE BAR DISCIPLINARY BOARD

William H. Monroe Jr., 2nd Vice Chair

VIRGINIA
BEFORE THE DISCIPLINARY BOARD OF THE VIRGINIA STATE BAR

IN THE MATTERS OF
THOMAS MARSHALL JAMES
VSB DOCKET NUMBERS: 07-070-1637, 07-070-1941, 07-070-2108, 07-070-2149, 07-070-2756, 07-070-2858, 07-070-070481, 07-070-070542, 07-070-070663, 07-070-070771, 07-070-070909, 070-07-070978, 07-070-071050, 07-070-071061, 08-070-071220, 08-070-071287, 08-070-071348, 08-070-071404, 08-070-071447, 06-070-0574, 06-070-1845, and 07-070-0455

ORDER OF SUSPENSION, WITH TERMS

These matters came on September 24, 2007, to be heard on the Agreed Disposition of the Virginia State Bar and the Respondent, based upon the Certification of the Seventh District Committee and Expedited Petition. The Agreed Disposition was considered by a duly convened panel of the Virginia State Bar Disciplinary Board consisting of William E. Glover, Glenn M. Hodge, Rhysa Griffin South, Rev. Dr. Theodore Smith, Lay member, and James L. Banks Jr., Chair, presiding.

Alfred L. Carr, representing the Bar, and the Respondent, Thomas Marshall James, by his counsel, Bernard J. DiMuro, presented an endorsed Agreed Disposition, dated September 24, 2007, reflecting the terms of the Agreed Disposition.

Having considered the Certifications, the Expedited Petition, and the Agreed Disposition, it is the decision of the Board that the Agreed Disposition be accepted, and the Virginia State Bar Disciplinary Board finds by clear and convincing evidence as follows:

1. The Respondent was licensed to practice law in the Commonwealth of Virginia on April 22, 1993.

2. Two Virginia State Bar Investigators, on three separate occasions, informed Respondent that use of his attorney trust account for personal financial matters is a violation of the *Rules of Professional Conduct* (hereinafter "*RPC*"). In response to questions from the VSB investigators regarding whether or not he was aware that his use of his attorney trust account for personal matters is a violation of the *RPC*, Respondent replied that he was aware of his misconduct, but "he must do what he had to do."

3. On February 8, 2006, and again on July 28, 2006, Virginia State Bar Investigator James Henderson warned Respondent that continued use of his attorney trust account for personal financial matters is a violation of *RPC* 1.15. During Investigator Henderson's second interview with Respondent, Respondent admitted that he knew that use of his trust account for personal financial matters is a violation of said *RPC*.

4. The Virginia State Bar does not contend that Respondent inappropriately used client funds for his personal use or that he held client funds in the account at the time of the Non-Sufficient Funds notices underlying Virginia State Bar docket numbers 07-070-1637, 07-070-1941, 07-070-2108, 07-070-2149, 07-070-2756, 07-070-2858, 07-070-070481, 07-070-070542, 07-070-070663, 07-070-070771, 07-070-070909, 070-07-070978, 07-070-071050, 07-070-071061, 08-070-071220, 08-070-071287, 08-070-071348, 08-070-071404, and 08-070-071447. Respondent used his attorney trust account to deposit and hold client funds in trust. However, upon the closure of his

personal account, Respondent began to deposit his personal funds into his attorney trust account in excess of two years' worth of funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution.

5. On May 31, 2007, Virginia State Bar Investigator David Jackson again informed Respondent that continued use of his attorney trust account for personal financial matters is a violation of *RPC* 1.15. During Investigator Jackson's interview with Respondent, Respondent again admitted that he knew that use of his trust account for personal financial matters is a violation of the *RPC*.

VSB DOCKET NUMBER 07-070-1637:

6. Paragraphs 1 through 5 inclusive are hereby incorporated by reference. On November 28, 2006, Respondent authorized by phone a withdrawal from his trust account to pay a personal telephone bill.

VSB DOCKET NUMBER 07-070-1941:

7. Paragraphs 1 through 5 inclusive are hereby incorporated by reference. On December 28, 2006, Respondent authorized by phone a withdrawal from his trust account to pay a personal telephone bill.

VSB DOCKET NUMBER 07-070-2108:

8. Paragraphs 1 through 5 inclusive are hereby incorporated by reference. On January 9, 2007, Respondent authorized by phone a withdrawal from his trust account to pay a personal telephone bill.

VSB DOCKET NUMBER 07-070-2149:

9. Paragraphs 1 through 5 inclusive are hereby incorporated by reference. On January 17, 2007, Respondent authorized a withdrawal from his trust account to make a payment of $626.07 on his son's law school loan, and to make a payment of $100.00 towards Respondent's own personal medical bill stemming from an injury for which he had received medical treatment.

VSB DOCKET NUMBER 07-070-2756:

10. Paragraphs 1 through 5 inclusive are hereby incorporated by reference. On March 14, 2007, Respondent authorized a withdrawal from his trust account in the amount of $583.88 to pay a personal Virginia Power bill.

VSB DOCKET NUMBER 07-070-2858:

11. Paragraphs 1 through 5 inclusive are hereby incorporated by reference. On March 16, 2007, Respondent's trust account had a negative balance of $222.71. However, Respondent, with knowledge of insufficient funds on deposit to cover same, wrote two personal checks totaling $210.00. The bank paid both personal checks, leaving a negative balance of $432.71. The respective payees were William Robbins ($150.00) and FIA Card Services ($60.00).

VSB DOCKET NUMBER 07-070-070481:

12. Paragraphs 1 through 5 inclusive are hereby incorporated by reference. On April 27, 2007, Respondent authorized by phone a withdrawal from his trust account to pay a personal telephone bill.

VSB DOCKET NUMBER 07-070-070542:

13. Paragraphs 1 through 5 inclusive are hereby incorporated by reference. On May 3, 2007, Respondent authorized by phone a withdrawal from his trust account to repay a personal loan to Sallie Mae Corporation.

VSB DOCKET NUMBER 07-070-070663:

14. Paragraphs 1 through 5 inclusive are hereby incorporated by reference. On May 16, 2007, Respondent authorized payment of $1,700.00 payable to Sears that caused a $2,062.83 negative balance in his trust account. Respondent informed Investigator Jackson that he knew he did not have the funds in his trust account to cover the payment and that he tried to stop payment before Sears negotiated it at the bank.

VSB DOCKET NUMBER 07-070-070771:

15. Paragraphs 1 through 5 inclusive are hereby incorporated by reference. The next day, May 17, 2007, Respondent withdrew another $20.00 from his trust account, causing a negative balance of $1,648.69.

VSB DOCKET NUMBER 07-070-070909:

16. Paragraphs 1 through 5 inclusive are hereby incorporated by reference. On June 5, 2007, notwithstanding a negative balance of $416.69, Respondent withdrew $120.00 from his trust account, causing a $536.69 negative balance.

VSB DOCKET NUMBER 07-070-070978:

17. Paragraphs 1 through 5 inclusive are hereby incorporated by reference. On June 8, 2007, notwithstanding a negative balance of $536.69, Respondent withdrew $185.83 from his trust account, causing a $722.52 negative balance.

VSB DOCKET NUMBER 07-070-071050:

18. Paragraphs 1 through 5 inclusive are hereby incorporated by reference. On June 15, 2007, notwithstanding a negative balance of $722.52, Respondent withdrew $100.00 from his trust account, causing a negative balance of $822.52.

VSB DOCKET NUMBER 07-070-071061:

19. Paragraphs 1 through 5 inclusive are hereby incorporated by reference. On June 19, 2007, notwithstanding a negative balance of $822.52, Respondent authorized payment of $271.05 from his trust account, causing a negative balance of $1,093.57. However, the bank returned the check unpaid, resulting in a return to the negative balance of $822.52.

VSB DOCKET NUMBER 08-070-071220:

20. Paragraphs 1 through 5 inclusive are hereby incorporated by reference. On June 26, 2007, notwithstanding a negative balance of $822.52, Respondent authorized two payments from his trust account. The bank returned both checks unpaid to payees. At this time, the Bar does not know the identity of these payees. If the bank had paid both checks on behalf of Respondent, his trust account would have had a negative balance of $1,593.57.

VSB DOCKET NUMBER 08-070-071287:

21. Paragraphs 1 through 5 inclusive are hereby incorporated by reference. On July 2, 2007, notwithstanding a negative balance of $822.52, Respondent authorized payment of $177.41 from his trust account which the bank returned to the payee unpaid and marked "NSF" ("non-sufficient funds"). On July 3, 2007, notwithstanding a negative balance of $822.52, Respondent authorized payment of $144.92 from his trust account that the bank also returned to the payee unpaid and marked "NSF." (At this time, the identity of both payees is unknown to the Bar.) If the bank had paid both checks on behalf of Respondent, Respondent's trust account would have had a negative balance of $1,144.85.

VSB DOCKET NUMBER 08-070-071348:

22. Paragraphs 1 through 5 inclusive are hereby incorporated by reference. On July 6, 2007, notwithstanding a negative balance of $822.52, Respondent authorized payment of $177.79 from his trust account that the bank returned to the payee unpaid and marked "NSF." If the bank had paid this check on behalf of Respondent, his trust account would have had a negative balance of $1,000.31.

VSB DOCKET NUMBER 08-070-071404:

23. Paragraphs 1 through 5 inclusive are hereby incorporated by reference. On July 16, 2007, notwithstanding a negative balance of $822.52, Respondent authorized a $100.00 personal payment from his trust account that the bank returned to the payee unpaid and marked "NSF." If the bank had honored this debit on behalf of Respondent, his trust account would have had a negative balance of $922.52.

VSB DOCKET NUMBER 08-070-071447:

24. Paragraphs 1 through 5 inclusive are hereby incorporated by reference. On July 18, 2007, notwithstanding a negative balance of $822.52, Respondent wrote a personal check in the amount of $100.00 from his trust account that the bank returned to the payee unpaid and marked "NSF." If the bank had paid this check on behalf of Respondent, his trust account would have had a negative balance of $922.52.

25. Paragraphs 1 through 5 inclusive are hereby incorporated by reference. On June 1, 2007, Respondent had actual notice that his trust account had a large negative balance and that he had no available funds in his trust account to cover any checks drawn against it. On May 31, 2007, in the presence of his attorney, Bernard J. DiMuro, Respondent informed Investigator Jackson that on June 1, 2007, he would close his attorney trust account at SunTrust Bank and open a personal checking account. In Respondent's Answer to several of the above-mentioned bar complaints, he states that on June 1, 2007, he attempted to close his attorney trust account, but Sun Trust Bank refused to

close the account because of the large negative balance. Respondent also claimed that SunTrust informed him that they would close his trust account only after he had repaid the money he owed to them for covering his bad checks. Previously, SunTrust had the same experience with Respondent when it closed his personal checking account after he caused a negative balance of approximately $2,000.00 in the account by issuing checks without sufficient funds to cover them. The bank closed his personal account once he repaid the debt.

26. Paragraphs 6 through 25, inclusive above, provide clear and convincing evidence that Respondent knowingly, willfully, and intentionally continues to use his attorney trust account for personal financial matters. Notwithstanding his representation to Investigator Jackson that he would close his attorney trust account at SunTrust Bank on June 1, 2007, and open a personal checking account to avoid any further *RPC* violations, Respondent has not opened a personal checking account at any other bank.

