Change "Notice of Hearing" to "Charge of Misconduct"

On December 7, 2005, COLD approved a proposed amendment changing references to "Notice of Hearing" to "Charge of Misconduct" because "Notice of Hearing" is no longer a defined term in Paragraph 13 of the Rules of Court.

Part 6, Section IV, Paragraph 13 of the Rules of the Virginia Supreme Court

13. PROCEDURE FOR DISCIPLINING, SUSPENDING, AND DISBARRING ATTORNEYS.

* * *

H. District Committee Proceedings

* * *

2. Hearing Procedure

a. Attendance at Hearing

District Committee Hearings, except deliberations, shall be open to the public.

b. Public Docket

The Clerk's Office shall maintain a public docket of all matters set for hearing before a District Committee or certified to the Board. For every matter for which a Notice of Hearing before a District Committee for which a Charge of Misconduct has been mailed by the Office of Bar Counsel, the Clerk shall place it on the docket 21 days after the date of the Notice Charge of Misconduct. For every Complaint certified to the Board by a Subcommittee, the Clerk shall place it on the docket on receipt of the statement of the certified charges from the Subcommittee.

* * *

I. Board Proceedings

1. Pre-Hearing Matters

* * *

3. Procedure Upon Appeal of a District Committee Determination

a. Procedure

Upon receipt of notice from the Clerk of the Disciplinary System that a Respondent has filed an appeal from a District Committee Determination or that the Board has granted a petition for appeal, the Board shall place such matter on its docket for review. The Clerk of the Disciplinary System shall notify the appellant when the entire record of the ~~p~~Proceeding before the District Committee has been received or when the time for appeal has expired. The record shall consist of the notice of hearing Charge of Misconduct, the complete transcript of the ~~p~~Proceeding, any exhibits received or refused by the District Committee, the District Committee Determination, and all briefs, memoranda or other papers filed with the District Committee by the Respondent or the Bar. Upon petition of the Respondent, for good cause shown, the Board may permit the record to be supplemented to prevent injustice, such supplement to be in such form as the Board may deem appropriate. Thereafter, briefs shall be filed in the office of the Clerk of the Disciplinary System, as follows.

* * *

4. Proceedings Upon Certification for Sanction Determination:

a. Initiation of Proceeding:

Upon receipt of the Certification for Sanction Determination from a District Committee, the Clerk of the Disciplinary System shall issue a ~~N~~notice of ~~H~~hearing on the Certification for Sanction Determination giving Respondent the date, time and place of the ~~p~~Proceeding and a copy of the Certification for Sanction Determination.

* * *

N. Confidentiality of Disciplinary Records and Proceedings.

* * *

3. Timing of Public Access to Disciplinary Information:

All records of a matter set for public hearing remain confidential until the matter is dismissed or a public sanction is imposed except:

a. A Notice of Hearing Charge of Misconduct is public when the matter is placed on the public District Committee hearing docket; and

* * *

Comments or questions should be submitted in writing to Thomas A. Edmonds, Executive Director, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219, no later than **February 13, 2006.** The Virginia State Bar Council will consider the proposed amendments when it meets on March 2–3, 2006.

Virginia State Bar Council to Review a Proposed Amendment to Rule 5.6 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 2–3, 2006 in Richmond, Virginia, is expected to consider for approval, disapproval, or modification, a proposed amendment Rule 5.6 of the Rules of Professional Conduct.

This proposed amendment came to the Committee at the recommendation of the Boyd-Graves Conference. This group proposed to amend Rule 5.6(b), which prohibits an attorney from entering into an agreement that broadly restricts his ability to practice law. These restrictions are usually sought by a civil defense firm in a settlement agreement and specifically call for the plaintiff's firm to refrain from ever bringing similar suits again. The inclusion of "broadly" in Virginia's rule is unique. Other states, as well as the American Bar Association, prohibit any restriction on the ability to practice in this context. Based on this analysis, the Committee adopted the Boyd-Graves Conference's recommendation to eliminate "broadly" from Rule 5.6.

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 A.M. and 4:30 P.M., 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 Page 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 **February 13, 2006**.

# # #

(July 21, 2005—Amendments as proposed by the Standing Committee on Legal Ethics)

RULE 5.6 Restrictions On Right To Practice

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a ~~broad~~* restriction on the lawyer's right to practice is part of the settlement of a controversy, except where such a restriction is approved by a tribunal or a governmental entity.

Comment

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits lawyers from agreeing to a ~~broad~~ restriction on their right to practice, unless approved by a tribunal (in such situations as the settlement of mass tort cases) or a governmental entity. However, the lawyer must fully disclose the extent of any restriction to any future client and refer the client to another lawyer if requested to do so.

Virginia Code Comparison

This Rule is similar to DR 2-106, although it specifically permits a ~~broad~~ restriction if it is approved by a tribunal or a governmental entity.

Committee Commentary

After a lengthy debate about the merits of settlements and the public policy favoring clients' unrestricted choice of legal representation, the Committee decided to generally prohibit provisions in settlement agreements that broadly restricted a lawyer's right to practice, but added an exception if a tribunal or a governmental entity approves the restriction. The Comment emphasizes that lawyers whose right to practice has been restricted by a court-approved settlement should advise all future clients of the restriction and refer them to other counsel, if necessary.

***** *In the printed version of the January 2006 issue of the Virginia Lawyer Register, the word "broad" in this location was not struck.*

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 2–3, 2006 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. The 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.

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 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 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 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 or law of a non-U.S. jurisdiction.

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.

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 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 the Secretary of the Commonwealth 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 A.M. and 4:30 P.M., 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 Page 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 **February 13, 2006**.

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

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

~~(a) A lawyer shall not:~~

~~(1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or~~

~~(2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.~~

(~~b~~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.

(~~c~~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.

(~~a~~c) A lawyer shall not practice law in a jurisdiction ~~where doing so violates~~ 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.

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*.

[~~1~~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 ~~unqualified~~ unauthorized persons. Paragraph ~~(a)(2)~~ (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. ~~In addition, a lawyer may counsel nonlawyers who wish to proceed *pro se*.~~

[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 prac-

tice. 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.

[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.

~~Virginia Code~~ Prior Rule Comparison

~~Paragraph (a)(1) had no direct counterpart in the *Virginia Code*. EC 3-9 stated: "Authority to engage in the practice of law conferred in any jurisdiction is not *per se* a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so."~~

~~Paragraph (a)(2) is substantially similar to DR 3-101(A) which provided that "[a] lawyer shall not aid a non-lawyer in the unauthorized practice of law."~~

~~Paragraph (b) is identical to DR 3101(B).~~

~~Paragraph (c) is identical to DR 3101(C).~~

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 Virginia Supreme Court 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 because while paragraph (a)(2) closely parallels DR 3-101(A), paragraph (a)(1) prohibits practicing law illegally in another jurisdiction, something not specifically prohibited by any Disciplinary Rule.~~

~~The Committee decided to continue the specific rules (found in paragraphs (b) and (c)) that govern lawyers whose licenses have been suspended or revoked.~~

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.

RULE 8.5 Disciplinary Authority; Choice Of Law

(a) Disciplinary Authority. A lawyer admitted to practice in ~~this jurisdiction~~ Virginia is subject to the disciplinary authority of ~~this jurisdiction~~ 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 ~~both this jurisdiction~~ Virginia and any ~~an~~other jurisdiction where the lawyer is admitted ~~for the same conduct~~.

(b) Choice of Law. In any exercise of the disciplinary authority ~~of this jurisdiction~~ Virginia, the ~~R~~rules of ~~P~~professional ~~C~~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 ~~has been admitted to practice (either generally or for purposes of that proceeding)~~ 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,~~

~~(i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and~~

~~(ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.~~

(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 to be 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] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.~~

[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] Paragraph (b) provides that as to a lawyer's conduct relating to a proceeding in a court or agency before which the lawyer is admitted to practice (either generally or *pro hac vice*), the lawyer shall be subject only to the rules of professional conduct of that court or agency. As to all other conduct, paragraph (b) provides that a lawyer licensed to practice only in this jurisdiction shall be subject to the rules of professional conduct of this jurisdiction, and that a lawyer licensed in mul-~~

~~tiple jurisdictions shall be subject only to the rules of the jurisdiction where the lawyer (as an individual, not the firm) principally practices, but with one exception: if particular conduct clearly has its predominant effect in another admitting jurisdiction, then only the rules of that jurisdiction shall apply. The intention is for the latter exception to be a narrow one. It would be appropriately applied, for example, to a situation in which a lawyer admitted in, and principally practicing in, State A, but also admitted in State B, handled an acquisition by a company whose headquarters and operations were in State B of another, similar such company. The exception would not appropriately be applied, on the other hand, if the lawyer handled an acquisition by a company whose headquarters and operations were in State A of a company whose headquarters and main operations were in State A, but which also had some operations in State B.~~

[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.

~~[5] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.~~

~~[6] The choice of law provision is not intended to apply to transnational practice. Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law.~~

~~Virginia Code Comparison~~

~~With respect to paragraph (a), DR 1-102(B) stated: "A lawyer admitted to practice in this jurisdiction is subject to these Disciplinary Rules although engaged in practice elsewhere, unless Disciplinary Rules of the foreign jurisdiction permit the activity." Paragraph (a) removes the "safe harbor" provision of the *Virginia Code*, and makes it clear that Virginia's lawyers are obligated to comply with these Rules regardless of where they practice (subject to Paragraph (b)).~~

~~Paragraph (b) had no counterpart in the *Virginia Code*.~~

~~Virginia Code~~ 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 because it provides, in an era in which attorneys often engage in legal activities in multiple jurisdictions, more specific guidance than the *Virginia Code* regarding controlling ethical rules.~~

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 1812
CAN LAWYER INCLUDE IN A FEE AGREEMENT A PROVISION ALLOWING FOR ALTERNATIVE FEE ARRANGEMENTS SHOULD CLIENT TERMINATE REPRESENTATION MID-CASE WITHOUT CAUSE

You have presented a hypothetical in which an attorney who regularly represents plaintiffs in personal injury cases wants to include the following language in her standard fee agreement:

> Either Client or Attorney has the absolute right to terminate this agreement. In the event Client terminates this agreement, the reasonable value of Attorney's services shall be valued at $200 per hour for attorney time and $65 per hour for legal assistant time for all services rendered. In the alternative, the Attorney may, where permitted by law, elect compensation based on the agreed contingency fee for any settlement offer made to Client prior to termination.

Based on the facts presented, you have asked the committee to opine as to whether the provision in the third sentence of that language is ethically permissible and legally enforceable. First, the committee notes that the issue of legal enforceability would involve an application of contract law to this provision and, as such, is outside the purview of this committee. The committee will limit its response to the question of ethical permissibility. The Committee further limits its response to situations where the client has terminated the attorney's services *without cause.* While the committee notes that this request does not specifically ask about the permissibility of the *second* sentence of the proposed language, the committee nonetheless will address that provision as well.