27. Respondent knowingly, willfully, and intentionally wrote checks or authorized withdraws of funds from his attorney trust account for personal financial matters knowing that there were insufficient funds available to cover the checks tendered to payees as evidenced in Paragraphs 6 through 25, inclusive above.

THE VIRGINIA STATE BAR DISCIPLINARY BOARD finds by clear and convincing evidence that such conduct in Virginia State Bar docket numbers 07-070-1637, 07-070-1941, 07-070-2108, 07-070-2149, 07-070-2756, 07-070-2858, 07-070-070481, 07-070-070542, 07-070-070663, 07-070-070771, 07-070-070909, 070-07-070978, 07-070-071050, 07-070-071061, 08-070-071220, 08-070-071287, 08-070-071348, 08-070-071404, and 08-070-071447 on the part of the Respondent, Thomas Marshall James, constitutes a violation of the following provisions of the 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.

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;

VSB DOCKET NUMBER 06-070-0574

28. On or about July 16, 1998, Mr. Charles F. McKay sustained injuries in a vehicular accident caused by James Bull, who had an alcohol content of 0.27 at the time of the accident. The Albemarle County Circuit Court convicted Mr. Bull of felony DWI.

29. Mr. McKay hired Respondent to protect his interests that developed from the vehicular accident caused by Mr. Bull. On or about July 14, 2000, two days before the statute of limitations would have lapsed on Mr. McKay's right to file a lawsuit against Mr. Bull, Respondent filed a motion for judgment against Mr. Bull in the Albemarle County Circuit Court. The motion filed by Respondent named James Bull and his insurance company, Integon General Insurance Corporation, as the only defendants in the lawsuit. Respondent did not name Mr. McKay's automobile insurance company as a party to the lawsuit *before* the statute of limitations lapsed on his right to sue his own insurance company under the underinsured motorist provision.

30. Respondent did not communicate to his client that he did *not* properly include his insurance company in the motion for judgment.

31. The court scheduled a jury trial on July 22, 2002. On July 19, 2002, however, upon a joint motion for a continuance generally, the court removed the trial from the docket because both parties represented that the matter was close to settlement.

32. On or about October 5, 2004, more than two years later, Charles Sipe, attorney for Integon General Insurance, drafted and delivered to Respondent a check in the amount of $25,000, a Release and a Dismissal Order. The Release Mr. Sipe mailed to Respondent recited the $25,000 settlement amount only. Respondent, however, created his own Release to present to Mr. McKay. Respondent intentionally and deliberately fabricated this Release showing a settlement amount of $50,000 and presented it to Mr. McKay for approval. Mr. McKay

contends that Respondent's fabricated Release misled him to believe that a second payment of $25,000 would be paid in January of 2005. Respondent will not oppose Mr. McKay's contention.

33. On October 13, 2004, Respondent deposited the $25,000 settlement check from Integon General Insurance Corporation into his attorney trust account. Respondent represented to Mr. McKay that Integon General had agreed to settle the lawsuit for $50,000, which he alleged was Mr. Bull's maximum policy limits. However, Mr. Sipe stated that Mr. Bull, a high-risk driver, carried only the $25,000 minimum insurance policy limits set by Virginia law.

34. On October 19, 2004, Mr. McKay negotiated the $25,000 check drawn on Respondent's attorney trust account. On October 20, 2004, the Albemarle Circuit Court entered an order that settled Mr. McKay's lawsuit against Mr. Bull and Integon General Insurance Corporation for $25,000. Mr. McKay had no knowledge that the lawsuit against Mr. Bull and Integon General Insurance Corporation had been settled by Respondent or that Respondent did not protect his claim against his own insurance company.

35. Respondent did *not* communicate to Mr. McKay the actual $25,000 settlement offer from Integon General Insurance Company. Respondent did *not* get Mr. McKay's approval to settle the lawsuit for the proposed $25,000. Respondent settled the case for $25,000 *without* Mr. McKay's approval and/or consent. In his affidavits to the Virginia State Bar dated August 17, 2005, and October 3, 2005, Respondent admits that he intentionally and deliberately fabricated the Release and Dismissal Order that he presented to Mr. McKay in order to cover up his error and in an effort to buy time to pay Mr. McKay from Respondent's own resources.

36. Mr. McKay confirms that Respondent falsely informed him that on October 19, 2004, the Bull lawsuit had settled for $50,000. In addition, Mr. McKay stated that Respondent told him that he would receive a large sum of money from his own insurance company. Mr. McKay stated that he relied on Respondent's deliberate misrepresentations of the facts concerning the posture of his lawsuit and the large sum of money he was to receive from his own insurance company and retired from his job as a teacher.

37. In his February 8, 2006, report, Virginia State Bar Investigator James W. Henderson states that Mr. McKay told Investigator Henderson that Respondent informed Mr. McKay that his case had settled twice. The first settlement agreement was not enforceable because the language was incorrect, and he had to start over. Mr. McKay also told Investigator Henderson that Respondent told him that the second settlement amounts would be $180,000 from his insurance company and $50,000 from Mr. Bull's insurance company. Investigator Henderson reported that Respondent paid Mr. McKay various sums of money from his own resources at several of their meetings together, totaling about $15,000. In his affidavits to the Bar dated August 17, 2005, and October 3, 2005, Respondent does not refute or deny, but corroborates, these facts.

38. Investigator Henderson's February 8, 2006, report states that Respondent informed him that he first told Mr. McKay that he would receive $300,000 from his insurance company, but later told him that he would receive $180,000 from his insurance company. Respondent told Investigator Henderson that he finally settled the Bull lawsuit for $25,000 without Mr. McKay's knowledge.

39. On or about May 17, 2006, Virginia State Bar Investigator Henderson submitted Mr. McKay's telephone records and personal calendars showing that, over the course of four years, Mr. McKay had over seventy meetings with Respondent to discuss the progress of his case.

40. Over the course of this four-year attorney-client relationship, Respondent did not discuss with Mr. McKay any fee arrangements concerning the personal injury matter. Respondent did *not* communicate to his client whether he would bill on an hourly basis, or handle the case for a flat fee or on a contingency-fee basis. Investigator Henderson reports that Respondent told him that, although he never discussed any type of fee arrangement with Mr. McKay, he had intended to charge him only a ten-percent (10%) contingency fee because of their thirty-year friendship. Under the *Rules of Professional Conduct*, a contingency fee arrangement must be in writing explaining the attorney's calculation of fees and expenses. At the conclusion of the matter, the attorney must provide the client written statement showing the results obtained and the calculation of remittance paid to the client. Respondent did not provide any of this information to Mr. McKay.

41. In his affidavit to the Virginia State Bar dated August 17, 2005, Respondent admits that he lied to Mr. McKay over the course of his representation in order to conceal the following facts:

    i) he did *not* properly include Mr. McKay's automobile insurance company in the lawsuit to protect his underinsured motorist claim;

    ii) he did *not* attempt to correct his error when he discovered it;

    iii) he had settled the lawsuit for $25,000 without Mr. McKay's approval and/or consent;

    iv) he had fabricated documents to intentionally and deliberately mislead Mr. McKay to cover up his error and to "buy time for [Respondent] to make efforts to pull the money together" to pay him from his own resources;

v) he did *not* communicate his mistake to Mr. McKay when he discovered it; and,

vi) he lied to other attorneys involved in the case to avoid detection.

42. In his affidavit to the Virginia State Bar dated October 3, 2005, Respondent admits that he told Mr. McKay so many lies that he cannot remember all of the lies he told him to cover up his error.

43. In January of 2005, Respondent began using his attorney trust account to conduct his personal business. Respondent had overdrawn his personal or business operating account by $2,000.00. Subsequently, due to the large overdraft, the bank closed Respondent's personal checking account.

44. In January of 2005, Respondent wrote a check from his attorney trust account for his personal use made payable to Giant Foods. In February of 2005, he wrote two checks from his attorney trust account, both for his personal use, one made payable to Giant Foods and the other to SunTrust. In November of 2005, he wrote two checks from his attorney trust account, both for his personal use, one made payable to Sallie Mae and the other to Texaco/Shell-Consumer. In December of 2005, he wrote two more checks from his attorney trust account for his personal use, one made payable to Wells Fargo Financial in the amount of $642.00 and another made payable to Duddy Ent. (sp.).

THE VIRGINIA STATE BAR DISCIPLINARY BOARD finds by clear and convincing evidence that such conduct in Virginia State Bar docket number 06-070-0574 on the part of the Respondent, Thomas Marshall James, constitutes a violation of the following provisions of the 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.

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

(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.

(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.

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;

VSB DOCKET NUMBER 06-070-1845

45. On December 5, 2005, SunTrust Bank, pursuant to the Attorney Trust Account Regulations, notified the Virginia State Bar that Respondent had two trust account instances of NSF (non-sufficient funds). A check made payable to Wells Fargo Financial and another check made payable "Duddy Ent." (sp.) caused an overdraft of $316.52 of Respondent's attorney trust account.

46. In November of 2005 and December of 2005, Respondent made deposits of earned fees, i.e., he deposited his personal income into his attorney trust account. In Virginia State Bar Investigator Henderson's February 3, 2006, Report of Investigation, Respondent told Investigator Henderson that he used his trust account to conduct his personal business because the bank closed his personal account due to an overdraft of $2,000.00 that he is in the process of paying back to the bank. Respondent did not attempt to open another personal checking account. Respondent admitted to Investigator Henderson that he used his IOLTA attorney trust account as a regular personal checking account ever since the bank closed his general personal account.

47. Prior to the closure of Respondent's personal bank account, he used his attorney trust account only to deposit client funds. Upon the closure of his personal account, Respondent began to deposit his personal funds into his attorney trust account and kept in excess of two years' worth of funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution. The Bar does not contend that Respondent inappropriately used client funds for his personal use or that client funds were held in the account at the time of the Non-Sufficient Funds notice.

THE VIRGINIA STATE BAR DISCIPLINARY BOARD finds by clear and convincing evidence that such conduct in Virginia State Bar docket number 06-070-1845 on the part of the Respondent, Thomas Marshall James, constitutes a violation of the following provisions of the 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.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) 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;

VSB DOCKET NUMBER 07-070-0455:

48. On August 8, 2006, Respondent overdrew his lawyer's trust account by $251.08. On August 11, 2006, he overdrew the account again by $128.42.

49. In August of 2006, Virginia State Bar Investigator James W. Henderson initiated another investigation of Respondent's use of his lawyer's trust account for personal banking. Investigator Henderson had conducted at least two previous investigations of Respondent in the past two years for the same behavior. During these previous investigations, Investigator Henderson had repeatedly warned Respondent that his use of his lawyer's trust account for personal banking — depositing personal funds into the trust account and paying personal bills from the trust account — was improper and a violation of Rule of Professional Conduct 1.15. Investigator Henderson also informed Respondent that his continued use of his lawyer's trust account for personal use subsequent to a previous warning was a violation of Rule of Professional Conduct 8.4 — Misconduct because he had actual notice of his violation, but by knowingly, intentionally, and willfully continued to use his IOLTA attorney trust account to conduct personal financial transactions.

50. Respondent had set up payment of three personal bills through automatic electronic withdrawals from his lawyer's trust account. In August of 2006, Respondent authorized the following automatic payments:

    a. on August 2, 2006, $602.33 to Sallie Mae Corp;

    b. on August 3, 2006, $155.00 to GEICO Insurance Co;

    c. on August 8, 2006, $348.00 to Chase Bank.

51. On October 17, 2006, Respondent, through his counsel, Bernard J. DiMuro, facsimiled his response to the instant Bar complaint to Investigator Henderson. This facsimile also included a statement, dated September 30, 2006, and prepared by Respondent, in which Respondent admitted that:

    a. he deposited personal funds into his lawyer's trust account in excess of two years' worth of financial institution service fees;

    b. he used his lawyer's trust account as a personal checking account; and

    c. he set up automatic withdrawals from his lawyer's trust account to conduct personal transactions unrelated to his practice of law.

52. Prior to the closure of Respondent's personal bank account, he used his attorney trust account only to deposit client funds. Upon the closure of his personal account, Respondent began to deposit his personal funds into his attorney trust account in excess of two years' worth of funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution. The Bar does not contend that Respondent inappropriately used client funds for his personal use or that he held client funds in the account at the time of the Non-Sufficient Funds notices.

THE VIRGINIA STATE BAR DISCIPLINARY BOARD finds by clear and convincing evidence that such conduct in Virginia State Bar docket number 06-070-0455 on the part of the Respondent, Thomas Marshall James, constitutes a violation of the following provisions of the 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.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) 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;

UPON CONSIDERATION WHEREOF, the Virginia State Bar Disciplinary Board hereby ORDERS that the Respondent shall receive a **FIVE (5) YEAR SUSPENSION, WITH TERMS,** effective September 30, 2007, subject to the terms and alternative disposition set forth below:

1. On September 30, 2012, Thomas Marshall James shall certify his compliance with this term by delivering a fully and properly executed sworn statement to the Assistant Bar Counsel assigned to the Virginia State Bar's Seventh District, at 100 North Pitt Street, Suite 310, Alexandria, Virginia 22314, that he has not received a notice of non-sufficient funds concerning any and all financial institution accounts where Respondent currently serves as a fiduciary or assumes a fiduciary obligation of an account, during the five-year period of his license suspension. For the purpose of this Order adopting the Agreed Disposition, the term "fiduciary" includes only Respondent's conduct as a personal representative, trustee, receiver, guardian, committee, custodian, and attorney-in-fact.

2. If, however, the term and condition set fourth in the immediately preceding Paragraph 1 has not been met by September 30, 2012, the alternative sanction shall be revocation of the Respondent's license to practice law in the Commonwealth of Virginia.

3. Should the Virginia State Bar allege that Respondent has failed to comply with the terms of discipline referred to herein and that the alternative disposition should be imposed, a "show cause" proceeding pursuant to the Rules of the Supreme Court of Virginia, Part 6, § IV, ¶ 13.I.2.g. will be conducted, at which proceeding the burden of proof shall be on the Respondent to show the disciplinary tribunal by clear and convincing evidence that he has complied with the terms of discipline referred to herein.

4. The provisions of Part 6, § IV, ¶ 13.M. of the Rules of the Supreme Court of Virginia are inapplicable to this Agreed Disposition because the Respondent is not engaged in the practice of law at this time. It is further ORDERED that if the Respondent is not handling any client matters on September 30, 2007, 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 ¶ 13.M. shall be determined by the Virginia State Bar Disciplinary Board, unless the Respondent makes a timely request for a hearing before a three-judge court.

5. Pursuant to Part 6, § IV, ¶ 13.B.8.c. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess costs against the Respondent.

6. Pursuant to Rule 1:13 of the Rules of the Supreme Court of Virginia, the Court dispenses with any requirement that this Order be endorsed by counsel of record for the parties.

It is further ORDERED that an attested copy of this Order be mailed to the Respondent by certified mail, return receipt requested, to his Virginia State Bar address of record at 700 East High Street, Charlottesville, VA 22902, and a copy by regular mail to his counsel, Bernard J. DiMuro, Esq., at 908 King Street, Suite 200, Alexandria, VA 22314-3018, and a copy by regular mail to Alfred L. Carr, Assistant Bar Counsel, Virginia State Bar**,** 100 North Pitt Street, Suite 310, Alexandria, VA 22314-3133.

ENTERED this 25th day of September, 2007.
VIRGINIA STATE BAR DISCIPLINARY BOARD

JAMES L. BANKS JR., Chair

VIRGINIA:
BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
CLAUDE MICHAEL SCIALDONE
VSB DOCKET NUMBER: 08-000-071841

AMENDED IMPAIRMENT SUSPENSION ORDER

This day came the Virginia State Bar (the Bar), by Assistant Bar Counsel Paul D. Georgiadis, and the Respondent, Claude Michael Scialdone, Esquire, by counsel Marvin D. Miller, Esquire, and represented to the Disciplinary Board that Mr. Scialdone suffers from "cognitive compromise". The bar now has four (4) misconduct complaints pending against Mr. Scialdone based upon reports from judges and others of courtroom misbehavior that has led to contempt of court findings.

The Board has received uncontradicted evidence of impairment and a recommendation from a health care provider that Mr. Scialdone suspend the practice of all attorney-related functions pending further assessment. Respondent, by counsel, has agreed to said suspension based upon indications of his impairment. As such, Mr. Scialdone currently suffers from an Impairment as that term is defined in Part 6, § IV, ¶ 13 of the Rules of the Supreme Court of Virginia (Paragraph 13), and his license to practice law should be suspended under ¶ 13(I)(6) until it is established he no longer suffers from an Impairment.

It appearing proper to do so under ¶ 13(I)(6), it is hereby

ORDERED that the license of Claude Michael Scialdone to practice law in the Commonwealth of Virginia is SUSPENDED indefinitely effective September 11, 2007. It is further

ORDERED that the Respondent shall comply with the requirements of ¶ 13(M). Issues concerning the adequacy of the notice and arrangements required shall be determined by the Board, which may impose a sanction of revocation or further suspension for failure to comply with the requirements of this paragraph. It is further

ORDERED that a copy of this Order be mailed by first-class mail, postage prepaid, to Respondent's Counsel, Marvin D. Miller, 1203 Duke Street, Alexandria, Virginia, 22314, hand-delivered to Paul D. Georgiadis, Assistant Bar Counsel, and mailed by Certified Mail, Return Receipt Requested, to Claude Michael Scialdone, Esq., Scialdone & Taylor, Inc., 2437 North Landing Road, P.O. Box 6116, Virginia Beach, VA 23456-6116, his address of record with the Bar.

ENTERED this 13th day of September, 2007.

FOR THE DISCIPLINARY BOARD OF
THE VIRGINIA STATE BAR

Barbara Sayers Lanier
Clerk of the Disciplinary System

VIRGINIA:
BEFORE THE DISCIPLINARY BOARD OF THE VIRGINIA STATE BAR

IN THE MATTERS OF
SIMON HERBERT SCOTT III
VSB DOCKET NUMBERS: 07-031-0072
06-031-3876

ORDER OF PUBLIC REPRIMAND WITH TERMS

On August 29, 2007, a telephone conference in this matter was held before the Disciplinary Board of the Virginia State Bar consisting of Robert E. Eicher, Chair, Timothy A. Coyle, Sandra L. Havrilak, Martha JP McQuade, and V. Max Beard, lay person, to consider acceptance of a proposed Modified Agreed Disposition presented by Simon Herbert Scott III, Respondent, and Paulo E. Franco Jr., Assistant Bar Counsel. Donna Chandler, Court Reporter for Chandler & Halasz, 8309 Powhickery Drive, Mechanicsville, Virginia 23116, 804-730-1222, after being duly sworn, reported the hearing and transcribed the proceedings.

VSB DOCKET NUMBER 07-031-0072
Complainant: Gloria D. Wood

STIPULATED FINDINGS OF FACT

1. Simon Herbert Scott III, was admitted to practice law in the Commonwealth of Virginia on April 23, 1997.

2. At all times relevant, Mr. Scott was licensed to practice law in the Commonwealth of Virginia.

3. In March of 2006, Mr. Scott was an attorney in the offices of the law firm Scott & Sams.

4. On March 7, 2006, Ms. Gloria Woods met with Mr. Scott to discuss his representation of her in divorce proceedings.

5. The parties did not execute a formal retainer agreement, but Ms. Woods wrote Mr. Scott a check in the amount of $1,580.00 as fee for the divorce representation.

6. On March 17, 2006, Ms. Wood called Mr. Scott for an update on her case, but he had not done anything in connection with the representation.

7. On April 7, 2006, Mr. Scott's secretary called Ms. Wood requesting information concerning the case.

8. On April 10, 2006, Ms. Wood called the secretary and provided the information.

9. Unbeknownst to Ms. Wood, Mr. Scott tendered his resignation from Sams & Scott but did not give Ms. Wood or any other of his clients notice.

10. Sams & Scott received several calls from courts in the Norfolk area wanting to know why Mr. Scott had not appeared in court-appointed cases.

11. Prior to his departure, Mr. Scott did not take appropriate steps of filing motions to seek leave to withdraw from his court-appointed and other cases, nor did he provide such courts with notice that he was leaving the firm.

12. Other attorneys in Sams & Scott continued in those cases that Mr. Scott abandoned once the firm became aware of Mr. Scott's appointment or role as counsel of record.

13. Mr. Scott did not inform any of the other attorneys at Sams & Scott that Ms. Wood was a client or that she had a pending divorce matter.

14. Sams & Scott discovered that Ms. Wood was a client only because she had called the firm after Mr. Scott's departure and advising the firm that she no longer wished Mr. Scott to represent her interests.

15. After his departure, Mr. Scott did not take appropriate steps to refund Ms. Wood the unearned portion of her retainer, nor did he take any appropriate steps to ensure that her records were returned to her.

16. Ms. Wood subsequently elected to retain LeRon Gilchrist, Esquire, an attorney with Sams & Scott.

Mr. Scott has advised Bar Counsel that he is no longer engaged in the active practice of law and is not representing clients. He has changed his status with the Virginia State Bar from Active to Associate Status.

STIPULATED FINDING OF MISCONDUCT

Such conduct by Simon Herbert Scott III constitutes misconduct in violation of the following provisions of the 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.

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 in paragraph (e).

VSB DOCKET NUMBER 06-031-3876

Complainant: VSB/Anonymous — Jemar Leon White

STIPULATED FINDINGS OF FACT

1. Simon Herbert Scott III, was admitted to practice law in the Commonwealth of Virginia on April 23, 1997.

2. At all times relevant, Mr. Scott was licensed to practice law in the Commonwealth of Virginia.

3. Jemar Leon White was convicted of possession of cocaine and resisting arrest and sentenced on September 9, 2005.

4. Respondent was appointed to represent Mr. White on appeal to the Court of Appeals of Virginia.

5. Prior to filing an appeal, Mr. White filed a motion to reconsider with the trial court. The trial court denied the motion to reconsider on November 8, 2005.

6. Respondent filed the transcripts of the proceedings at the trial court on December 6, 2005.

7. In calculating the date on which to file the transcripts as part of the appeal, Respondent erroneously used the date of November 18, 2005, the date of the order denying the Motion to Reconsider. The final order for calculating the date in which to file the transcripts was the sentencing order of September 9, 2005.

8. On December 13, 2005, the Court of Appeals issued a Rule to Show Cause requiring Mr. White to show cause why the appeal should not be dismissed.