The attorney in this hypothetical would insert the above language in contingent fee contracts for personal injury plaintiffs. The proposed language purports to establish alternative fee arrangements if the client terminates the representation prior to the natural conclusion of the matter. When a client terminates a contingent fee agreement before the contemplated services are fully performed, and the fee agreement does not contain an alternative fee arrangement applicable upon early termination by the client, the discharged attorney is entitled to a fee based upon *quantum meruit* (the reasonable value of the attorney's services up to the date of termination). *Heinzman v. Fine, Fine, Legum, & Fine*, 217 Va. 958 234 S.E. 2d 282 (1977). The Heinzman decision holds that the discharged attorney, under the circumstances of that case, is not entitled to recover the contractual contingent fee, but rather the discharged attorney is limited to recovery on a *quantum meruit* basis. As noted in LEO 1606, the *Heinzman* decision explained that:

> When, as here, an attorney employed under a contingent fee contract is discharged without just cause and the client employs another attorney who effects a recovery, the discharged attorney is entitled to a fee based upon quantum meruit for services rendered prior to discharge …

Heinzman at 964.[1]

The committee notes, however, that the court in *Heinzman* did not have before it a termination or conversion clause of the type presented in your inquiry. Thus, the *Heinzman* court did not have an opportunity to consider whether an attorney and client may properly agree upon alternative fee arrangements in the event the client elects to terminate the contingent fee agreement before the contemplated services have been fully performed. However, the Supreme Court did state the following in *Heinzman*:

> We agree that, absent overreaching on the part of the attorney, contracts for legal services are valid and when those services have been performed as contemplated in the contract, the attorney is entitled to the fee fixed in the contract …

Heinzman at 962 (footnote omitted).

While an attorney may consider including discharge conversion clauses in the contingent fee agreement, he or she must be mindful of the court's characterization in *Heinzman* of contracts between lawyer and client:

> Seldom does a client stand on an equal footing with an attorney in the bargaining process. Necessarily, the layman must rely upon the knowledge, experience, skill, and good faith of the professional. Only the attorney can make an informed judgment as to the merit of the client's legal rights and obligations, the prospects of success or failure, and the value of the time and talent which he must invest in the undertaking. Once fairly negotiated, the contract creates a relationship unique in the law. The attorney-client relationship is founded upon trust and confidence, and when the foundation fails, the relationship may be, indeed should be, terminated.

Heinzman at 963.

As indicated by this committee in LEO 1606, *Heinzman* stands for the proposition that contracts between attorney and client are unique and not governed solely by principles that govern ordinary commercial contracts.

Other states' ethics opinions have held that a lawyer may ethically include in a contingent fee agreement what he is to receive as a fee in the event he is discharged by the client. Kansas Bar Ass'n Ethics Op. 93-03 (lawyer may included in contingent fee agreement his entitlement to a *quantum meruit* recovery which could include a stated percentage of the client's ultimate recov-

FOOTNOTES

1 While not expressly at issue here or in *Heinzman*, the committee does note a body of cases from a number of jurisdictions suggesting that this notion of quantum meruit may not be appropriate in those extreme cases where the client terminates the representation at the last moment before accepting an award or receiving an award, with the attorney's work substantially performed and the client in bad faith attempting to circumvent the contractual agreement. *See* Restatement (Third) of Law Governing Lawyers §40 Comment c at 293 (1988), and cases cited therein.

ery); Colo. Bar Ass'n Ethics Op. 100 (1997) (lawyer not ethically precluded from using "conversion clause" providing for alternative fee, so long as the fee charged does not unreasonably interfere with client's absolute right to fire lawyer); Miss. Bar Ethics Op. 144 (1988) (discharge clause entitling lawyer to $60 per hour or 20% of any recovery is permissible as long as it does not result in an excessive fee); New Mexico Bar Ethics Op. 1995-2 (1995) (approving contingent fee agreement that proposes a *quantum meruit* recovery if lawyer is fired without cause or if client gives lawyer cause to withdraw); Nassau County Bar Ass'n Op. 90-24 (1990) (discharged lawyer may charge contingent fee if it is reasonable and represents reasonable value of services rendered prior to discharge); *cf. Kirshenbaum v. Hartshorn*, 539 So. 2d 497 (Fla. Dist. Ct. App. 1989) (lawyer loses right to any fee when contingent fee contract did not specify compensation in event client elected to discharge lawyer before recovering anything).

The committee opines that such alternative fee arrangements are permissible in contingent fee contracts so long as the alternative fee arrangements otherwise comply with the Rules of Professional Conduct. For example, the alternative fee arrangement must be adequately explained to the client (Rule 1.4 and 1.5(b)), be reasonable (Rule 1.5(a)), and not unreasonably hamper the client's absolute right to discharge his lawyer, with or without cause, at any point in the representation (Rule 1.16)[2]. Given these parameters, the committee believes that when determining reasonableness, the reasonableness of the alternative fee must be evaluated and judged not only in the context of when the fee agreement was signed, but also as of the time that the lawyer's services were terminated, as well as when the recovery, if any, was obtained. An example is in order. Client retains Lawyer A on a one-third contingent fee, with an alternative hourly fee arrangement to apply if the Client terminates Lawyer A's services before recovery. After discovery is completed, Lawyer A concludes that the insurance coverages available total $25,000.00 and the defendant has no means to satisfy a judgment in any amount. Given the expenses involved in trying the case and the risks associated with litigation, Lawyer A recommends to the Client that the Client accept the defendant's last and final offer of $22,500.00. The Client not only rejects the offer, but terminates the relationship with Lawyer A. Employing the alternative hourly fee arrangement, Lawyer A sends Client a bill for $20,000.00, which is properly calculated by Lawyer A by multiplying his stated hourly rate by the number of hours worked on the file. Lawyer A also claims a lien in this amount on any recovery in the case and notifies Lawyer B, who now is reviewing the case to determine whether he will represent Client. The committee believes that while the alternative hourly fee arrangement may have been reasonable at the time the fee agreement was signed, it is not reasonable when viewed at the time of discharge. Under this scenario, the alternative hourly fee arrangement is impermissible and, therefore, Lawyer A would only be left with a *quantum meruit* claim.

With these general principles in mind, the committee will address the second and third sentences of the alternative fee provision presented in your hypothetical.

Second Sentence of the Proposed Language

The second sentence states as follows:

> In the event Client terminates this agreement, the reasonable value of Attorney's services shall be valued at $200 per hour for attorney time and $65 per hour for legal assistant time for all services rendered.

In the committee's view, this provision is unclear. The committee cannot determine whether the language is attempting to establish an alternative contractual hourly fee arrangement or is attempting to establish an agreed upon hourly rate to be used in employing a quantum meruit calculation. Rule 1.5(b) requires that the fee arrangement be adequately explained to the client, preferably in writing. The committee opines that the second sentence of the proposed language fails to meet this requirement of Rule 1.5(b).

Furthermore, this provision is misleading if it purports to establish a *quantum meruit* fee. An attorney stating in a fee agreement that a particular hourly rate meets *quantum meruit* standards does not in fact make it so. *Quantum meruit* is a common law concept, with case law presenting appropriate factors for determining the fee in a particular case. *See County of Campbell v. Howard*, 133 Va. 19, 112 S.E. 876 (1922) (discussing the pertinent factors). *See also* Virginia Rule 1.5 which sets out the factors used to determine whether a lawyer's fee is reasonable. Significantly, neither *Howard* nor Rule 1.5 employs the attorney's usual hourly rate or "lodestar" as a factor in determining the reasonableness of the fee. If an attorney states a rate in the agreement that would not be reasonable under the *quantum meruit* concept, such a provision would be misleading to the client. Rule 1.5 places an affirmative obligation on an attorney to adequately explain his fee to the client. While the committee believes that an attorney is not required to do so, some attorneys may want to advise their clients that if the attorney is terminated without cause before completion of the attorney's services, the attorney will present evidence of her normal hourly rate in determining an appropriate *quantum meruit* amount. It is not impermissible for the attorney to state that her normal hourly rate is $200 an hour, if that is so, and to indicate to the client that in the event the client prematurely terminates the representation, the attorney will seek *quantum meruit* compensation based on that hourly rate for services performed up to the date of termination. Unfortunately, the second sentence of the proposed language goes too far and actually appears to attempt to set an hourly rate for *quantum meruit* analysis, which is misleading and, therefore, impermissible.

FOOTNOTES

2 Comment 6 to Rule 1.16 ("Declining or Terminating Representation") states that a "client has the right to discharge a lawyer at any time, with or without cause." *See also* Law. Man. On Prof. Conduct (ABA/BNA) 41:116 (2005), citing *Florida Bar v. Hollander*, 607 So. 2d 412 (Fla. Sup.Ct. 1992); *Florida Bar v. Doe*, 550 So.2d 1111 (Fla. Sup.Ct. 1989); *Cincinnati Bar Association v. Schultz*, 643 N.E.2d 1139 (Ohio Sup.Ct. 1994).

Based on the foregoing, the committee opines that the second paragraph of the termination clause in the proposed contract is improper as it is misleading and fails to fully inform the client of the basis of the attorney's fee when a contingent fee representation is terminated by the client before its completion. See Virginia Rules 1.4 and 1.5.

Third Sentence of the Proposed Language

The third sentence states as follows:

> In the alternative, the Attorney may, where permitted by law, elect compensation based on the agreed contingency fee for any settlement offer made to Client prior to termination.

The committee is of the opinion that this provision is likewise improper as it is misleading and fails to fully and properly inform the client of the lawyer's entitlement to compensation in the event the client terminates the representation prior to a recovery from the defendant. The committee notes that the provision does state that it applies "where permitted by law." However, the contract does not explain under what circumstances law may permit the attorney to elect compensation based on the agreed contingent fee or any settlement offer made to client prior to termination. As stated by the Supreme Court in the *Heinzman* case, contracts for legal services are not the same as other contracts. The client actually retains the lawyer for the purposes of explaining the client's legal rights and to advise the client as to what actions are "permitted by law." In this hypothetical, the lawyer's contract does not fully explain when the lawyer would be entitled to elect to receive a contingent fee "where permitted by law."

The Committee concludes that the agreement does not fully and adequately explain to the client the fee arrangement and, in fact, contains language that, without more, is likely to be confusing for and misunderstood by the client.

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

Committee Opinion
October 31, 2005

Respondent's Name	Address of Record (City/County)	Action	Effective Date	Page
Circuit Court				
Patrick Earl Bailey	Fort Washington, MD	3 Year Suspension	April 19, 2005	2
Charles Frederick Daum	Washington, D.C.	Public Reprimand w/Terms	November 8, 2005	5
Kenan Michael Pinkard	Norfolk, VA	2 Year Suspension	November 1, 2005	8
Jeffrey Bourke Rice	Fairfax, VA	Revocation	October 19, 2005	n/a
Mark Steven Weiss	Woodbridge, VA	5 Year Suspension w/Terms	September 29, 2005	14
Disciplinary Board				
David H. N. Bean	Strasburg, VA	2 Year Suspension	November 10, 2005	n/a
Burman Aaron Berger	Rockville, MD	Revocation	November 18, 2005	n/a
Charles VanEvera Hardenbergh	Lexington, VA	Admonition w/o Terms	September 14, 2005	20
Lawrence Bradford Haskin	Virginia Beach, VA	Public Reprimand	September 28, 2005	21
James B. Hovis*	New York, NY	5 Year Suspension	September 23, 2005	23
Charles Everett Malone	Norfolk, VA	2 Year Suspension	December 7, 2006	26
Gregg Michael Paley	Boca Raton, FL	Revocation	November 28, 2005	n/a
Bonar Mayo Robertson	Boyds, MD	Suspension	November 21, 2005	n/a
William P. Robinson Jr.*	Norfolk, VA	3 Year Suspension	October 28, 2005	28
Andrew Mark Steinberg	Woolbridge, VA	30 Day Suspension	July 26, 2005	32
George E. Talbot Jr.	Portsmouth, VA	60 Day Suspension	December 1, 2005	34
John Joseph Vavala	Virginia Beach, VA	5 Year Suspension	November 18, 2005	n/a
Starr Ilene Yoder	Virginia Beach, VA	Public Reprimand w/Terms	September 23, 2005	36
District Committees				
Tinya Lynnette Banks	Norfolk, VA	Public Reprimand	October 18, 2005	40
John Edward Stanley	Lebanon, VA	Public Reprimand w/Terms	November 7, 2005	45

Interim Suspensions — Failure to Comply w/Subpoena

David Ashley Grant Nelson	Charlotte Court House, VA	November 22, 2005	n/a

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

VIRGINIA:
IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

VIRGINIA STATE BAR EX REL
FIRST DISTRICT COMMITTEE
Complainant
v.
PATRICK EARL BAILEY
Respondent
Case No. L-226962

ORDER OF SUSPENSION

THIS CAUSE came to be heard on the 19th day of April, 2005, by a Three-Judge Court impaneled by the Supreme Court of Virginia on March 24, 2005, by designation of the Chief Justice of the Supreme Court of Virginia, pursuant to Section 54.1-3935 of the Code of Virginia (1950) as Amended, consisting of the Honorable James F. Almand, Judge of the Seventeenth Judicial Circuit, the Honorable Frank A. Hoss, Jr., Retired Judge of the Thirty-first Judicial Circuit, and the Honorable Clifford R. Weckstein, Judge of the Twenty-third Judicial Circuit, designated Chief Judge.

The Virginia State Bar appeared through its Assistant Bar Counsel, Edward L. Davis. The Respondent attorney, Patrick Earl Bailey, was duly noticed and appeared in person and by his counsel, Stephen A. Armstrong.

WHEREUPON, a hearing was conducted upon the Rule to Show Cause issued against the Respondent, Patrick Earl Bailey, which Rule directed him to appear and to show cause why his license to practice law in the Commonwealth of Virginia should not be suspended, revoked, or otherwise sanctioned by reason of allegations of ethical misconduct set forth in the Certification issued by a subcommittee of the First District Committee of the Virginia State Bar.

The Complainant presented evidence in open court and the Respondent presented evidence.

Following closing arguments by the parties, the Three-Judge Court retired to deliberate, and thereafter returned and announced that it had found, unanimously, and by clear and convincing evidence, that:

1. On September 14, 2001, the Respondent, Patrick Earl Bailey (hereinafter Respondent or Mr. Bailey) was admitted to the Virginia State Bar by motion, in accordance with Rule 1A:1 of the Rules of Court.

2. On November 22, 2000, in preparation for his admission by motion, Mr. Bailey submitted an Applicant's Character and Fitness Questionnaire to the Virginia Board of Bar Examiners.

3. Mr. Bailey answered "No" to the following questions on the questionnaire:

    11. (a) State whether you have ever been, or presently are, a party to or otherwise involved (except as a witness) in:
        (1) any civil or administrative action or legal proceeding;
        (2) any criminal or quasi-criminal action or legal proceeding (whether involving a felony, misdemeanor, minor misdemeanor, or any traffic offense);

    (b) Have you ever been summoned for a violation of any other statute, regulation, or ordinance?

The following text appeared at the end of question 11:

> If your answer to any question above is "Yes," attach a separate sheet of paper, identified in accordance with the instructions of the first page hereof, on which you set forth the facts in detail, designating by letter the portion of the question to which you refer. If any court or agency proceedings were involved, state the names, case numbers, and dates of all court or agency proceedings, including an accurate description of the ORIGINAL CHARGE, regardless of a finding of guilt of a lesser offense or a complete dismissal; the dispositions made thereof; the names and addresses of the courts or agencies in which the record may be found; and the name and address of your legal counsel in each proceeding. Non-disclosure of a criminal charge is allowable only when the charge has been expunged in accordance with applicable state law.

4. Contrary to his negative answer on the questionnaire, in January 1997, while on leave in Jamaica, Mr. Bailey was arrested for the crime of murder, a felony. On July 8, 1997, he was officially charged with murder, and his trial ran from October 21 to

October 30, 1997. The Circuit Court for the Parish of Kingston, Jamaica, found him guilty of the lesser offense of manslaughter, and sentenced him to two years imprisonment at hard labor. On June 4, 1998, Mr. Bailey's appeal of his conviction was denied, and his conviction and sentence were affirmed. He was released from prison in February 1999, and then returned to the United States.

5. Contrary to his negative answer on the questionnaire, on June 3, 1999, the United States Marine Corps convened a Board of Inquiry, an administrative procedure, to determine whether Mr. Bailey should be separated for cause from the Marine Corps for misconduct. Mr. Bailey was directed to show cause for retention at the Board of Inquiry. He appeared in person with his counsel, and the proceedings were held on June 3-4, 1999.

6. The Board of Inquiry found, by a majority vote, that a preponderance of the evidence proved the allegations of misconduct and, by unanimous vote, substandard performance of duty against Mr. Bailey, and substantiated, inter alia the following basis for separation from the service:
   c. Commission of a military or civilian offense that, if prosecuted under the UCMJ, could be punished by confinement for 6 months or more, or, if prosecuted under the UCMJ, would require specific intent for conviction.

7. On September 3, 1999, the Commander, Marine Corps Base Quantico, forwarded the Report of the Board of Inquiry recommending that Mr. Bailey be separated from the Marine Corps with an Other Than Honorable characterization of service.

8. On October 5, 1999, Mr. Bailey became eligible for voluntary retirement from the Marine Corps because he had achieved twenty years in service. Regulations provided that if an officer who is to be removed from active duty upon the recommendation of a Board of Inquiry subsequently becomes eligible for voluntary retirement, the officer shall be retired at the grade and with the retired pay that he would otherwise be eligible for if retired under such provision. The same regulation provided that if the officer engaged in misconduct that would warrant his separation with an Other Than Honorable characterization of service, he should be retired in the next inferior grade.

9. Accordingly, by memorandum dated January 24, 2000, the Marine Corps Deputy Chief of Staff for Manpower and Reserve Affairs recommended that Mr. Bailey be retired from the Marine Corps in the next inferior grade of captain, one grade down from his rank of major. On February 25, 2000, this recommendation was approved, and Mr. Bailey was retired from the Marine Corps in the grade of captain.

10. Contrary to his negative answer on the questionnaire, Mr. Bailey's Maryland driving record shows that he was convicted on April 24, 1985 of driving at a speed not reasonable or prudent, that he was convicted of the same offense again on March 21, 1986, convicted of failing to obey a traffic signal on March 22, 1990, and convicted of exceeding the maximum speed limit by ten miles per hour on October 9, 1990.

11. By letter, dated November 18, 2003, Mr. Bailey attempted to explain to the bar his answers on the questionnaire. He said that in the spring of 1999, he contacted the Pennsylvania Bar/Pennsylvania Disciplinary Committee for advice about reporting the "incident in Jamaica." He said that he spoke with a lady, name unknown, who said "Neither the incident nor any result was reportable because it occurred outside the United States and especially in a place where the courts are known to be 'kangaroo courts' very corrupt, with bribery, without proper safeguards, such results cannot be trusted." He said he "was told" not to report it as it was not what the rules had intended.

12. Mr. Bailey said that he asked "the lady" for a written opinion on the matter, but that she said they did not give written opinions.

13. Mr. Bailey said that he relied and trusted this advice and direction in completing the Virginia Bar application.

14. Mr. Bailey did not indicate whether he asked anyone at the Pennsylvania Bar about reporting the administrative procedure that the Marine Corps conducted against him in June 1999.

15. He did not indicate whether he asked anyone at the Virginia State Bar or Board of Bar Examiners about reporting the criminal or the administrative matter.

16. The third paragraph of the instructions to the Virginia Board of Bar Examiners questionnaire provided:

    If you have any doubts about whether any matter should be reported on this questionnaire, report it. If you are not sure of dates, time, places, or other information requested, it is your responsibility to consult the court, governmental agency, or other entity or person involved to obtain the accurate and complete information.

17. Mr. Bailey closed the application by stating:
    I understand and acknowledge that my application for the Bar of Virginia is a continuing process and that I have an obligation to inform the Board of Bar Examiners promptly and in writing, of any change in any of the information I have provided in this questionnaire and in any attachment hereto. I agree to cooperate fully by furnishing any supplemental information requested by the Board or the Character and Fitness Committee (and the agents thereof) so that the Board and the Committee will have all information relevant to my character and fitness to practice law when making a decision on my applications.

18. Mr. Bailey endorsed the application under oath.

19. By letter, dated April 30, 2003, the Judge Advocate General of the Marine Corps advised the Virginia State Bar that it had taken Professional Responsibility action against Mr. Bailey. Specifically, it indefinitely suspended Mr. Bailey's certification under Article 27 (b) of the Uniform Code of Military Justice, 10 U.S.C. Section 827 (b), which in turn prohibited Mr. Bailey from representing members of the Naval Service before any forum in the Department of the Navy, and from practicing law in any other capacity in the Department of the Navy. The criminal act was the same that led to his conviction in Jamaica.

UPON CONSIDERATION WHEREOF, the Three-Judge Court found unanimously, by clear and convincing evidence, that the Respondent violated the following provisions of the Virginia Rules of Professional Conduct;

RULE 8.1 Bar Admission And Disciplinary Matters

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

(a) knowingly make a false statement of material fact;

The Court did not find that the Respondent violated Rules 8.1 (b) and (c), or Rule 8.4 (b) and (c) as alleged, and dismissed those counts accordingly.

Thereafter, the Virginia State Bar and the Respondent presented argument regarding the sanction to be imposed upon the Respondent for the misconduct, and the Three-Judge Court recessed to deliberate.

AFTER DUE CONSIDERATION of the evidence and the nature of the ethical misconduct committed by the Respondent, the Three-Judge Court reached the unanimous decision that the Respondent's license to practice law in the Commonwealth of Virginia should be suspended for three (3) years effective immediately.

In finding misconduct, and electing to suspend the Respondent's license to practice law, the Court considered the matter of *Shea v. Virginia State Bar*, 236 Va. 442, 444, 374 S.E.2d 63, 65 (1988), which held that:

Lawyers are trained and encouraged to be independent thinkers deciding for themselves, based on the law, what conduct is appropriate and what is not … Each lawyer has an individual duty to abide by the disciplinary rules … Any lawyer who violates the disciplinary rules must stand ready to bear the individual consequences of that violation regardless of what others were doing.

It is hereby **ORDERED** that the license of the Respondent, Patrick Earl Bailey, to practice law in the Commonwealth of Virginia be, and the same hereby is, SUSPENDED for a period of three (3) years, effective the date of this hearing, April 19, 2005.

It is further **ORDERED**, pursuant to the provisions of Part Six, Section IV, Paragraph 13.M of the Rules of the Supreme Court of Virginia, that the Respondent shall forthwith give notice, by certified mail, return receipt requested, of the suspension of his license to practice law in the Commonwealth of Virginia to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care, in conformity with the wishes of his clients. The Respondent shall give such notice within 14 days of the effective date of the order, and make such arrangements as are required herein within 45 days of this effective date of the order. The Respondent shall furnish proof to the Bar within 60 days of the effective date of the 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 the arrangement required herein shall be determined by the Virginia State Bar Disciplinary Board, which may impose a sanction of revocation or suspension for failure to comply with these requirements.

Pursuant to Part Six, Section IV, Paragraph 13.B.8.c of the Rule of the Supreme Court of Virginia, the Clerk of the Disciplinary System of the Virginia State Bar shall assess costs.

It is further **ORDERED** that a copy teste of this order shall be served by the Clerk of this Court upon the Respondent, Patrick Earl Bailey, by certified mail, return receipt requested, at 8908 Bluffwood Lane, Fort Washington, Maryland 20744, his address of record with the Virginia State Bar; and by regular mail to his counsel, Stephen A. Armstrong, at Suite 307, 10521 Judicial Drive, Fairfax, Virginia 22030-5160, and to Edward L. Davis, Assistant Bar Counsel, at the Virginia State Bar, Eighth and Main Building, Suite 1500, 707 East Main Street, Richmond, Virginia 23219.