9. On April 18, 2006, the Court of Appeals dismissed the case for failure to timely file the transcripts.

10. Respondent failed to advise his client that his appeal had been dismissed and failed to advise his client that he left the firm.

11. Mr. Scott has advised Bar Counsel that he is no longer engaged in the active practice of law and is not representing clients. He has changed his status with the Virginia State Bar from Active to Associate Status.

STIPULATED FINDING OF MISCONDUCT

Such conduct by Simon Herbert Scott III constitutes misconduct in violation of the following provisions of the 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.

DISPOSITION

The Disciplinary Board finds that had this matter gone to a full hearing the Bar would have met its burden to prove the aforementioned Rule violations by clear and convincing evidence. Pursuant to Part 6, § IV, ¶ 13.I.2.f, g and h of the Rules of the Supreme Court of Virginia, the

Disciplinary Board of the Virginia State Bar hereby accepts by a unanimous vote the Modified Agreed Disposition tendered to it, as modified by the suggestion of the Board and freely and voluntarily accepted by Respondent and Assistant Bar Counsel, and

Accordingly it is ORDERED that the Respondent, Simon Herbert Scott III, receive a Public Reprimand with Terms effective August 29, 2007.

The terms to which Respondent shall be held are as follows:

1. In the event that Respondent elects to return to the active practice of law and activates his status with the Virginia State Bar from Associate to Active, within 30 days of such activation he shall provide written certification to the Office of Bar Counsel that he is working under the supervision of another lawyer.

2. Respondent shall remain under the active supervision of such lawyer for a period of not less than one year.

Should Respondent fail to comply with the foregoing terms, the Virginia State Bar shall issue and serve upon the Respondent a Notice of Hearing to Show Cause why the alternate sanction should not be imposed. The matter shall be referred to the Disciplinary Board for a hearing to determine an appropriate alternative sanction. The sole factual issue will be whether the Respondent has violated the terms of this Agreed Disposition without legal justification or excuse. All issues concerning the Respondent's compliance with the terms of this Agreed Disposition shall be determined by the Disciplinary Board. At the hearing, the burden of proof shall be on the Respondent to show timely compliance with the terms, including timely certification of such compliance by clear and convincing evidence.

It is further **ORDERED** that the Clerk of the Disciplinary System shall assess an administrative fee pursuant to Part 6, § IV, ¶ 13.B.8.C.1 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 Simon Herbert Scott III, at his address of record with the Virginia State Bar, being 4012 Newport Avenue, Norfolk, Virginia 23508, by certified mail, return receipt requested, and hand delivered to Paulo E. Franco Jr., Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

ENTERED this 7th day of September, 2007.

Robert E. Eicher, First Vice Chair
Virginia State Bar Disciplinary Board

DISTRICT COMMITTEES

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

IN THE MATTER OF
MICHAEL JAMES GEORGE, ESQUIRE
VSB DOCKET NUMBER 03-060-0264

SUBCOMMITTEE DETERMINATION
PUBLIC ADMONITION WITH TERMS

On the 28th day of June, 2007, a meeting in this matter was held before a duly convened subcommittee of the Sixth District Committee consisting of Richard Henry Stuart, Esq., John E. Graham, and Jennifer Lee Parrish, Esq., presiding. Pursuant to Part 6, § IV, ¶ 13(G)(1)(d) of the Rules of Virginia Supreme Court, a subcommittee of the Sixth District Committee of the Virginia State Bar hereby serves upon the Respondent the following Public Admonition With Terms:

I. FINDINGS OF FACT

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

2. The events that led to the bar complaint are related to a contentious divorce between the Respondent and his former wife. The Complainant in this matter was counsel for the Respondent's wife during the divorce proceeding.

3. On or about September 9, 2000, the Respondent and his wife were married in Stafford County, Virginia, after a brief courtship. Following the marriage, the wife began working in the Respondent's law office.

4. After she began working in his law office, the Respondent's wife opened a checking account in her own name at Wachovia Bank. The Respondent did not have signatory authority on the wife's Wachovia Bank account.

5. At the time of the events in question, the Respondent's income was derived primarily from court-appointed guardian *ad litem* fees which had been earned upon receipt. In addition, he had a small number of retained clients.

6. On one or more occasions during the time the Respondent's wife worked at the Respondent's law office, unearned fees were received from retained clients in the form of checks, and the Respondent's wife deposited them in her individual account at Wachovia Bank. The Respondent's wife abruptly terminated her employment at the Respondent's office and relocated to the state of California.

7. The Respondent stipulates that the deposit of unearned fees into his wife's account was a direct result of his failure to properly supervise an employee and was inconsistent with the Rules of Professional Conduct related to trust account practices. At no time, however, was the Respondent out of trust, and there is no evidence that any client harm resulted from the practice described in paragraph six (6) *supra*.

II. NATURE OF MISCONDUCT

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

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 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 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.

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 by the dates set forth below shall be a predicate for the disposition of this complaint by imposition of a Public Admonition With Terms. The terms and conditions which shall be met are:

1. On or before December 31, 2007, the Respondent shall complete sixteen (16) hours of continuing legal education credits by attending courses approved by the Virginia State Bar in the subject matter of ethics. The Respondent's Continuing Legal Education attendance obligation set forth in this paragraph ***shall not*** be applied toward his Mandatory Continuing Legal Education requirement in Virginia or

any other jurisdictions in which the Respondent may be licensed to practice law**.** The Respondent shall certify his compliance with the terms set forth in this paragraph by delivering a fully and properly executed Virginia MCLE Board Certification of Attendance Form (Form 2) to Marian L. Beckett, Assistant Bar Counsel, at 100 North Pitt Street, Suite 310, Alexandria, Virginia 22314, promptly following his attendance of each such CLE program(s).

2. For a period of one (1) year following the date of entry of this Order, the Respondent shall engage in no conduct that violates any provisions of Virginia Rules of Professional Conduct 1.15, and 5.3, including any amendments thereto, and/or which violates any analogous provisions, and any amendments thereto, of the disciplinary rules of another jurisdiction in which the Respondent may be admitted to practice law. The terms contained in this Paragraph 2 shall be deemed to have been violated when any ruling, determination, judgment, order, or decree has been issued against the Respondent by any disciplinary tribunal that contains a finding that Respondent has violated one or more provisions of the disciplinary rules referred to above; *provided, however*, that the conduct upon which such finding was based occurred within the one-year period referred to above, and provided, further, that such ruling has become final.

Upon satisfactory proof that the above noted terms and conditions have been complied with in full, a PUBLIC ADMONITION WITH TERMS shall then be imposed, and this matter shall be closed. If, however, the Respondent fails to comply with any of the terms set forth herein, as and when the obligation with respect to any such Term has accrued, then, and in such event, the alternative disposition of CERTIFICATION TO THE VIRGINIA STATE BAR DISCIPLINARY BOARD shall be imposed, upon an agreed stipulation of facts and misconduct as the facts and misconduct are set forth herein for the sole purpose of the imposition of a sanction deemed appropriate by the Virginia State Bar Disciplinary Board, pursuant to Part 6, § IV, ¶ 13(I)(2)(g) of the Rules of the Supreme Court of Virginia.

IV. COSTS

Pursuant to Part Six, § IV, ¶ 13(B)(8)(c)(1) of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess costs.

SIXTH DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

Jennifer Lee Parrish, Chair

VIRGINIA STATE BAR COUNCIL TO REVIEW PROPOSED AMENDMENTS TO RULES 1.9 AND 1.11 OF THE RULES OF PROFESSIONAL CONDUCT

Pursuant to Part Six: Section IV, Paragraph 10(c) of the Rules of the Supreme Court of Virginia, the Virginia State Bar Council, at its meeting on March 1, 2008, in Richmond, Virginia, is expected to consider for approval, disapproval, or modification, proposed amendments to Rules 1.9 and 1.11 of the Rules of Professional Conduct by the Standing Committee on Legal Ethics.

RULES 1.9 AND 1.11

The Committee proposes an amendment to Rule 1.11 that moves the language from Comment [10] into the body of the rule. Rule 1.11 deals with special conflicts of interest for former and current government officers and employees.

The substance of Comment [10] deals with the issue of disqualification of other lawyers in the agency when one of the lawyers is disqualified from a matter. The Committee believes that since Comment [10] deals with a substantive issue of lawyer conduct, it should be directly incorporated into the rule versus in a comment, as comments are meant to provide guidance to lawyers rather than to direct their conduct. The Committee has not modified the rule in that other lawyers in the agency are not disqualified, even if the lawyer in question is disqualified, but has moved this language directly into Rule 1.11 by adding subsection (3) to section (d) of the Rule.

In addition, the Committee believes that Rule 1.9 needed additional commentary to provide direction to lawyers regarding law firm disqualifications when lawyers move from private to public employment. The Committee added this direction in Comment [5] to Rule 1.9.

Inspection and Comment

The proposed amendment may be inspected at the office of the Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800, between the hours of 9:00 AM and 4:30 PM, Monday through Friday. Copies of the proposed amendment can be obtained from the offices of the Virginia State Bar by contacting the Office of Ethics Counsel at (804) 775-0557, or can be found at the Virginia State Bar's Web site at http://www.vsb.org.

Any individual, business or other entity may file or submit written comments in support of, or in opposition to, the proposed amendment by filing ten copies with Thomas A. Edmonds, the Executive Director of the Virginia State Bar, not later than **December 31, 2007.**

# # #

(September 27, 2007, as revised by the Standing Committee on Legal Ethics)

RULE 1.9 Conflict of Interest: Former Client

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

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

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

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

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

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

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

COMMENT

[1] After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.

[2] The scope of a "matter" for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved and other lawyers may be subject to imputed disqualification under Rule 1.10. If a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of paragraphs 1.9 (b) and (c) concerning confidentiality have been met.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the Rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the Rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[4a] Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek *per se* rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there may be a presumption that all confidences known by the partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

[4b] The other rubric formerly used for dealing with disqualification is the appearance of impropriety proscribed in Canon 9 of the *Virginia Code*. This rubric has a twofold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety. A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. *See* Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm<u>; and Rule 1.11(d) for restrictions on a firm regarding a lawyer moving from private employment to public employment.</u>

Confidentiality

[6] Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

[6a] Application of paragraph (b) depends on a situation's particular facts. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. *See* Rules 1.6 and 1.9.

Adverse Positions

[8] Information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using non-confidential information about that client when later representing another client.

[9] Disqualification from subsequent representation is primarily for the protection of former clients but may also affect current clients. This protection, however, can be waived by both. A waiver is effective only if there is full disclosure of the circumstances, including the lawyer's intended role in behalf of the new client.

[10] With regard to an opposing party's raising a question of conflict of interest, *see* Comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, *see* Rule 1.10 and Rule 1.11.

VIRGINIA CODE COMPARISON

Paragraph (a) is substantially the same as DR 5-105(D), although the Rule requires waiver by both a lawyer's current and former client, rather than just the former client.

There was no direct counterpart to paragraph (b) in the *Virginia Code*. Representation by a lawyer adverse to a client of a law firm with which a lawyer was previously associated was sometimes dealt with under the rubric of Canon 9 of the *Virginia Code* which provided: "A lawyer should avoid even the appearance of impropriety."