The court reporter who transcribed these proceedings is Carol D. Neeley, Rudiger & Green Reporting Service, 4116 Leonard Drive, Fairfax, Virginia 22030, (703) 591-3136.

ENTER: October 14, 2005.

CLIFFORD R. WECKSTEIN
Chief Judge, Three-Judge Court

James F. Almand, Judge
Three-Judge Court

Frank A. Hoss, Jr., Retired Judge
Three-Judge Court

VIRGINIA:

IN THE CIRCUIT COURT FOR ARLINGTON COUNTY

VIRGINIA STATE BAR, ex rel.
FOURTH DISTRICT B SECTION I COMMITTEE,
Complainant/Petitioner,
v.
CHARLES FREDERICK DAUM, ESQ,
Respondent.
Chancery No. 05-389

ORDER

THIS MATTER came before the Three-Judge Court empaneled on October 24, 2005, by designation of the Chief Justice of the Supreme Court of Virginia, pursuant to § 54.1-3935 of the 1950 Code of Virginia, as amended. A fully endorsed Agreed Disposition, dated the 27th day of October, 2005, was tendered by the parties, and was presented by the parties in open court on November 8, 2005, to the Three-Judge Court, consisting of the Honorable James E. Kulp and Frank A. Hoss, Jr., retired Judges of the Fourteenth and Thirty-first Judicial Circuits, respectively, and by the Honorable Jonathan C. Thacher, Judge of the Nineteenth Judicial Circuit and Chief Judge of the Three-Judge Court.

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

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

2. On or about the 12th day of January, 2004, Ms. Valerie Hawkins (hereafter "Complainant") retained the Respondent in Respondent's office in Arlington, Virginia, to represent her son, Rishawn Hawkins, in defense of three criminal charges then pending against Rishawn Hawkins in Prince William County, Virginia.

3. The agreed-upon fee for representation was the sum of Three Thousand Dollars ($3,000.00), the total amount of which the Complainant paid to the Respondent in installments.

4. The sums tendered to the Respondent by the Complainant as legal fees were not fully earned by the Respondent as of the time they were tendered to him. The Respondent deposited all such fees in his operating account, and failed to deposit any such fees in an attorney trust account.

5. During the course of a personal interview of the Respondent conducted by a Virginia State Bar investigator on December 15, 2004, the Respondent stated that he did not use his trust account for deposits of criminal fees, and that he did not reconcile his trust account.

6. The Respondent was discharged as Rishawn Hawkins's attorney in April of 2004, and successor counsel was engaged during that month. Through Respondent's secretary, Mr. Hawkins's new attorney requested a copy of the client file and an accounting of the time Respondent had devoted to Mr. Hawkins's case.

7. Although the Respondent left Mr. Hawkins's file with his secretary for the benefit of Mr. Hawkins's new attorney, the file materials were not forwarded to the new attorney within a reasonable period of time, nor was an accounting of time devoted to the matter and/or a refund of any unearned fees promptly made. However, on September 24, 2004, the Respondent, through counsel represented to defend him concerning the Bar Complaint filed in this matter, made a full refund of fees and provided certain file materials to the Complainant related to his representation of Rishawn Hawkins.

THE THREE-JUDGE COURT finds by clear and convincing evidence that such conduct on the part of the Respondent, Charles Frederick Daum, 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:
(2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(c) A lawyer shall:
(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; and
(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

(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.
(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.

RULE 1.16 Declining Or Terminating Representation

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

(e) All original, client furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and shall be returned to the client upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Upon request, the client must also be provided copies of the follow-

ing documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third party communications; the lawyer's copies of client furnished documents (unless the originals have been returned to the client pursuant to this paragraph); pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer/client relationship.

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

1. On or before the fifteenth (15th) day following the date of entry of this Order, the Respondent shall engage the services of one of the following law office management consultants:

   Kathleen M. Uston, Esquire
   127 South Fairfax Street, #152
   Alexandria, Virginia 22314
   Phone: (703) 683-0440

   Janean S. Johnston, Esquire
   250 South Reynolds Street, #710
   Alexandria, Virginia 22304-4421
   Phone: (703) 567-0088

   to review Respondent's attorney trust account record-keeping, accounting, and reconciliation methods and procedures to ensure compliance with Rule 1.15 of the Rules of Professional Conduct. In the event the consultant determines that Respondent is in compliance with the said Rule, the consultant shall so certify in writing to the Respondent and the Virginia State Bar. In the event the consultant determines that Respondent is not in compliance with Rule 1.15, then, and in that event, the consultant shall notify the Respondent and the Virginia State Bar, in writing, of the measures that Respondent must take to bring himself into compliance with the said Rule.

2. The Respondent shall be obligated to pay when due the consultant's fees and costs for its services (including provision to the Bar and to Respondent of information concerning this matter).

3. In the event the Respondent is determined by the consultant to be not in compliance with Rule 1.15, he shall have sixty (60) days following the date the consultant issues its written statement of the measures Respondent must take to comply with Rule 1.15 within which to bring himself into compliance. The consultant shall be granted access to Respondent's office, books, and records, following the passage of the sixty (60) day period to determine whether Respondent has brought himself into compliance, as required. The consultant shall thereafter certify in writing to the Virginia State Bar and to the Respondent either that the Respondent has brought himself into compliance with the said Rule within the sixty day (60) period, or that he has failed to do so. Respondent's failure to bring himself into compliance with Rule 1.15 as of the conclusion of the aforesaid sixty (60) day period shall be considered a violation of the Terms set forth herein.

4. The Respondent shall read *Lawyers and Other People's Money* by Frank A. Thomas, III, (Third Edition, Virginia CLE Publications), and he shall certify to Bar Counsel in writing that he has done so. Respondent's written certification shall be delivered, within thirty (30) days following the date of entry of this Order to: Seth M. Guggenheim, Assistant Bar Counsel, at 100 North Pitt Street, Suite 310, Alexandria, Virginia 22314.

Upon satisfactory proof furnished by Respondent to the Virginia State Bar that the above Terms have been complied with, in full, a **PUBLIC REPRIMAND, WITH TERMS** shall then be imposed. If, however, Respondent fails to comply with any of the Terms set forth herein, as and when his obligation with respect to any such Term has accrued, then, and in such event, the Virginia State Bar Disciplinary Board shall be authorized, by agreement of the parties, to conduct a show cause hearing to determine if a six (6) month suspension of Respondent's license to practice law in the Commonwealth of Virginia should be imposed as an alternative disposition to the Public Reprimand, with Terms provided for herein; and it is further

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

ORDERED that four (4) copies of this Order be certified by the Clerk of the Circuit Court of Fairfax County, 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 and Bar Counsel consistent with the rules and procedures governing the Virginia State Bar Disciplinary System.

ENTER: November 8, 2005.

JONATHAN C. THACHER
Chief Judge of Three-Judge Court

JAMES E. KULP
Judge of Three-Judge Court

FRANK A. HOSS, JR.
Judge of Three-Judge Court

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK

VIRGINIA STATE BAR EX REL
SECOND DISTRICT COMMITTEE
Complainant
v.
KENAN MICHAEL PINKARD
Respondent
Case No. L05-1740

ORDER OF SUSPENSION

THIS CAUSE came to be heard on the 25th day of October, 2005, by a Three-Judge Court impaneled by the Supreme Court of Virginia on October 6, 2005, by designation of the Chief Justice of the Supreme Court of Virginia, pursuant to Section 54.1-3935 of the Code of Virginia (1950) as Amended, consisting of the Honorable Robert G. O'Hara, Jr., Retired Judge of the Sixth Judicial Circuit, the Honorable James E. Kulp, Retired Judge of the Fourteenth Judicial Circuit, and the Honorable Louis R. Lerner, Judge of the Eighth Judicial Circuit, designated Chief Judge.

The Virginia State Bar appeared through its Assistant Bar Counsel, Edward L. Davis. The Respondent attorney, Kenan Michael Pinkard, was duly noticed and appeared in person, *pro se*.

WHEREUPON, a hearing was conducted upon the Rule to Show Cause issued against the Respondent, Kenan Michael Pinkard, which Rule directed him to appear and to show cause why his license to practice law in the Commonwealth of Virginia should not be suspended, revoked, or otherwise sanctioned by reason of allegations of ethical misconduct set forth in the Certification issued by a subcommittee of the Second District Committee of the Virginia State Bar.

The Complainant and the Respondent presented evidence in open court separately in each of three individual complaints.

Following closing arguments by the parties, the Three-Judge Court retired to deliberate on each of the three complaints separately, and thereafter returned and announced that it had found, unanimously, and by clear and convincing evidence, as set forth hereinafter, that:

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

04-021-2415
Complainant: VSB/Judicial

2. Mr. Pinkard was appointed to serve as Guardian *ad Litem* (GAL) in two child support enforcement cases pending in the Chesapeake Juvenile and Domestic Relations District Court: *Kathryn Swann v. Keith Stewart*, JA 059918-01-00 and *Sheretha Jones v. Merritt M. Lane*, JA 060771-01-00.

3. On December 5, 2003, the Court appointed Mr. Pinkard to serve as GAL in the *Swann* matter, a paternity claim against his client, Keith Stewart, a sixteen-year-old minor. The child's mother, Kathryn Swann, had petitioned for child support, and the court ordered a paternity test

4. On February 2, 2004, before the case had been heard by the Court, Mr. Pinkard submitted a payment request for $5,641.00, claiming that he had worked 101.2 hours out-of-court and one hour in-court on the case. (He erroneously reversed these figures on his claim form.)

5. Chief Judge Rufus Banks rejected the claim and by letter, dated February 6, 2004, advised Mr. Pinkard that his claim was unreasonable in light of the nature of the case, a determination of paternity by DNA testing. He asked him to resubmit his claim at the conclusion of the case, and suggested that he consult with other attorneys and the Court Clerk before he did so.

6. By letter, dated February 8, 2004, Mr. Pinkard responded to Judge Banks, advising him that he would not reconsider his claim, arguing with Judge Banks over the hourly reimbursement rates, and threatening to sue the Court under 42 U.S.C. 1983.

7. Mr. Pinkard's claim for payment included multiple hours trying to locate his client, preparing grounds of defense, preparing a discovery request in which he sought a "non-formal" deposition, and researching applicable law. He also claimed several hours for a legal memorandum containing various case authorities, calling it his Guardian *ad Litem* Report. A GAL Report, however, is a narrative report explaining the GAL's factual findings and recommendations to the court.

8. Upon request of the court clerk, Mr. Pinkard deleted the fourteen hours devoted to research, reducing his claim to 87 hours, but did not adjust his claim any further.

9. Judge Banks authorized compensation for two hours in-court and one hour out-of court for Mr. Pinkard, and removed Mr. Pinkard from the court-appointed list. The blood draw took place on March 26, 2004, and the test was performed on April 2, 2004.

10. On January 15, 2004, the Court appointed Mr. Pinkard to serve as GAL for the father in the matter of *Sheretha Jones v. Merritt M. Lane*, another child support matter brought by the Division of Child Support Enforcement (DCSE). His client, Mr. Lane, was incarcerated.

11. The same day that Mr. Pinkard was appointed, January 15, 2004, the case was called to hearing and finished sometime between 9:00 A.M. and 12:10 P.M., when the DCSE docket was concluded.

12. Mr. Pinkard, however, submitted a claim for twenty hours out-of-court, and two hours in court, for a total of $1,250.

13. Mr. Pinkard's claim included six-and-one-half hours for pretrial client interviews and case preparation. (The case was concluded less than two hours after he received it.)

14. He also billed for responsive pleadings and for composing an Answer for the client on dates after the case was closed. (There was no appeal or any other post-trial matter pending.)

15. Finally, he claimed five hours for an interview with his client nine days after the case was closed. (There was no appeal or any other post-trial matter pending.)

16. By letter, dated February 9, 2004, Judge Banks expressed the same concerns to Mr. Pinkard as he did in the *Swann* matter.

17. Mr. Pinkard responded by letter, dated February 11, 2004, accusing the judge of making an improper *ex parte* communication with him "not within the bounds of professional responsibility."

18. Mr. Pinkard reduced his claim in response to the Judge's letter; however, he still claimed payment for more hours than he could have possibly spent on the case before it was closed.

UPON CONSIDERATION WHEREOF, the Three-Judge Court found unanimously, by clear and convincing evidence, that the Respondent violated the following provisions of the Virginia Rules of Professional Conduct;

RULE 1.5 Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the nature and length of the professional relationship with the client;

RULE 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal;

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

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

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

The Court did not find that the Respondent violated Rules 1.1 or 3.1 of the Rules of Professional Conduct, and dismissed those counts accordingly.

VSB DOCKET NO. 04-021-2731
Complainant: VSB/Anonymous

Following the presentation of evidence and closing arguments by the parties in the above-captioned complaint, the Three-Judge Court retired to deliberate, and thereafter returned and announced that it had found, unanimously, and by clear and convincing evidence, that:

19. Mr. Pinkard was licensed to practice law in the Commonwealth of Virginia on October 16, 2001.

20. In April 2003, Mr. Pinkard opened his own law practice in Norfolk, Virginia, using letterhead styled:
THE PINKARD LEGAL GROUP, P.C.
ATTORNEYS AT LAW

21. By letter, dated June 18, 2003, Mr. Pinkard asked to be placed on the court-appointed list for the Chesapeake Juvenile and Domestic Relations District Court. He introduced himself by saying:
... I am an attorney for the Pinkard Legal Group, P.C., a full service law firm specializing in Corporate law, Bankruptcy, and General litigation …

22. Understanding that Mr. Pinkard was a sole practitioner, the bar chose to investigate the matter.

23. The bar's investigation revealed that Mr. Pinkard was always a sole practitioner, although his letterhead read "Legal Group" and "Attorneys at Law."

24. The investigation also revealed that he never registered as a Professional Corporation (P.C.) with the Virginia State Bar, in accordance with the Rules of the Supreme Court of Virginia, Part 6, Section IV, Subparagraph 14, and the Code of Virginia, Sections 13.1-549.2, and 54.1-3902, although his letterhead read "P.C.," and he described his practice as a "P.C." in the body of his letter to the Chesapeake Court.

25. In a written response to questions posed by the Virginia State Bar investigator, Mr. Pinkard acknowledged that he had been practicing by himself since his return to Virginia in April 2003, that he had never practiced with other attorneys in a law firm,

and that he had always been a sole practitioner. He said that "there are no other attorneys, whom (sic) practice with me, its (sic) just singular plural verbiage..."

26. In response to being asked whether he had ever registered with the State Corporation Commission as a professional corporation, he said that a physical address is required but that he had a home-based practice (suggesting that he had not registered with the SCC).

27. Mr. Pinkard also said that "Pinkard Legal Group" was accurate because he and another individual were a group, "one attorney and one volunteer defacto employee" who volunteered her time to answer the phone and type. He said that he changed the letterhead after the bar complaint in February 2004.

28. In his written response to the bar complaint, undated, and received April 1, 2004, Mr. Pinkard said that he was not engaging in deceptive conduct with the letterhead because the Code of Virginia does not require a professional corporation to use the initials "PC." (The Code of Virginia and Rules of the Supreme Court, however, require a Professional Corporation to obtain a registration certificate from the Virginia State Bar before engaging in the practice of law.)

UPON CONSIDERATION WHEREOF, the Three-Judge Court found unanimously, by clear and convincing evidence, that the Respondent violated the following provisions of the Virginia Rules of Professional Conduct;

RULE 7.5 Firm Names And Letterheads

(a) A lawyer or law firm may use or participate in the use of a professional card, professional announcement card, office sign, letterheads, telephone directory listing, law list, legal directory listing, or a similar professional notice or device unless it includes a statement or claim that is ... misleading, or deceptive. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

RULE 8.4 Misconduct

(c) engage in professional conduct involving ... deceit or misrepresentation;

The Court did not find that the Respondent violated Rule 8.4 (b), and dismissed that charge accordingly.

VSB DOCKET NO. 05-021-0053
Complainant: VSB/Judicial)

Following the presentation of evidence and closing arguments by the parties in the above-captioned complaint, the Three-Judge Court retired to deliberate, and thereafter returned and announced that it had found, unanimously, and by clear and convincing evidence, that:

29. Mr. Pinkard undertook to represent his mother in a slip-and-fall case resulting from injuries sustained on February 12, 2004.

30. Mrs. Pinkard saw a treating physician the same day.

31. Six days later, on February 18, 2004, Mr. Pinkard filed a motion for judgment against the defendant, Tidewater Scales and Butchers Suppliers, Inc., seeking $50,000 in compensatory damages and $80,000 in punitive damages.

32. Upon filing the motion for judgment, Mr. Pinkard unilaterally set a trial date of April 5, 2004 without consulting the defense counsel or any agent of the defendant, and before a responsive pleading could be filed.

33. When the defense counsel requested Mr. Pinkard's cooperation in changing the trial date, Mr. Pinkard responded with several rude voicemail messages, and a sarcastic facsimile letter stating his refusal to cooperate, although no discovery had been conducted.

34. The Clerk of Court's office ultimately removed the April 5 trial date on its own initiative after the defense counsel filed a motion for a continuance and sanctions, which he withdrew upon the removal of the trial date.

35. When the defense counsel issued subpoenas *duces tecum* for treatment records to the plaintiff's health care providers, Mr. Pinkard, on March 10, 2004, filed a frivolous motion to quash the subpoenas and motion for sanctions on the ground that the plaintiff had not authorized the release of the records.

36. Mr. Pinkard filed two other motions for sanctions against the defense counsel on March 5 and 8, 2004.

37. Mr. Pinkard did not furnish opposing counsel with copies of any of the motions for sanctions, and the defense counsel did not see the motion for sanctions and to quash until the court ordered Mr. Pinkard to produce it at a hearing on another matter on March 19, 2004.

38. When contacted by the defense counsel or his paralegal for available hearing dates, Mr. Pinkard repeatedly refused to provide them.

39. Mr. Pinkard had become so abusive and threatening to the clerks of the Norfolk Circuit Court in voicemail messages that the Honorable Joseph Leafe, Chief Judge, after hearing the recordings, felt compelled to admonish him. Nonetheless, Mr. Pinkard continued to leave abusive and rude voicemail messages for the court clerks.

40. Similarly, when the court reporter advised Mr. Pinkard that his mother's deposition was ready for review, Mr. Pinkard responded in a rude manner that he had 21 days to review it and that he could change whatever he wanted to on the errata sheet, even though no one challenged him on these issues. His behavior was such that the court reporter declined further involvement in the case.

41. During an office visit with the defense counsel's paralegal in May 2004 concerning the status of some records, the treating physician offered some unsolicited comments regarding the examination of the plaintiff, prompting the defense counsel to send a letter of explanation, dated June 2, 2004, to Mr. Pinkard and to the court.

42. Mr. Pinkard responded with a motion for sanctions accusing the defense counsel of "conduct interposed therewith improper purpose to unlawfully solicit opinions from Plaintiff's expert witness, Dr. Horwitz, and to Harass (sic) such witness at his place of employment by inquiring about pretrial and privileged information."

43. Mr. Pinkard's stated basis for the motion was the defense counsel's letter of explanation, dated June 2, 2004, although the letter was in complete contradiction to Mr. Pinkard's motion.

44. On July 15, 2004, the court summarily denied the motion, noting that the motion lacked any basis in law or fact, and that it was frivolous.

45. On July 6, 2004, Mr. Pinkard filed another motion for sanctions against the defense counsel, this time accusing him of materially false and fraudulent statements to the court, and of, *inter alia*, being a pathological liar

46. On July 15, 2004, the court specifically found that the motion lacked any basis in law or fact, that it was frivolous and, citing Chief Judge Leafe's previous counseling about Mr. Pinkard's treatment of court staff, and the trial court's repeated counseling to tone down his approach and to be more cooperative, sanctioned Mr. Pinkard $500 for filing the motion.

47. During the course of the case, Mr. Pinkard repeatedly refused to endorse some orders prepared by the defense counsel, and/or marked them up and added matters not ordered by the court, and on one occasion, caused the court to have to restore language that he had lined out from the order.

48. Mr. Pinkard filed a list of witnesses the day before the discovery deadline, and then tried to prevent the defense counsel from deposing the witnesses on the basis that the deadline for discovery had passed

49. During the course of the case, Mr. Pinkard failed to comply with discovery, or prepare or plead his case correctly; causing most of his evidence and witnesses to be excluded.

50. Nonetheless, Mr. Pinkard chose to proceed with trial. The case was dismissed on a motion to strike.

51. Mr. Pinkard repeatedly interrupted the court while it was addressing him, going so far as to tell the court, on September 9, 2004, "I would caution you," about a point of law.

UPON CONSIDERATION WHEREOF, the Three-Judge Court found unanimously, by clear and convincing evidence, that the Respondent violated the following provisions of the Virginia Rules of Professional Conduct;

RULE 1.1 Competence

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

RULE 3.1 Meritorious Claims And Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(a) Obstruct another party's access to evidence …

(e) … fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

(j) … assert a position or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass …

RULE 3.5 Impartiality And Decorum Of The Tribunal

(f) A lawyer shall not engage in conduct intended to disrupt a tribunal.

The Court did not find that the Respondent violated Rules 1.3 (a), 3.4 (d), or 3.5 (e) (2) or 8.4 the Rules of Professional Conduct, and dismissed those counts accordingly.

THEREAFTER, the Virginia State Bar and the Respondent presented argument regarding the sanction to be imposed upon the Respondent for the misconduct, and the Three-Judge Court recessed to deliberate.

AFTER DUE CONSIDERATION of the evidence and the nature of the ethical misconduct committed by the Respondent, the Three-Judge Court reached the unanimous decision that the Respondent's license to practice law in the Commonwealth of Virginia should be suspended for two (2) years, effective November 1, 2005. Therefore, it is hereby **ORDERED** that the license of the Respondent, Kenan Michael Pinkard, to practice law in the Commonwealth of Virginia be, and the same hereby is, **SUSPENDED** for a period of two (2) years, effective November 1, 2005.

It is further **ORDERED**, pursuant to the provisions of Part Six, Section IV, Paragraph 13.M of the Rules of the Supreme Court of Virginia, that the Respondent shall forthwith give notice, by certified mail, return receipt requested, of the suspension of his license to practice law in the Commonwealth of Virginia to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care, in conformity with the wishes of his clients. The Respondent shall give such notice within 14 days of the effective date of the order, and make such arrangements as are required herein within 45 days of this effective date of the order. The Respondent shall furnish proof to the Bar within 60 days of the effective date of the 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 the arrangement required herein shall be determined by the Virginia State Bar Disciplinary Board, which may impose a sanction of revocation or suspension for failure to comply with these requirements.