There was no counterpart to paragraph (c) in the *Virginia Code*. The exception in the last clause of paragraph (c)(1) permits a lawyer to use information relating to a former client that is in the "public domain," a use that also was not prohibited by the *Virginia Code* which protected only "confidences and secrets." Since the scope of paragraphs (a) and (b) is much broader than "confidences and secrets," it is necessary to define when a lawyer may make use of information about a client after the client-lawyer relationship has terminated.

COMMITTEE COMMENTARY

The Committee believed that, in an era when lawyers frequently move between firms, this Rule provided more specific guidance than the implicit provisions of the Disciplinary Rules. However, the Committee added language to paragraph (a) requiring consent of both present and former clients. Additionally, the Committee adopted broader language in paragraph (c) precluding the use of any information "relating to or gained in the course of" the representation of a former client, rather than precluding the use only of information "relating to" the former representation.

(September 27, 2007, as revised by the Standing Committee on Legal Ethics)

RULE 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees

(a) A lawyer who holds public office shall not:

(1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;

(2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or

(3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

(b) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the private client and the appropriate government agency consent after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) 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; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer, mediator or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(3) This paragraph does not disqualify other lawyers in the disqualified lawyer's agency.

(e) As used in this Rule, the term "matter" includes:

(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.

(f) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this Rule

is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

COMMENT

[1] This Rule prevents a lawyer from exploiting public office for the advantage of the lawyer or a private client. A lawyer who is a public officer should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with official duties or obligations to the public.

[2] A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.

[3] *ABA Model Rule* Comments not adopted.

[4] Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The private client should be informed of the lawyer's prior relationship with a public agency at the time of engagement of the lawyer's services.

[5] When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

[6] Paragraphs (b)(1) and (c) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Paragraph (b)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (b) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

~~[10] Paragraph (d) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.~~

VIRGINIA CODE COMPARISON

Paragraph (a) is identical to DR 8-101(A).

Paragraph (b) is substantially similar to DR 9-101(B), except that the latter used the terms "in which he had substantial responsibility while he was a public employee." The Rule also requires consent of both a current client and the former agency.

Paragraphs (c), (d), (e) and (f) have no counterparts in the *Virginia Code*.

COMMITTEE COMMENTARY

The Committee believed that the *ABA Model Rule* provides more complete guidance regarding lawyers' movement between the public and private sectors. However, the Committee added the language of DR 8-101(A) as paragraph (a) in order to make this Rule a more complete statement regarding the particular responsibilities of lawyers who are public officials. Additionally, to make paragraph (b) consistent with similar provisions under Rule 1.9(a) and (b), the Committee modified the paragraph to require consent to representation by both the current client and the lawyer's former government agency.

VIRGINIA STATE BAR COUNCIL TO REVIEW PROPOSED FOREIGN LEGAL CONSULTANT RULE 1A:7

On March 1, 2008, the Virginia State Bar Council ("Bar Council") will meet at the Omni Hotel in Richmond to consider a proposed rule that will allow a non-U.S. attorney to practice in Virginia as a Foreign Legal Consultant ("FLC"). The proposed rule is a work product of the Virginia State Bar's Task Force on Multi-jurisdictional Practice ("MJP Task Force"). It is a revised version of the FLC Rule presented to and approved by Bar Council in February 2005 and which was then submitted to the Supreme Court of Virginia for review and approval. While under the Court's review certain necessary revisions were identified and on February 13, 2007, the Virginia State Bar withdrew its petition for approval of this rule. The MJP Task Force reconvened in April and September 2007 to make these revisions and produced the current proposed FLC Rule.

The MJP Task Force revised paragraph (d) to clarify the scope of practice of a FLC and add a definition of "international law;" added paragraph (e)(2)(ii) to allow a FLC to be employed as in-house counsel under Part II of Rule 1A:5 Rules of the Supreme Court of Virginia; and revised paragraph (g) to give the Virginia Board of Bar Examiners authority to set the application and renewal fees for FLC status.

The need for and importance of Virginia's adoption of the FLC Rule has only increased since the Rule was first proposed in 2004. Currently twenty eight (28) jurisdictions have adopted a foreign legal consultant rule. Bilateral agreements are being negotiated between individual states and some foreign countries. In this global economy, business transactions increasingly require the involvement of U.S. and non-U.S. lawyers. All but five states annually export billions of dollars of merchandise; even the five smallest exporters ship hundreds of millions of dollars of merchandise to other countries. (See http://www.ita.doc.gov/td/industry/otea/state/2005_year_end_dollar_value_05.html for a state-by-state listing of exports over the last five years.) To appreciate the magnitude of these exports, Illinois, which ranked 6th highest in exports, exports $26 billion dollars annually. Rhode Island, which is ranked 45th in the country, exports over $1 billion annually. Virginia is ranked 23rd, with a total of over $12 billion annually. In addition to these exports, every state in the country has significant foreign investment or imports. Clients who are engaged in this inbound and outbound trade undoubtedly want to (and probably do) rely on the expertise of both U.S. and non-U.S. lawyers.

Furthermore, because of its location on the Atlantic seaboard and its proximity to Washington, D.C., Virginia has become an attractive location for international business. Many companies with either parents or divisions overseas have established sales and service offices or headquarters in Virginia. In fact, more Fortune 500 companies are located in Virginia than in each of 40 other states. See *Fifty Years of the Fortune 500* (April 5, 2004). According to the Virginia Economic Development Partnership, nearly 800 Virginia corporations have overseas operations, and thus have potential need for the expertise of foreign lawyers. Today in Virginia foreign-owned firms are present from more than 40 countries, account for more than 130,000 Virginia jobs, and represent more than 5 billion dollars in investment in the Commonwealth. *See* Virginia International Trade Alliance: http://www.vitalforva.org/task_forces/existing_international_companies.htm.

Authorizing foreign lawyers to be regulated as FLCs (and allowing U.S. lawyers to hire and partner these FLCs) can also benefit residents of Virginia who were born in another country. Every U.S. jurisdiction has a significant number of residents who were born in other countries, many of whom probably still have connections in their country of origin. Based on the 2000 census, Virginia increased its foreign-born population by 83% between 1999 and 2000 and 35.7% between 2000 and 2006 and is ranked 11 out of the 50 states and the District of Columbia. See *Migration Information Source* at http://www.migrationinformation.org/USFocus/statemap.cfm#.

The proposed FLC rule is in the best interests of clients because it provides access to foreign law expertise with accountability; FLCs will be subject to the ethics rules and discipline system in Virginia. Many of the clients in Virginia that are engaged in import or export activities will need advice about foreign law. The proposed FLC rule serves the interests of clients because it makes it more likely that these clients could remain in the U.S. and find foreign law expertise. In addition, the foreign-born residents in Virginia will be better served if they have access not just to U.S. lawyers who can advise on domestic law, but FLCs who can advise them on the law of a foreign country. Without the proposed FLC rule, foreign-born citizens and clients needing professional advice on the law of a foreign country would have to look for FLCs in another state where they are authorized to practice. This translates to lost revenue and business opportunities for Virginia.

The public, as well as individual clients, benefit by having foreign lawyers accessible and accountable. The proposed FLC rule acknowledges and addresses the economic realities, in which there is significant inbound and outbound foreign trade (and foreign lawyers who work on that trade). Without foreign lawyer participation, much of this economic reality could not occur. The proposed FLC rule therefore facilitates the participation of regulated, accountable foreign lawyers.

Adoption of the FLC rule will help Virginia lawyers as well. Experience has shown that in a global economy, when jurisdictions close their borders to foreign lawyers, global businesses move to another jurisdiction where foreign lawyers are available. By recognizing the rights of foreign lawyers to practice in a limited fashion in the U.S. temporarily and with accountability, the proposed FLC rule makes it more likely that multinational clients will continue to rely on Virginia lawyers (rather than U.K. or Canadian lawyers) for their legal work. While a solo practitioner or small firm is less likely to represent multinational corporations, chances are good that many of their clients will in the future have legal issues involving foreign law.

Finally, the FLC rule is in the best interest of Virginia and other U.S. lawyers who practice overseas. U.S. foreign lawyers are among the most active participants in the globalized world economy. According to the *National Law Journal*, the number of lawyers working in foreign offices jumped from 800 in 1982 to 10,493 in 2004.[1] U.S. lawyers have responded to clients' needs by opening offices in more than 30 foreign countries, with an estimated 1,000 lawyers. In addition, probably tens of thousands of U.S. lawyers regularly travel abroad to perform services on a temporary basis in foreign countries, assisting their U.S. clients with their

FOOTNOTES

1 David Hechler, *As Economy Slows, So Does Firms' Global Reach*, THE NATIONAL LAW JOURNAL (November 15, 2004) at S10.

foreign interests or representing foreign companies doing business with U.S. firms and individuals. Commerce Department statistics indicate that U.S. lawyers have earned well in excess of $3 billion in the last calendar year through their "export" of legal services. The actual figures may be substantially greater. Adoption of this rule will facilitate the work of U.S. lawyers engaged in international work because it will make it clear that foreign lawyers can receive a license to practice their Home State law and can work with U.S. lawyers and law firms.

The proposed FLC rule carves out a rather limited role for the foreign legal consultant. An FLC will be permitted to render any legal services only with regard to matters involving the law of the foreign nation(s) in which the person is admitted to practice, or international law. They cannot appear before any court. Finally, an FLC cannot hold him/herself out as a member of the Virginia State Bar.

Inspection and Comment

The proposed rule may be inspected at the office of the Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800, between the hours of 9:00 AM and 4:30 PM, Monday through Friday. Copies of the proposed rule can be obtained from the offices of the Virginia State Bar by contacting the Office of Ethics Counsel at (804) 775-0557, or can be found at the Virginia State Bar's Web site at http://www.vsb.org.

Any individual, business or other entity may file or submit written comments in support of, or in opposition to, the advisory opinion by filing ten copies with Thomas A. Edmonds, the Executive Director of the Virginia State Bar, not later than **January 4, 2008.**

(As approved by the Multijurisdictional Task Force — September 13, 2007)

Rule 1A:7. Certification of Foreign Legal Consultants

(a) General Requirements. A person admitted to practice law by the duly constituted and authorized professional body or governmental authority of any foreign nation may apply to the Virginia Board of Bar Examiners ("Board") for a certificate as a foreign legal consultant, provided the applicant:

(1) is a member in good standing of a recognized legal profession in a foreign ~~country~~ nation, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a governmental authority;

(2) for at least five of the seven years immediately preceding his or her application has been a member in good standing of such legal profession and has actually been engaged in the authorized practice of law ~~in the said foreign country, or elsewhere,~~ substantially involving or relating to the rendering of advice or the provision of legal services concerning the law of the said foreign ~~country~~ nation;

(3) possesses the good moral character and general fitness requisite for a member of the bar of this Commonwealth;

(4) is at least twentysix years of age; and

(5) intends to practice as a foreign legal consultant in this Commonwealth and maintain an office in this Commonwealth for that purpose.