Pursuant to Part Six, Section IV, Paragraph 13.B.8.c of the Rule of the Supreme Court of Virginia, the Clerk of the Disciplinary System of the Virginia State Bar shall assess costs.

It is further **ORDERED** that a copy teste of this order shall be served by the Clerk of this Court upon the Respondent, Kenan Michael Pinkard, by certified mail, return receipt requested, at Post Office Box 41419, Norfolk, Virginia 23502, his address of record with the Virginia State Bar; and by regular mail to Edward L. Davis, Assistant Bar Counsel, at the Virginia State Bar, Eighth and Main Building, Suite 1500, 707 East Main Street, Richmond, Virginia 23219.

The court reporter who transcribed these proceedings is Catherine Edwards, Ronald Graham and Associates, Inc., 5344 Hickory Ridge, Virginia Beach, Virginia 23455-6680 (757) 490-1100.

ENTER: November 30, 2005.

LOUIS R. LERNER
Chief Judge, Three-Judge Court

JAMES E. KULP
Retired Judge, Three-Judge Court

ROBERT G. O'HARA, Jr.
Retired Judge, Three-Judge Court

VIRGINIA:

BEFORE THE THREE-JUDGE COURT PRESIDING
IN THE CIRCUIT COURT FOR PRINCE WILLIAM COUNTY

VIRGINIA STATE BAR, ex rel.
FIFTH DISTRICT B SECTION III COMMITTEE,
Complainant/Petitioner,
Chancery No. 57041
v.
MARK STEVEN WEISS, ESQ.
Respondent
[VSB Docket No.: 04-053-0083]

ORDER OF SUSPENSION, WITH TERMS

THIS MATTER came before the Three-Judge Court empaneled on August 10, 2005, by designation of the Chief Justice of the Supreme Court of Virginia, pursuant to § 54.1-3935 of the 1950 Code of Virginia, as amended. A fully endorsed Agreed Disposition, dated the 12th day of September, 2005, was tendered by the parties, and was considered by the Three-Judge Court, consisting of the Honorable J. Warren Stephens and James E. Kulp, retired Judges of the Seventh and Fourteenth Judicial Circuits, respectively, and by the Honorable Joanne F. Alper, Judge of the Seventeenth Judicial Circuit and Chief Judge of the Three-Judge Court.

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

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

2. On or about September 15, 1994, Ms. Barbara A. Dunkley retained the Respondent's law firm to represent her and her minor daughter Monica's interests in their respective medical malpractice claims. The Complainant's daughter, Monica, born on February 3, 1994, was at all times severely and profoundly disabled due to birth-related neurological injuries. The two legal matters were initially the responsibility of the Respondent's then law partner, but were transferred to Respondent for handling as of October 1995.

3. On or about February 2, 1996, the Respondent filed a suit on the Complainant's behalf respecting her individual claim in the Prince William County, Virginia, Circuit Court, claiming damages in the sum of One Million Dollars ($1,000,000.00) against health care providers who had rendered health care to the Complainant.

4. The Respondent took no further action with regard to the suit that he had filed, and the Circuit Court entered an Order on March 24, 1999, discontinuing the case because the matter had been pending without activity for more than three years.

5. The Respondent did not advise the Complainant that her suit had been discontinued. The Complainant learned that the suit had been discontinued only after traveling to the courthouse and securing the assistance of a clerk. The Complainant telephoned the Respondent, who advised her that he was not aware that the suit had been dismissed. The Complainant would testify that he promised to reinstitute the litigation, but he failed to do so and never discussed the Complainant's case with

her again; the Respondent would testify that he promised the Complainant only that he would explore the possibility of having the litigation reinstated.

6. On or about January 16, 2002, the Respondent filed a medical malpractice suit in the Prince William County, Virginia, Circuit Court on behalf of the Complainant's minor child, Monica, against two health care providers and a related business entity. The suit claimed damages in the sum of One Million Dollars ($1,000,000.00) for injuries sustained at the time of Monica's birth.

7. As of the time the Respondent instituted the suit on Monica's behalf, he had secured an expert opinion regarding the standard of care applicable to the claim that he had filed, and that opinion was, according to information provided by the Respondent to the Virginia State Bar, that the expert "did not find evidence of a breach of the ordinary standard of care within a reasonable degree of medical certainty."

8. On or about February 15, 2002, defense counsel served interrogatories and a request for production of documents upon the Respondent. The Respondent failed to respond to the discovery thus propounded within the time prescribed by law or at any time thereafter.

9. On or about May 22, 2002, defense counsel filed a "Motion to Refer." The defendants sought referral of the case to the Worker's Compensation Commission "for purposes of determining whether the cause of action satisfies the requirements of the Virginia Birth-Related Neurological Injury Compensation Act."

10. The Respondent was unaware of the Act's existence until it was brought to his attention by counsel defending Monica's lawsuit. A child eligible for coverage under the Act can receive a lifetime of medical care and many other entitlements, including housing and transportation assistance and, between the ages of 18 and 65, coverage similar to that available for worker's compensation claimants. No proof of negligence committed by a health care provider is needed for an eligible child to secure coverage under the Act.

11. Monica was, in fact, eligible for coverage under the Act, and a claim for benefits thereunder could have been made by the Respondent on her behalf at or near the time the Respondent was retained in 1994. The Respondent did not advise the Complainant that the Motion to Refer had been filed; did not at any time provide her with any advice or information respecting the applicability of the Act to Monica's circumstances; and did not seek her permission either to oppose or consent to Defendant's Motion that the case be referred to the Workers' Compensation Commission.

12. On June 21, 2002, the Circuit Court entered an Order granting the Motion to Refer and stayed the action in that Court. On April 14, 2003, the Worker's Compensation Commission, to which Monica's claim had been referred by the Court, entered an Order directing the Respondent to file an address for Monica's parent within twenty-one days following that date. The Respondent failed to provide the Commission with the Complainant's address within twenty-one days, or at any time thereafter.

13. It was at all times in Monica's best interests that at the earliest possible time she be declared eligible for benefits under the Virginia Birth-Related Neurological Injury Compensation Act. Such a determination required that Monica's medical records sufficient for an eligibility assessment be provided for review to a panel of physicians acting at the request of the Workers' Compensation Commission.

14. Notwithstanding defense counsel's repeated telephone requests and letters to the Respondent, seeking Monica's updated medical records and/or a release to allow defense counsel to procure them directly from health care providers, the Respondent failed to provide such records. He did, however, induce and foster defense counsel's belief that he, the Respondent, was working on getting the requested records. He at one time falsely stated to defense counsel that he had a meeting scheduled with the Complainant.

15. Having received no voluntary cooperation from Respondent, defense counsel applied on or about June 27, 2003, to the Workers' Compensation Commission for leave to propound written discovery to Complainant and to take Complainant's deposition. Leave was granted, as requested, by the Workers' Compensation Commission on July 2, 2003, and defense counsel propounded discovery on her clients' behalf.

16. On July 8, 2003, the Workers' Compensation Commission mailed a letter to the Respondent, which, *inter alia*, reminded him that he had been directed on April 14, 2003, to provide Monica's parent's address.

17. On July 18, 2003, the Respondent wrote to the Chief Deputy Commissioner at the Workers' Compensation Commission, stating in such letter, in pertinent part, the following:

> I am writing to seek permission to withdraw my appearance in this matter. Barbara A. Dunkley, the mother and next friend of Monica Dunkley, has failed to maintain contact with my office and I have not been able to reach her. Ms. Dunkley's failure to maintain contact with my office has prevented me from providing information previously requested by the Commission and other counsel. Insofar as I cannot effectively represent Monica L. Dunkley under these circumstances, I am seeking leave to withdraw and will file a corresponding motion with the Circuit Court of Prince William County.

18. Although Respondent would testify to the contrary, the Bar's evidence is that the Respondent had made no effort to contact the Complainant since approximately February 25 of 2002.

19. The Deputy Commissioner to whom the Respondent addressed his July 18, 2003, letter wrote to the Respondent and other interested parties on July 23, 2003, stating, inter alia, the following:

> I write to ask for your advice and assistance in the referenced matter because of an unusual set of circumstances. Mr. Weiss has advised me that he is unable to reach Barbara A. Dunkley, the mother and next friend of Monica Dunkley. As you have seen in my earlier correspondence, I have attempted to find an address for Ms. Dunkley so that I can provide her with copies of all pleadings and correspondence.
>
> Unless one of you knows how to contact Ms. Dunkley, I see no way to go forward with this proceeding. If you have suggestions or advice in regard to this issue, I would appreciate hearing from you at your earliest convenience.
>
> I am sending a copy of this letter to Barbara Dunkley at an address found in the medical records. If Ms. Dunkley receives this letter, I would ask that she contact my office immediately.

20. The Complainant received a copy of the Deputy Commissioner's July 23, 2003, letter. Promptly following her receipt of the Deputy Commissioner's letter, the Complainant telephoned the Workers' Compensation Commission offices.

21. The Deputy Commissioner wrote to the Complainant on July 28, 2003, acknowledging the Complainant's telephone call, forwarding a copy of the Commission's file in the matter, confirming that the Complainant no longer wished to have the Respondent represent her, and urging her to retain new counsel immediately should she wish to be represented in the matter.

22. The Complainant engaged new counsel in early August of 2003. The Complainant's new counsel promptly secured the required medical records and provided them to defense counsel, responded to outstanding discovery requests, and otherwise cooperated with defense counsel and the Commission such that an Order was entered by the Commission on October 22, 2003, declaring Monica to be entitled to compensation under the Act and directing the Birth-Related Neurological Injury Compensation Fund "to pay all amounts and expenses" provided by law for Monica's benefit.

23. It came to defense counsel's attention that the Respondent had failed to withdraw from the Circuit Court action consistent with his representation to the Deputy Commissioner by letter dated July 18, 2003, that he would "file a corresponding motion [to withdraw] with the Circuit Court of Prince William County." Accordingly, defense counsel wrote to Respondent on November 19, 2003, reminding him of the representation to the Deputy Commissioner contained in his July 18, 2003, letter.

24. During an interview of the Respondent conducted by a Virginia State Bar investigator on January 16, 2004, the Respondent stated that he believed he had sent the Complainant a letter and refund of the unexpended portion of a costs advance that she had provided to him, and which he had placed in escrow. The Bar's evidence would show, however, that it was not until March 25, 2004, that any refund of costs advanced was provided to the Complainant via a check drawn on Respondent's trust account and sent to the Complainant on that date by Respondent's counsel.

25. In mitigation, the evidence would show that Respondent's conduct was not motivated by the prospect of pecuniary gain.

THE THREE-JUDGE COURT finds by clear and convincing evidence that such conduct on the part of the Respondent, Mark Steven Weiss, Esquire, constitutes a violation of the following provisions of the revised Virginia Code of Professional Responsibility and the Rules of Professional Conduct:

DR 6 101. Competence and Promptness.

(A) A lawyer shall undertake representation only in matters in which:
(1) The lawyer can act with competence and demonstrate the specific legal knowledge, skill, efficiency, and thoroughness in preparation employed in acceptable practice by lawyers undertaking similar matters, or

(2) The lawyer has associated with another lawyer who is competent in those matters.

(B) A lawyer shall attend promptly to matters undertaken for a client until completed or until the lawyer has properly and completely withdrawn from representing the client.

(C) A lawyer shall keep a client reasonably informed about matters in which the lawyer's services are being rendered.

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

DR 7 101. Representing a Client Zealously.

(A) A lawyer shall not intentionally:
(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.
(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-108, DR 5-102, and DR 5-105.
(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 4-101(D).

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 1.15 Safekeeping Property

(c) A lawyer shall:
(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; and
(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

RULE 1.16 Declining Or Terminating Representation

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

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

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

RULE 3.1 Meritorious Claims And Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

RULE 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal[.]

RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

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

(e) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

RULE 4.1 Truthfulness In Statements To Others

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

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

RULE 8.1 Bar Admission And Disciplinary Matters

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

(a) knowingly make a false statement of material fact[.]

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

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

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

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

1. Subject to the provisions of Paragraph 3 set forth below, the Respondent shall receive a five (5) year suspension of his license to practice law in the Commonwealth of Virginia, to commence on the date of entry of this Order, as representing an appropriate sanction if this matter were to be heard.

2. In addition to those terms set forth in the then-applicable Rules of the Supreme Court of Virginia which Respondent must meet as a condition of having his license to practice law in the Commonwealth of Virginia reinstated following the five (5) year suspension, the Respondent shall take and pass the written portion (essay and Virginia short answers portion) of the Virginia State Bar examination. The Respondent shall not be eligible to sit for the written portion of the Virginia State Bar examination prior to January of 2010.

3. If, following the five (5) year period of law license suspension, the Respondent makes application to the Virginia State Bar for reinstatement of his license to practice law in the Commonwealth of Virginia without having first taken and passed the written portion the Virginia State Bar examination, then, and in that event, the Virginia State Bar Disciplinary Board shall, as an alternative disposition to the license suspension otherwise provided for herein, REVOKE the Respondent's license to practice law in the Commonwealth of Virginia; 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, 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 shall also 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 shall also 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 pursuant to Part Six, § IV, ¶ 13.B.8.c. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess costs against the Respondent; and it is further

ORDERED that four (4) copies of this Order be certified by the Clerk of the Circuit Court of Prince William County, 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 and Bar Counsel consistent with the rules and procedures governing the Virginia State Bar Disciplinary System.

ENTER: September 29, 2005.

JOANNE F. ALPER
Chief Judge of Three-Judge Court

J. WARREN STEPHENS
Judge of Three-Judge Court

JAMES E. KULP
Judge of Three-Judge Court

VIRGINIA:
BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
CHARLES VANEVERA HARDENBERGH
VSB DOCKET NO. 06-000-0155

ORDER OF ADMONITION

THIS MATTER came on to be heard on Friday, August 26, 2005, at 9:00 a.m., before a panel of the Virginia State Bar Disciplinary Board convening at the State Corporation Commission, Courtroom B, Tyler Building, 1300 East Main Street, Second Floor, Richmond, Virginia, 23219. The Board was comprised of Robert L. Freed, Chair, Stephen A. Wannall, Lay Member, Russell W. Updike, Carl A. Eason, and Sandra L. Havrilak. Proceedings in this matter were transcribed by Jennifer L. Hairfield, a registered professional reporter, P.O. Box 9349, Richmond, Virgina, 23227, (804) 730-1222. The court reporter was sworn by the Chair, who then inquired of each member of the panel as to whether they had any personal or financial interest or bias which would interfere with or influence that member's determination of the matter. Each member, including the chair, answered in the negative; the matter proceeded. The Respondent, Charles VanEvera Hardenbergh, was represented by his counsel, Michael L. Rigsby, Esquire, and was present in person. The Virginia State Bar appeared by its counsel, Alfred L. Carr, Esquire.

This matter came before the Disciplinary Board as a result of the Respondent being suspended from practicing law in the Army effective September 2, 2004, by memorandum from the Department of the Army, U.S. Army Judiciary, dated November 5, 2005. A Rule to Show Cause and Order of Suspension and Hearing was entered on July 27, 2005. An Answer to the Rule to Show Cause was filed by Respondent's counsel, Michael L. Rigsby, on August 10, 2005.

Respondent's counsel filed an Objection on July 26, 2005, to the initiation of a Show Cause proceeding and entry of an Order of Suspension. Respondent's counsel contended that the Army is not a "jurisdiction" as that term is used in Paragraph (13)(I)(7)(a) Respondent's Objection was overruled by the Chair by Order dated July 27, 2005.

I. FINDINGS OF FACT

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

(1) During all times relevant hereto, the Respondent, Charles V. Hardenbergh, was an attorney licensed to practice law in the Commonwealth of Virginia (except for the period beginning July 27, 2005, to August 26, 2005, when his license to practice law was summarily suspended) and his address of record with the Virginia State Bar has been 100 Pecan Drive, Las Cruces, New Mexico, 88001; and 304 B North Main Street, Lexington, Virginia, 24450. The Respondent received proper notice of this proceeding as required by Part Six, § IV, Paragraph (13)(E) of the Rules of the Virginia Supreme Court.

(2) On September 3, 2002, while Respondent was serving in the Department of the Army, Respondent submitted a urine sample during a routine unit urinalysis that tested positive for traces of marijuana.

(3) As a result of the positive drug test, the Department of the Army suspended Respondent from practicing before Army court-martial and the United States Army Court of Criminal Appeals. The Army further revoked Respondent's Article 27b, UCMJ, certification and his authority to practice law in the Army.

(4) On January 11, 2004, Respondent separated from the Army receiving a "general discharge under honorable circumstances."

(5) Respondent contested the Army's determination by letter which was received by the Department of Army on October 18, 2004.

(6) On July 22, 2005, Respondent filed an Application for Correction of Military Record Under the Provisions of Title 10, U.S. Code Section 1552.

(7) Respondent provided numerous urine samples during his career with only one documented case of a positive result.

(8) There is no evidence to indicate that Respondent's drug use led others to do so; nor is there any evidence that his drug use affected or hindered him in the performance of his legal responsibilities as an attorney.

(9) Respondent has not posed any harm to the public or to the Army at any time during his professional career.

(10) Respondent has been the subject of significant adverse publicity in connection with the actions taken by the Army and his separation from the military.

(11) By Rule to Show Cause and Order of Suspension and Hearing dated July 27, 2005, Respondent's license to practice law in Virginia was immediately suspended pursuant to Rules of Court, Part Six, § IV, Paragraph 13(I)(7).

(12) Respondent was Ordered to appear before the Virginia State Bar Disciplinary Board at 9:00 a.m. on August 26, 2005, to show cause why his license to practice law within the Commonwealth of Virginia should not be further suspended.

II. DISPOSITION

Paragraph 13(I)(7)(e), Part Six, § IV of the Rules of the Supreme Court of Virginia entitled "Disbarment or Suspension in Another Jurisdiction" provides in relevant part:

(c) The Respondent shall have the burden of proof, by a clear and convincing evidentiary standard, and the burden of producing the Record upon which the Respondent relies to support the Respondent's contentions, and shall be limited at the hearing to proof of the specific contentions raised in any written response. Except to the extent the allegations of the written response are established, the findings in the other jurisdiction shall be conclusive of all matters for purposes of the Proceeding before the Board.

The Board finds that the Respondent has met his burden of proof by clear and convincing evidentiary standard establishing that the Virginia State Bar Disciplinary Board should not impose the same discipline imposed by the Department of Army.

It is therefore **ORDERED** that the suspension effected by the July 27, 2005, Order is hereby terminated effective August 26, 2005.

It is further **ORDERED**, pursuant to Paragraph 13(I)(2)(f)(2)(a), that the Respondent receive an admonition without terms.

It is further **ORDERED** that the Clerk of the Disciplinary System shall mail an attested copy of this Order to the Respondent, Charles VanEvera Hardenburgh, at his address of record with the Virginia State Bar, 304 B North Main Street, Lexington, Virginia, 24450, by certified mail, return receipt requested, and to his counsel, Michael L. Rigsby, Esquire, Carrol, Rice & Rigsby, 7275 Glen Forest Drive, Forest Plaza II, Suite 310, Richmond, Virginia, 23226, by first-class mail, and a copy to Alfred L. Carr, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia, 23219, hand-delivered.

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

ENTERED this 14th day of September, 2005
VIRGINIA STATE BAR DISCIPLINARY BOARD
Robert L. Freed, Chair

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
LAWRENCE BRADFORD HASKIN
VSB Docket No. 05-000-4876

ORDER OF PUBLIC REPRIMAND

THIS MATTER came on to be heard upon proper Notice on August 26, 2005. Members of the panel for this hearing were J. Rudy Austin, Leonard L. Brown, Jr., Dennis R. Gallagher (lay member) Gordon P. Peyton, and Joseph R. Lassiter, Jr. (Acting Chair). Prior to the hearing the Chair inquired of each member of the panel whether any conflict of interest existed and each member responded on the record in the negative. Paul D. Georgiadis, Assistant Bar Counsel, appeared for the Virginia State Bar. The Respondent, Lawrence Bradford Haskin, did not appear in person but was represented at the hearing

by his guardian *ad litem*, Frank George Uvanni. These proceedings were transcribed by Donna T. Chandler, RPR, RMR, RCR of Chandler and Halasz, P.O. Box 9349, Richmond, Virginia 23227 (804) 730-1222.

This matter concerns an alleged violation by the Respondent of Part Six, Section IV, paragraph 13.M of the Rules of The Supreme Court of Virginia. This section sets out the duties of a disbarred or suspended attorney, specifically that he or she give a Notice, within fourteen (14) days of the effective date of the Order of Suspension to all clients, opposing attorneys and presiding judges. On February 28, 2003, the Virginia State Bar Disciplinary Board issued an Order of Indefinite Suspension for Disability suspending Respondent Haskin's license to practice law. With the Order of Indefinite Suspension, the Board also caused the Respondent to be served with a letter setting forth Respondent's duties of notice to clients, opposing attorneys, and courts under Part Six, Section IV, Paragraph 13.M of the Rules of the Supreme Court of Virginia, and informed Respondent that he must provide the Clerk of the Disciplinary System with proof of compliance with Paragraph 13.M by April 29, 2003. The Clerk's letter of February 28, 2003, also forwarded to Respondent sample form letters for his use in complying with Paragraph 13.M. The Clerk's letter, sent to Respondent's address of record with the Virginia State Bar, was received on March 1, 2003. Having received no proof of compliance with Paragraph 13.M, on May 6, 2003, the Clerk sent Respondent a letter advising that she had not received proof of compliance and that a show cause proceeding may be initiated against him. The letter was sent to Respondent's address of record with the Virginia State Bar, and to Respondent's then Guardian *ad litem* Elliott P. Park, Esquire. On May 14, 2003, Assistant Bar Counsel Richard E. Slaney sent Respondent a follow-up reminder urging Respondent to comply and citing a recent revocation of another attorney for failure to comply with Paragraph 13.M.

Christine Condon, a former client of Respondent, testified that after she retained the Respondent she moved to California, and she did receive a letter from him stating that he was entering disability status with the Virginia State Bar, although not in the required form. Jeal Willard, also a former client, testified that he had retained the Respondent for a personal injury case in March 2002, but had lost contact with him and had no notice of Respondent's disability. Gene Reagan, a Virginia State Bar Investigator, testified that he had interviewed Respondent prior to his suspension and the Respondent was so severely depressed that he could not even get out of bed some mornings. The Investigator returned in 2004 and the Respondent apparently said he "felt 100% better."

The Respondent's current guardian *ad litem*, Mr. Uvanni, advised the Board that he had great difficulty communicating with the Respondent, and that he was "distracted and difficult to follow."

The Board retired to determine whether there had been a violation. The Board finds from the evidence before us that there is, in fact, a violation of 13.M. The Board then heard evidence as to sanctions. The Bar introduced no current medical evidence. In July, 2005, the Bar dismissed for "exceptional circumstances" certain complaints pending against Respondent due to his disability. The Board finds that there is a paucity of medical information; that which the Board has before it could reasonably be interpreted to indicate that the Respondent had diminished capacity to comply because of his disability. We therefore impose a Public Reprimand.