(b) Proof Required. An applicant under this rule shall file with the secretary of the Board:

(1) an application for a foreign legal consultant certificate, on a form furnished by the Board,

(2) a certificate, for each foreign ~~country~~ nation in which the applicant is admitted to practice, from the professional body or governmental authority in such foreign country having final jurisdiction over professional discipline, certifying as to the applicant's admission to practice and the date thereof, and as to his or her good standing as an attorney or counselor at law or the equivalent;

(3) a letter of recommendation, for each foreign ~~country~~ nation in which the applicant is admitted to practice, from one of the members of the executive body of such professional body or governmental authority or from one of the judges of the highest law court or court of original jurisdiction of such foreign country;

(4) a duly authenticated English translation of each certificate and letter if, in either case, it is not in English;

(5) a copy or summary of the law, regulations, and customs of the foreign country that describes the opportunity afforded to a member of the Virginia State Bar ("the Bar") to establish an office to provide legal services to clients in such foreign country, together with an authenticated English translation if it is not in English;

(6) the requisite documentation establishing the applicant's compliance with the immigration laws of the United States; and

(7) such other evidence as to the applicant's educational and professional qualifications, good moral character and general fitness, and compliance with the requirements of paragraph (a) of this rule as the Board may require.

(c) Reciprocal Treatment of Members of the Bar of this Commonwealth. In considering whether to certify an applicant to practice as a foreign legal consultant, the Board may in its discretion take into account whether a member of the Bar would have a reasonable and practical opportunity to establish an office and give legal advice to clients in the applicant's country of admission**.** Any member of the Bar who is seeking or has sought to establish an office or give advice in that country may request the Board to consider the matter, or the Board may do so *sua sponte*.

~~**(d) Scope of Practice.** A person certified to practice as a foreign legal consultant under this Rule may render legal services in the Commonwealth of Virginia subject, however, to the limitations that he or she shall not:~~

~~(1) appear or prepare pleadings for a person, other than himself or herself, as an attorney in any court, or before any magistrate or other judicial officer, in the Commonwealth of Virginia;~~

~~(2) prepare:~~

~~(i) any instrument effecting the transfer or registration of title to real estate located in the United States of America; or~~

~~(ii) any contract or other legal instrument effecting the transfer of ownership of, or other legal interest in, any business located in the United States of America, except as otherwise authorized by law;~~

~~(3) prepare:~~

~~(i) any will or trust instrument effecting the disposition on death of any property located in the United States of America and owned by a resident thereof, or~~

~~(ii) any instrument relating to the administration of a decedent's estate in the United States of America;~~

~~(4) prepare any instrument in respect of the marital or parental relations, rights or duties of a resident of the United States of America, or the custody or care of the children of such a resident;~~

~~(5) render legal advice (whether rendered incident to the preparation of legal instruments or otherwise) on the law of the Commonwealth of Virginia, the District of Columbia, or of any other state or territory of the United States of America except on the basis of lawful association with a person duly qualified and entitled (otherwise than by virtue of having been licensed under this rule) to render such professional legal advice in the Commonwealth of Virginia;~~

~~(6) be, or in any way hold himself or herself out as, a member of the Bar; or~~

~~(7) carry on his or her practice under, or utilize in connection with such practice, any name, title or designation other than one or more of the following:~~

~~(i) his or her own name;~~

~~(ii) the name of the law firm with which he or she is affiliated;~~

~~(iii) his or her authorized title in the foreign country of his or her admission to practice, which may be used in conjunction with the name of such country; and~~

~~(iv) the title "foreign legal consultant," which may be used in conjunction with the words "admitted to the practice of law in [name of the foreign country of his or her admission to practice]."~~

(d) **Scope of Practice**. A person certified to practice as foreign legal consultant under this Rule may render legal services in the Commonwealth only with regard to matters involving the law of foreign nation(s) in which the person is admitted to practice or international law. For purposes of this paragraph, the term "international law" means a body of laws, rules or legal principles that are based on custom, treaties or legislation and that control or affect (1) the rights and duties of nations in relation to other nations or their citizens, or (2) the rights and obligations pertaining to international transactions.

The practice permitted under this rule does not authorize the foreign legal consultant to appear in court.

(e) Rights and Obligations. Subject to the scope of practice limitations set forth in paragraph (d) of this rule, a person certified as a foreign legal consultant under this rule shall be entitled and subject to:

(1) the rights and obligations contained in the Virginia Rules of Professional Conduct as set forth in Part 6, Section II of the Rules of the Supreme Court of Virginia; and the procedure for disciplining attorneys as set forth in Part 6, Section IV, Paragraph 13 of the Rules of the Supreme Court of Virginia

(2) the rights and obligations of a member of the Bar with respect to:

(i) affiliation in the same law firm with one or more members of the bar of this Commonwealth, including by:

(A) employing one or more members of the Bar;

(B) being employed by one or more members of the Bar or by any partnership or other limited liability entity authorized to practice law pursuant to Part 6, Section IV, Paragraph 14 of the Rules of the Supreme Court of Virginia, which such entity includes an active member of the Bar or which maintains an office in this Commonwealth; ~~and~~

(C) being a director, partner, member, manager or shareholder in any partnership or other professional limited liability entity authorized by Part 6, Section IV, Paragraph 14 to practice law in this Commonwealth which includes an active member of the Bar or which maintains an office in this Commonwealth; ~~and~~

(ii) employment as in-house counsel under Part II of Rule 1A:5; and

(iii) attorney-client privilege, work-product privilege and similar professional privileges.

(3) No time spent practicing as a foreign legal consultant shall be considered in determining eligibility for admission to the Virginia bar without examination.

(f) Disciplinary Provisions. A person certified to practice as a foreign legal consultant under this Rule shall be subject to professional discipline in the same manner and to the same extent as any member of the Bar and to this end:

(1) Every person certified to practice as a foreign legal consultant under these Rules:

(i) shall be subject to regulation by the Bar and to admonition, reprimand, suspension, removal or revocation of his or her

certificate to practice in accordance with the rules of procedure for disciplinary proceedings set forth in Part 6, Section IV, Paragraph 13 of the Rules of the Supreme Court of Virginia; and

(ii) shall execute and file with the Bar, in such form and manner as the Bar may prescribe:

(A) his or her commitment to observe the Virginia Rules of Professional Conduct and any other rules of court governing members of the bar to the extent they may be applicable to the legal services authorized under paragraph (d) of this Rule;

(B) a written undertaking to notify the Bar of any change in such person's good standing as a member of any foreign legal profession referred to in paragraph (a)(1) of this rule and of any final action of any professional body or governmental authority referred to in paragraph (b)(2) of this rule imposing any disciplinary censure, suspension, or other sanction upon such person; and

(C) a duly acknowledged instrument, in writing, setting forth his or her address in this Commonwealth which shall be both his or her address of record with the Bar and such person's actual place of business for rendering services authorized by this rule. Such address shall be one where process can be served and the foreign legal consultant shall have a duty to promptly notify the Membership Department of the Bar in writing of any changes in his or her address of record.

(g) Application and Renewal Fees. An applicant for a certificate as a foreign legal consultant under this rule shall pay to the Virginia Board of Bar Examiners the application fee and costs as may be fixed from time to time by the Board ~~Supreme Court of Virginia~~. A person certified as a foreign legal consultant shall pay an annual fee to the Virginia State Bar which shall ~~also~~ be fixed by the Supreme Court of Virginia. A person certified as a foreign legal consultant who fails to complete and file the renewal form supplied by the Bar or pay the annual fee shall have his or her certificate as a foreign legal consultant administratively suspended in accordance with the procedures set out in Part 6, Section IV, Paragraph 19 of the Rules of the Supreme Court of Virginia.

(h) Revocation of Certificate for Non-Compliance. In the event that the Board determines that a person certified as a foreign legal consultant under this rule no longer meets the requirements under this rule, it shall revoke the certificate granted to such person hereunder.

(i) Reinstatement. Any foreign legal consultant whose authority to practice is suspended shall be reinstated upon evidence satisfactory to the Bar that such person is in full compliance with this rule; however, a reinstatement of a foreign legal consultant's certificate following a suspension for non-compliance with paragraph (g) of this rule shall be governed by Part 6, Section IV, Paragraph 19 of the Rules of the Supreme Court of Virginia; and reinstatement of a foreign legal consultant's certificate following a disciplinary suspension or revocation shall be governed by Part Six, Section IV, Paragraph 13 of the Rules of the Supreme Court of Virginia.

(j) Admission to Bar. In the event that a person certified as a foreign legal consultant under this rule is subsequently admitted as a member of the Bar under the provisions of the rules governing such admission, the certificate granted to such person hereunder shall be deemed superseded by the admission of such person to the Bar.

(k) **Regulations.** The Bar ~~or~~ and the Board may adopt regulations as needed to implement their respective responsibilities under this rule.

(m) **Effective Date.** This rule shall become effective on July 1, 2008.

VIRGINIA STATE BAR COUNCIL TO REVIEW PROPOSED AMENDMENTS TO RULES 5.5 AND 8.5 OF THE RULES OF PROFESSIONAL CONDUCT

Pursuant to Part Six, Section IV, Paragraph 10(c) of the Rules of the Supreme Court of Virginia, the Virginia State Bar Council, at its meeting on March 1, 2008 in Richmond, Virginia, is expected to consider for approval, disapproval, or modification, proposed amendments to Rules 5.5 and 8.5 of the Rules of Professional Conduct.

The proposed amendments to Rules 5.5 and 8.5 are the work product of the Virginia State Bar's Task Force on Multi-Jurisdictional Practice ("MJP Task Force"). The MJP Task Force was created to study foreign attorney practice in Virginia and make recommendations concerning the requirements under which non-Virginia lawyers should be permitted to practice in Virginia. One of the foremost tasks of the MJP Task Force is to develop rules that define and regulate temporary practice in Virginia by lawyers who are not members of the Virginia State Bar. The proposed amendment to Rule 5.5 addresses criteria for temporary practice and unauthorized practice of law in Virginia by foreign attorneys in Virginia. The proposed amendment to Rule 8.5 addresses the disciplinary authority and jurisdiction of the Virginia State Bar over foreign attorneys practicing in Virginia.

Proposed Rule 5.5 presented here is a revised version of the rule presented to and approved by Bar Council in March 2006 and which was then submitted to the Supreme Court of Virginia for review and approval. The present proposed Rule 8.5 is the same rule presented to and approved by Bar Council in March 2006 and submitted thereafter to the Supreme Court of Virginia. No revisions have been made to this rule.

While under the Court's review certain necessary revisions were identified for proposed Rule 5.5 and on February 13, 2007, the Virginia State Bar withdrew its petition for approval of this rule and Rule 8.5. The MJP Task Force reconvened in April and August 2007 to make the revisions and produced the current proposed Rule 5.5. Specifically, the MJP Task Force revised paragraph (d)(4)(iv), deleting the language "or the law of a non-U.S. jurisdiction;" added paragraph (d)(5); and added the language "in which the Foreign Lawyer is admitted to practice" to the end of Comment [14].

Rule 5.5—Temporary Practice by a Foreign Lawyer

The proposed amendment to Rule 5.5 is patterned after ABA Model Rule 5.5. It regulates unauthorized practice of law in Virginia by non-Virginia licensed attorneys, both those from other U.S. jurisdictions and those licensed in foreign countries. Under current Virginia law, unauthorized practice of law by attorneys or non-attorneys is regulated and monitored by the Virginia State Bar's Standing Committee on the Unauthorized Practice of Law ("the UPL Committee") and governed by Virginia's Unauthorized Practice of Law Rules, the Definition of the Practice of Law in Virginia, and Part 6, § I (C), Rules of the Supreme Court of Virginia. Proposed Rule 5.5 makes practice by non-Virginia licensed lawyers, other than as authorized by the rule, a disciplinary matter. Part 6, § I (C), Rules of the Supreme Court of Virginia would be eliminated and the UPL Committee would deal only with unauthorized practice of law by non-attorneys.

The proposed Rule 5.5 authorizes a Foreign Lawyer to provide legal services in Virginia on a "temporary and occasional basis" (similar to what is currently allowed under Part 6, § I (C), Rules of the Supreme Court of Virginia) only if they are: (1) undertaken in association with a licensed Virginia lawyer who actively participates in the matter; (2) related to a pending or potential proceeding in Virginia or another jurisdiction if the lawyer is authorized to appear or expects to be so authorized; (3) related to mediation or arbitration in Virginia or another jurisdiction if such services are related to the lawyer's practice in his/her licensing jurisdiction and do not require *pro hac vice* admission; or (4) related to representation of a client in the foreign lawyer's licensing jurisdiction or which are governed by international law.

The proposed rule prohibits a lawyer from establishing an office or other systematic presence in Virginia except as authorized by other Rules of Professional Conduct or other law. The proposed rule retains the long-standing restrictions under the current Rule 5.5 regarding the employment of a lawyer whose license has been suspended or revoked. Paragraph (d)(5), which was added to the proposed rule, specifically excludes a corporate counsel registrant practicing under Part II of Rule 1A:5 of the Rules of the Virginia Supreme Court and, should the Supreme Court of Virginia approve the rule, a foreign legal consultant practicing under proposed Rule 1A:7 of the Rules of the Supreme Court of Virginia from being authorized to practice under proposed Rule 5.5.

Rule 8.5—Disciplinary Authority and Choice of Law

The proposed amendment to Rule 8.5, patterned after ABA Model Rule 8.5, addresses disciplinary authority and choice of law in disciplinary cases and provides enforcement authority for proposed Rule 5.5. The proposed rule extends the Virginia State Bar's disciplinary authority over any lawyer who provides or holds out to provide legal services in Virginia, regardless of where the lawyer is licensed. Under the proposed amendment to Rule 8.5, a lawyer not admitted in Virginia, who provides or holds out to provide legal services in Virginia, shall consent to appointment of an official designated by the Supreme Court of Virginia as his/her agent for disciplinary service of process. The choice of law to be applied in a disciplinary matter will be: (1) the rules of the court, agency or tribunal if the conduct in question occurred in connection with a matter before such court, agency or tribunal; (2) for any other conduct, the rules of the jurisdiction where conduct occurred; or (3) the Virginia Rules of Professional Conduct, if the lawyer provides or holds out to provide legal services in Virginia. The ABA Model Rule provides for a choice of law where the conduct had its "predominant effect;" however, the Task Force chose not to include this in the Virginia rule revision because it believed that where the conduct occurred provided a brighter line for enforcement than the "predominant effect" test.

Nine states have adopted ABA Model Rules 5.5 and 8.5, in whole or in part, and fifteen others have endorsed and submitted proposed revisions consistent with ABA recommendations to their highest courts.

Inspection and Comment

The proposed amendments may be inspected at the office of the Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800, between the hours of 9:00 AM and 4:30 PM, Monday through Friday. Copies of the proposed amendments can be obtained from the offices of the Virginia State Bar by contacting the Office of Ethics Counsel at (804) 775-0557, or can be found at the Virginia State Bar's Web site at http://www.vsb.org.

Any individual, business or other entity may file or submit written comments in support of, or in opposition to, the proposed amendments by filing ten copies with Thomas A. Edmonds, the Executive Director of the Virginia State Bar, not later than **January 4, 2008.**

(***September 13, 2007***—as approved by the Task Force on Multijurisdictional Practice of Law)

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer, law firm or professional corporation shall not employ in any capacity a lawyer whose license has been suspended or revoked for professional misconduct, during such period of suspension or revocation, if the disciplined lawyer was associated with such lawyer, law firm or professional corporation at any time on or after the date of the acts which resulted in suspension or revocation.

(b) A lawyer, law firm or professional corporation employing a lawyer as a consultant, law clerk or legal assistant when that lawyer's license is suspended or revoked for professional misconduct shall not represent any client represented by the disciplined lawyer or by any lawyer with whom the disciplined lawyer practiced on or after the date of the acts which resulted in suspension or revocation.

(c) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(d) Foreign Lawyers:

(1)"Foreign Lawyer" is a person authorized to practice law by the duly constituted and authorized governmental body of any State or Territory of the United States or the District of Columbia, or a foreign nation, but is neither licensed by the Supreme Court of Virginia or authorized under its rules to practice law generally in the Commonwealth of Virginia, nor disbarred or suspended from practice in any jurisdiction.

(2) A Foreign Lawyer shall not, except as authorized by these Rules or other law:

(i) establish an office or other systematic and continuous presence in Virginia for the practice of law, which may occur even if the Foreign Lawyer is not physically present in Virginia; or

(ii) hold out to the public or otherwise represent that the Foreign Lawyer is admitted to practice law in Virginia.

(3) A Foreign Lawyer shall inform the client and interested third parties in writing:

(i) that the lawyer is not admitted to practice law in Virginia;

(ii) the jurisdiction(s) in which the lawyer is licensed to practice; and

(iii) the lawyer's office address in the foreign jurisdiction.

(4) A Foreign Lawyer, may, after informing the client as required in 3(i)-(iii) above, provide legal services on a temporary and occasional basis in Virginia that:

(i) are undertaken in association with a lawyer who is admitted to practice without limitation in Virginia and who actively participates in the matter;

(ii) are in or reasonably related to a pending or potential proceeding before a tribunal in Virginia or another jurisdiction, if the Foreign Lawyer, or a person the Foreign Lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(iii) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in Virginia or another jurisdiction, if the services arise out of or are reasonably related to the Foreign Lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(iv) are not within paragraphs (4)(ii) or (4)(iii) and arise out of or are reasonably related to the representation of a client by the Foreign Lawyer in a jurisdiction in which the Foreign Lawyer is admitted to practice or, subject to the foregoing limitations, are governed primarily by international law ~~or the law of a non-U.S. jurisdiction~~.

(5) A foreign legal consultant practicing under Rule 1A:7 of this Court and a corporate counsel registrant practicing under Part II of Rule 1A:5 of this Court are not authorized to practice under this rule.

COMMENT

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (c) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

[2] For purposes of paragraphs (a), (b) and (c), "Lawyer" denotes a person authorized by the Supreme Court of Virginia or its Rules to practice law in the Commonwealth of Virginia including persons admitted to practice in this state pro hac vice.

[3] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unauthorized persons. Paragraph (c) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. *See* Rule 5.3. Likewise, it does not

prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law–for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies.

[4] Other than as authorized by law or this Rule, a Foreign Lawyer violates paragraph (d)(2)(i) if the Foreign Lawyer establishes an office or other systematic and continuous presence in Virginia for the practice of law. Presence may be systematic and continuous even if the Foreign Lawyer is not physically present here. Such "non-physical" presence includes, but is not limited to, the regular interaction with residents of Virginia for delivery of legal services in Virginia through exchange of information over the Internet or other means. Such Foreign Lawyer must not hold out to the public or otherwise represent that the Foreign Lawyer is admitted to practice law in Virginia. *See also,* Rules 7.1(a) and 7.5(b). Despite the foregoing general prohibition, a Foreign Lawyer may establish an office or other systematic and continuous presence in Virginia if the Foreign Lawyer's practice is limited to areas which by state or federal law do not require admission to the Virginia State Bar. Examples of lawyers admitted in another United States jurisdiction include those lawyers whose practices are limited to federal tax practice before the IRS and Tax Court, patent law before the Patent and Trademark Office or immigration law. A Foreign Lawyer admitted to practice in a jurisdiction outside the United States may be authorized to practice under Rule 1A:7 as a foreign legal consultant and may likewise establish an office or other systematic and continued presence in Virginia.

[5] Paragraphs (d)(4)(i),(ii) and (iii) identify circumstances in which a Foreign Lawyer may provide legal services on a temporary basis in Virginia that do not create an unreasonable risk to the interests of their clients, the public or the courts. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. Except as authorized by this rule or other law, a Foreign Lawyer may not establish an office or other systematic and continuous presence in Virginia without being admitted to practice generally here.

[6] There is no single test to determine whether a Foreign Lawyer's services are provided on a "temporary basis" in Virginia, and may therefore be permissible under paragraph (d)(4). Services may be "temporary" even though the Foreign Lawyer provides services in Virginia on a recurring basis, or for an extended period of time, as when the Foreign Lawyer is representing a client in a single lengthy negotiation or litigation. "Temporary" refers to the duration of the Foreign lawyer's presence and provision of services, while "occasional" refers to the frequency with which the Foreign lawyer comes into Virginia to provide legal services.

[7] Paragraph (d)(1) requires that the Foreign Lawyer be authorized to practice in the jurisdiction in which the Foreign Lawyer is admitted and excludes a Foreign Lawyer who while technically admitted is not authorized to practice, because, for example, the Foreign Lawyer is on inactive status.

[8] Paragraph (d)(4)(i) recognizes that the interests of clients and the public are protected if a Foreign Lawyer associates with a lawyer licensed to practice Virginia. For this paragraph to apply, however, the lawyer admitted to practice in Virginia must actively participate in and share responsibility for the representation of the client.

[9] Foreign Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (d)(4)(ii), a Foreign Lawyer does not violate this Rule when the Foreign Lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of Virginia requires a Foreign Lawyer to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the Foreign Lawyer to obtain that authority.

[10] Paragraph (d)(4)(ii) also provides that a Foreign Lawyer rendering services in Virginia on a temporary basis does not violate this Rule when the Foreign Lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the Foreign Lawyer is authorized to practice law or in which the Foreign Lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a Foreign Lawyer may engage in conduct temporarily in Virginia in connection with pending litigation in another jurisdiction in which the Foreign Lawyer is or reasonably expects to be authorized to appear, including taking depositions in Virginia.

[11] Paragraph (d)(4)(iii) permits a Foreign Lawyer to perform services on a temporary basis in Virginia if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the Foreign Lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted to practice. The Foreign Lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[12] Paragraph (d)(4)(iv) permits a Foreign Lawyer to provide certain legal services on a temporary basis in Virginia that arise out of or are reasonably related to that lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted but are not within paragraphs (d)(4)(ii) or (d)(4)(iii). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers. Paragraph (d)(4)(iv) applies to a Foreign Lawyer admitted to practice only in a foreign nation.

[13] Paragraphs (d)(4)(ii), (d)(4)(iii) and (d)(4)(iv) require that the services arise out of or be reasonably related to the Foreign Lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted to practice. A variety of factors evidence such a relationship. The Foreign Lawyer's client may have been previously represented by the Foreign Lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the Foreign Lawyer is admitted. The matter, although involving other

jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the Foreign Lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their Foreign Lawyer in assessing the relative merits of each. In addition, the services may draw on the Foreign Lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

[14] Paragraph (d)(4)(iv) recognizes that a Foreign Lawyer may provide legal services when the services provided are governed by international law or the law of a foreign jurisdiction in which the Foreign Lawyer is admitted to practice.

[15] A Foreign Lawyer who practices law in Virginia pursuant to this Rule is subject to the disciplinary authority of Virginia. See Rule 8.5(a).

[16] Paragraph (d)(4) does not authorize communications advertising legal services to prospective clients in Virginia by Foreign Lawyers who are admitted to practice in other jurisdictions. Whether and how Foreign Lawyers may communicate the availability of their services to prospective clients in Virginia is governed by Rules 7.1 to 7.5.

PRIOR RULE COMPARISON

Neither former Rule 5.5 nor any other of the Virginia Rules of Professional Conduct provided any criteria for practice in Virginia by a foreign lawyer (non-Virginia or non-U.S.). Such practice was controlled by Part 6, § I (C) of the Rules of the Supreme Court of Virginia which defined "non-lawyer" and set out the parameters for temporary practice in Virginia by a "foreign lawyer," defined only as admitted to practice and in good standing in any state in the U.S. There was no provision for practice by a foreign, non-U.S. lawyer. Enforcement of Part 6, § I (C) fell within the authority of the Virginia State Bar's Standing Committee on the Unauthorized Practice of Law. Rule 5.5 allows for temporary and occasional practice in Virginia by both non-Virginia and non-U.S. lawyers and places enforcement within the Virginia State Bar's disciplinary system.

COMMITTEE COMMENTARY

The Committee adopted this Rule in light of the recommendation of the American Bar Association (ABA) that the states adopt more specific rules governing multi-jurisdictional practice. This rule adopts language similar to ABA Model Rule 5.5 allowing for circumstances of temporary and occasional practice by lawyers licensed in other U.S. jurisdictions, but expands such practice to include lawyers licensed in non-U.S. jurisdictions. Paragraphs (a) and (b) are identical to paragraphs (b) and (c) in former Virginia Rule 5.5.

(***December 14, 2005—***as approved by the Task Force on Multijurisdictional Practice of Law)

RULE 8.5 Disciplinary Authority; Choice Of Law

(a) Disciplinary Authority. A lawyer admitted to practice in Virginia is subject to the disciplinary authority of Virginia, regardless of where the lawyer's conduct occurs. A lawyer not admitted in Virginia is also subject to the disciplinary authority of Virginia if the lawyer provides, holds himself out as providing or offers to provide legal services in Virginia. By doing so, such lawyer consents to the appointment (insert here an official designated by the Supreme Court of Virginia)as his agent for purposes of notices of any disciplinary action by the Virginia State Bar. A lawyer may be subject for the same conduct to the disciplinary authority of Virginia and any other jurisdiction where the lawyer is admitted.

(b) Choice of Law. In any exercise of the disciplinary authority of Virginia, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a proceeding in a court, agency or other tribunal before which a lawyer appears, the rules to be applied shall be the rules of the jurisdiction in which the court, agency or other tribunal sits, unless the rules of the court, agency or other tribunal provide otherwise;

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred; and

(3) notwithstanding subparagraphs (b)(1) and (b)(2), for conduct in the course of providing, holding out as providing or offering to provide legal services in Virginia, the Virginia Rules of Professional Conduct shall apply.

COMMENT

Disciplinary Authority

[1] In the past, a jurisdiction's authority to discipline a lawyer has been based upon whether the lawyer is admitted in that jurisdiction. Subparagraph (a) is a significant change in that a lawyer not admitted in Virginia is nonetheless subject to the disciplinary authority of Virginia for conduct occurring in the course of providing, holding himself out as providing or offering to provide legal services in Virginia. Subparagraph (a) adopts the scope of jurisdiction recommended by the ABA Model Rules for Lawyer Disciplinary Enforcement, as amended in 1996, by extending Virginia's disciplinary authority to any lawyer who commits misconduct within Virginia.

It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints (insert here an official designated by the Supreme Court of Virginia) to receive service of process in this jurisdiction.

Choice of Law

[2] Subparagraph (b) seeks to resolve conflicts that may arise when a lawyer is subject to the rules of more than one jurisdiction. The rules of one jurisdiction may prohibit the questioned conduct while the rules of another jurisdiction may permit it. A lawyer admitted in only one jurisdiction may also be subject to the rules of another jurisdiction in which he is not admitted to practice for conduct occurring in the course of providing, holding himself out as providing or offering to provide legal services in the non-admitting jurisdiction. Also, a lawyer admitted in one jurisdiction may be subject to the rules of another jurisdiction if he appears before a court, agency or other tribunal in that jurisdiction.

[3] If the lawyer appears before a court, agency or other tribunal in another jurisdiction, subparagraph (b)(1) applies the law of the jurisdiction in which the court, agency or other tribunal sits. In some instances, the court, agency or other tribunal may have its own lawyer conduct rules and disciplinary authority. For example, the United States Patent and Trademark Office ("PTO"), through the Office of Enrollment and Discipline, enforces its own rules of conduct and disciplines practitioners under its own procedures. A lawyer admitted in Virginia who engages in misconduct in connection with practice before the PTO is subject to the PTO rules, and in the event of a conflict between the rules of Virginia and the PTO rules with respect to the questioned conduct, the latter would control.

[4] As to other conduct, if jurisdictions have conflicting rules regarding the questioned conduct, subparagraph (b)(2) resolves the conflict by choosing the rules of the jurisdiction where the conduct occurred. The physical presence of the lawyer is not dispositive in determining where the questioned conduct occurred. Determining where the lawyer's conduct occurred in the context of transactional work, may require the appropriate disciplinary tribunal to consider other factors including the residence and place of business of any client, third person or public institution such as a court, tribunal, public body or administrative agency the interests of which are materially affected by the lawyer's actions.

PRIOR RULE COMPARISON

Virginia Rule 8.5 made no provision for disciplinary authority over a lawyer not admitted to practice in Virginia. Rather, a non-lawyer who committed misconduct in Virginia was subject to Virginia's unauthorized practice of law rules and the authority of the Virginia State Bar's Standing Committee on the Unauthorized Practice of Law.

Under former Rule 8.5 (b)(2) if a lawyer was subject to the rules of more than one jurisdiction, the rules of the jurisdiction in which the lawyer principally practiced applied unless the conduct had its predominant effect in another jurisdiction in which the lawyer was admitted to practice. The former rule, however, did not provide clear guidance if the lawyer's conduct occurred in a jurisdiction where the lawyer was not admitted.

COMMITTEE COMMENTARY

The Committee adopted this Rule in light of the ABA recommendation that the states adopt more specific rules governing multi-jurisdictional practice. Like ABA Model Rule 8.5 (a), this rule states that for conduct occurring in the course of providing, holding oneself out as providing or offering to provide legal services in Virginia the Virginia State Bar may exercise disciplinary authority over a lawyer not admitted in Virginia. Consistent with ABA Model Rule 8.5, the Virginia rule adopts choice of law rules for circumstances in which the lawyer is subject to the professional conduct rules of more than one jurisdiction and they conflict. The Virginia rule adopts verbatim ABA Model Rule 8.5 (b)(1), applying the rules of the jurisdiction in which the court, agency or other tribunal sits. The Committee, however, did not adopt the "predominant effect" test used in ABA Model Rule 8.5 (b)(2), favoring instead the application of the rules of the jurisdiction in which the lawyer's conduct occurred. Virginia Rule 8.5 (b)(3) is new. The Committee did not adopt *ABA Model Rule* Comments 1–7.

LEGAL ETHICS OPINION 1840
CAN A LAWYER REPRESENTING A SETTLEMENT COMPANY FACILITATE THAT COMPANY'S PRACTICE OF RE-DEEDING PROPERTY THROUGH A RELOCATION INTERMEDIARY WITHOUT PROPER RECORDATION?

In this hypothetical real estate Lawyer A has been asked to handle a real estate settlement of property, involving Relocation Company's ("Relocation") sale of property to purchaser. Relocation routinely purchases real estate on behalf of some of their client's employees who have been transferred and as a benefit of employment the company, through Relocation, agrees to purchase the employee's real estate.

Relocation purchases the real estate from Seller and Seller executes a deed to Relocation. Relocation does not record this original deed and then enters into a contract and sells the same real estate to Buyer. Lawyer B for Relocation drafts a deed for this transaction by preparing a new "page one" that contains the name of Buyer but uses the signature page of the original deed between Seller and Relocation. This is routine practice for Relocation and Lawyer B as it relates to these types of transactions for their client's employees.

Relocation advises Lawyer A that the proceeds of the sale are to be payable to Relocation (not the grantor of the deed). Lawyer A recognizes that Relocation should have recorded the original deed and paid all applicable recording fees and taxes and that seller's warranties under the original deed were made to Relocation, not the buyer.

The question posed involves whether or not this is unethical for Lawyer A to facilitate Relocation's practice of not recording the first deed and preparing legal documentation that does not accurately reflect the true chain of title to the real estate. What are Lawyer A's ethical obligations as to the chain of title and is Lawyer A obligated to report Lawyer B's conduct?

There are two principal issues involved with these facts. The first issue involves the failure of Relocation to properly record the chain of title of said property and pay all applicable recording fees and taxes. The facts you provide indicate that Lawyer B clearly knew that he was substituting a second front page over the original deed thereby misrepresenting the actual conveyance of the property. The committee believes that this conduct clearly involves fraud and is a violation of the Rules of Professional Conduct. A lawyer cannot knowingly assist a client in committing fraud. Rule 1.2 (c)[1]

When the client's course of conduct has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. Rule 1.2 Comment [10]. In this scenario Lawyer A must counsel the client as to any past fraudulent conduct and cannot continue with this closing knowing that Lawyer B and Relocation's offered deed is fraudulently constructed and does not legally reflect the chain of title and deeds in this conveyance.

The second issue involves the misconduct of Lawyer B, who is employed by Relocation and has advised Relocation in this course of conduct and misrepresentation. Whether Lawyer A has a duty to report Lawyer B under Rule 8.3 (a)[2] is based upon a two-prong test: first, a lawyer must have information indicating that another lawyer has committed a violation of the Rules of Professional Conduct. Rule 8.4(c) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on that lawyer's fitness to practice law. Rule 8.4(c).[3] Since the committee has opined above that Lawyer B's conduct involved fraud the committee believes that the first prong of the test has been met.

Second, the lawyer in possession of information regarding the conduct of another lawyer must determine whether the misconduct "raises a substantial question as to that lawyer's fitness to practice law in other respects." Following the analysis used in LEO 1522[4], the committee is of the opinion that Lawyer B's knowing failure to record the first deed and thereby fraudulently substituting a second front page on the deed does raise a substantial question as to the lawyer's fitness to practice law in other respects and thereby triggers Lawyer A's duty to report, unless there are additional mitigating circumstances.[5]

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

Committee Opinion
September 25, 2007

FOOTNOTES

1 RULE 1.2 Scope of Representation

(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.

2 RULE 8.3 Reporting Misconduct

(a) A lawyer having reliable information that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law shall inform the appropriate professional authority.

3 RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:
(c) engage in conduct involving dishonest, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law;

4 LEO 1522 involved a similar fact pattern in that a lawyer knowingly stated an incorrect consideration on a deed for the purpose of avoiding the payment of the grantor's tax on a higher amount and the committee found that lawyer to have made a false statement of fact in violation of DR 7-102(A)(5) and DR 1-102(A)(4), which trigged the requestor's duty to report under DR 1-103(A). LEO 1522 analysis was based upon DRs 1-102(A)(4), 1-103(A) and 7-102(A)(5) which are substantially the same as Rule 8.4, 8.3 and 3.3(a)(1).

5 The Committee cautions that this conduct may involve criminal conduct in altering a document that was attested to and notarized, however that involves a legal analysis.