Pursuant to Part Six, Section IV, Paragraph 13.B.8.c. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess all costs against the Respondent.

A copy teste shall be served by certified mail, return receipt requested, upon the Respondent, Lawrence Bradford Haskin, at his address of record with the Virginia State Bar, 1816 Duke of Norfolk Quay, Virginia Beach, Virginia 23454; by regular mail to his guardian *ad litem*, Frank George Uvanni, 9410 Atlee Commerce Boulevard, Ashland, Virginia, 23005 and by hand to Paul D. Georgiadis, Assistant Bar Counsel, at 707 East Main Street, Suite 1500, Richmond, Virginia, 23219.

ENTERED this 28 day of September, 2005.
THE VIRGINIA STATE BAR DISCIPLINARY BOARD
By: Joseph R. Lassiter Jr., Acting Chair

(**Editor's Note:** *Respondent has noted an appeal with the Virginia Supreme Court.*)
VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
JAMES B. HOVIS, ESQUIRE
VSB Docket No. 05-041-0517

ORDER OF SUSPENSION

THIS MATTER came to be heard on September 23, 2005, before a duly convened panel of the Disciplinary Board consisting of James L. Banks, Jr., Acting Chair, William H. Monroe, Jr., Robert E. Eicher, William E. Glover, and V. Max Beard, Lay Member. The Virginia State Bar was represented by Seth M. Guggenheim, Assistant Bar Counsel. James B. Hovis (the "Respondent") did not appear, but was represented by counsel Charles E. Ayers, Jr. The Acting Chair polled the members of the Board Panel as to whether any of them was conscious of any personal or financial interest or bias which would preclude any of them from fairly hearing this matter and serving on the panel, to which inquiry each member responded in the negative.

Tracy Stroh, Court Reporter of Chandler & Halasz, P.O. Box 9349, Richmond, VA 23227, (804) 730-1222, after being duly sworn, reported the hearing and transcribed the proceedings. 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.

This matter came before the Board on the Subcommittee Determination (Certification) served by mail upon the Respondent on April 28, 2005 after duly being issued by a subcommittee of the Fourth District Committee duly convened on January 12, 2005.

On June 1, 2005, the Board entered a Pre-Hearing Order, which among other things, set deadlines for filing witness lists and exhibits. The Pre-Hearing Order was served upon the Respondent by the Clerk of the Disciplinary System. The Respondent did not file any exhibits or witness lists. Furthermore, as set forth in the Certification Regarding Stipulations filed by Bar Counsel, the Virginia State Bar, despite the exercise of due diligence and the making of a good faith effort to secure the Respondent's cooperation in entering into stipulations, was unsuccessful in procuring any stipulations. The Virginia State Bar's exhibits, designated as numbers 1 through 12 were admitted without objection during the pre-hearing conference which was conducted by telephone on Wednesday, September 14, 2005 at 9:00 A.M. The respondent failed to attend the pre-hearing conference.

On September 12, 2005, the Virginia State Bar received a letter from Charles E. Ayers, Jr., counsel for James B. Hovis. That letter requested a continuance of the hearing set for September 23, 2005. On September 12, 2005, Seth M. Guggenheim, Assistant Bar Counsel, responded to the request for continuance objecting to the request and informing counsel for the Respondent that the continuance request would be decided by the Board during its telephone conference of September 14, 2005.

James L. Banks, Jr., Acting Chair conducted the pre-trial conference on September 14, 2005, heard the request for continuance and denied it.

At the beginning of the hearing, before the presentation of evidence by the Bar, counsel for the Respondent renewed his Motion for a continuance and offered Respondent's Exhibit 1 which purported to be a copy of a Subpoena issued by the Securities and Exchange Commission for an appearance by the Respondent before the Securities and Exchange Commission on September 23, 2005, that Subpoena having been issued on or about August 11, 2005. In answer to a question from the Board, counsel for the Respondent stated that he did not know if the Subpoena had been served. The Board considered the request for a continuance and denied the Motion.

Counsel for the Respondent made a motion that the complaint against the Respondent should be dismissed for lack of jurisdiction. Counsel for the Respondent argued that the Respondent's license had been suspended on October 13, 1998 for failure to complete the CLE requirements then in effect, had been suspended on October 26, 1998 for non-payment of annual dues and non-filing of mandatory insurance, and had been cancelled on January 10, 2001 for non-payment of annual dues. Counsel for the Respondent argued that these actions by the Bar took the Respondent outside the jurisdiction of the Virginia State Bar and stripped the Bar of jurisdiction in the pending disciplinary matters.

Assistant Bar Counsel offered Exhibits 13 and 14, consisting of a transcript of the September 14, 2005 telephone conference and the Bar's Affidavit of Standing. The exhibits were admitted without objection. The Board deliberated on the Motion to Dismiss for lack for jurisdiction and then denied the Motion. The Board then heard opening statements from Bar Counsel and counsel for the Respondent. The Bar Counsel then presented its case. The Respondent presented no evidence and called no witnesses.

Following the conclusion of the presentation of evidence, the matter was argued by Assistant Bar Counsel and by counsel for the Respondent. The Board then deliberated and made the following findings of fact on the basis of clear and convincing evidence:

I. FINDINGS OF FACT

1. At all times relevant to the matters set forth herein, James B. Hovis, Esquire (hereafter "Respondent"), was an attorney licensed to practice law in the Commonwealth of Virginia, although not in good standing.

2. On August 3, 2000, Justice Ira Gammerman of the Supreme Court, New York County, New York, entered an Order of Commitment, which, *inter alia*, declared the Respondent guilty of contempt of court for having willfully disobeyed a prior order of that Court directing the Respondent to appear for an examination to be conducted by counsel for a judgment creditor of PHLO Corporation.

3. In a civil matter pending before the United States District Court for the Southern District of New York, the Respondent was ordered to appear before United States District Judge Denny Chin on February 15, 2002, to show cause why an order for Respondent's arrest should not be issued. The Respondent failed to appear pursuant to such order to show cause.

4. In the same civil matter pending before the United States District Court for the Southern District of New York, the Respondent was ordered to appear before the Court on March 12, 2002, to explain why he should not be held in further contempt of that Court. The Respondent failed to appear pursuant to such order.

5. In consequence of Respondent's failures to appear in the federal court matter, as referred to above, the United States District Court for the Southern District of New York issued a warrant for Respondent's arrest on May 21, 2002.

6. On or about August 20, 2004, with regard to a matter that had been pending before the Superior Court of New Jersey, Hudson Vicinage, the Respondent transmitted by facsimile a letter bearing his signature to Superior Court Judge Maurice J. Gallipoli. *Inter alia*, the Respondent, a principal of one or more corporate parties that had been proceeded against in litigation before the said judge, accused the judge of having acted improperly, illegally, with impunity, wrongfully, and as part of the opposing party's "team." The letter further stated to the judge that the Respondent's corporation "is aware that the New Jersey media has reported allegations that you have ruled on another case based on your political connections to the Hudson County Democratic Organization and that you once again ignored very clear statutory law for some alternative agenda."

7. On November 16, 2004, Virginia State Bar Investigator James W. Henderson contacted the Respondent by telephone regarding a complaint that had been filed against the Respondent with the Virginia State Bar. The Respondent advised the investigator that he hadn't practiced law in eight years and that he did not give "a rat's ass" about a complaint in Virginia. The investigator asked the Respondent for an address to which could be mailed a copy of the Complaint inasmuch as the Respondent had failed to maintain an accurate address of record with the Virginia State Bar. The Respondent stated to the investigator that he did not have to deal with a "scumbag piece of shit," and hung up.

8. In response to concerns raised on Respondent's behalf concerning the manner in which the Bar Complaint in this matter was being investigated and prosecuted, Bar Counsel wrote to the Respondent on February 10, 2005, stating, *inter alia*, as follows:

> Your current address of record is 124 West 60th Street, Apartment 45-F, New York, New York 10023. Mail sent to that address is returned. A written request to change your address of record should be directed to Diana L. Balch, Membership Director, Virginia State Bar, 707 E. Main Street, Suite 1500, Richmond, Virginia 23219. Failure to change your address of record may result in your not receiving notices and a disciplinary charge under Rule of Professional Conduct 3.4(d) for knowingly disobeying a standing rule of a tribunal.

9. The Respondent acknowledged Bar Counsel's February 10, 2005, letter in a letter dated March 21, 2005. Bar Counsel responded to the Respondent by letter dated March 23, 2005, observing, *inter alia*, that Respondent's current address of record was still the New York address set forth above. The Respondent was once again admonished to change his address of record. In her letter, Bar Counsel set forth an excerpt of the Rules of the Supreme Court of Virginia regarding the duty to promptly advise the Virginia State Bar's membership department of changes of address, and she again set forth the Rules of Professional Conduct applicable thereto.

10. Notwithstanding Bar Counsel's two written notices to the Respondent that he had a duty to change his address of record with the Virginia State Bar, the Respondent failed to make the noticed change of address.

II. NATURE OF MISCONDUCT

The Certification charged violations of the following provisions of the Virginia Rules of Professional Conduct:

RULE 3.4 Fairness to Opposing Party And Counsel

A lawyer shall not:

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

RULE 8.1 Bar Admission And Disciplinary Matters

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

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

RULE 8.2 Judicial Officials

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or other judicial officer.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

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

III. DISPOSITION

Upon review of the evidence presented including the exhibits presented by Bar Counsel on behalf of the Virginia State Bar, and considering argument by counsel for the Virginia State Bar and by counsel for the Respondent, at the conclusion of the evidence regarding misconduct, the Board recessed to deliberate. After due deliberation, the Board reconvened and stated its unanimous findings as follows:

The Board determined that the Bar proved, by clear and convincing evidence, that the Respondent had violated Rules 3.4(d), 8.1(c), 8.2, and 8.4(b). Thereafter, the Board called for evidence of aggravation and mitigation of the violations found. The Bar presented a certificate that the Respondent had no prior disciplinary record in Virginia. The Board also heard argument from Bar Counsel and from counsel for the Respondent as to the appropriate sanction. The Board then recessed to deliberate the appropriate sanction to impose upon its findings of misconduct by the Respondent.

IV. SANCTION

After due deliberation, the Board reconvened to announce the sanction imposed. The Board unanimously imposed the sanction of a **FIVE-YEAR SUSPENSION** of the Respondent's license to practice law in the Commonwealth of Virginia, with such suspension effective immediately.

The Board's unanimous sanction decision is based on the totality of the circumstances. The Board has found that the Virginia State Bar had acted with diligence to communicate with the Respondent to make certain that the Respondent was aware of the requirements to remain in good standing as a member of the Virginia State Bar. In addition, the Board found that the Virginia State Bar made substantial and consistent efforts to notify the Respondent of the charges against him and give him an opportunity to participate in the disciplinary process in Virginia, and to defend himself in that process.

The Respondent's abusive and profane treatment of the Bar's investigator, the Respondent's stark indifference to the authority of and respect for a federal district court, and his intemperate language toward a judge of a state court in New Jersey influenced the Board's decision as to the appropriate sanction. The Board took into consideration the fact that the Respondent had no previous disciplinary record in Virginia.

Accordingly, it is **ORDERED** that the license of the Respondent, James B. Hovis, Esq., to practice in the Commonwealth of Virginia is hereby suspended for five (5) years effective September 23, 2005.

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

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

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

It is further **ORDERED** that the Clerk of the Disciplinary System shall mail an attested copy of this Order to Respondent, James B. Hovis, at his address of record with the Virginia State Bar, being 124 West 60th Street, Apartment 45F, New York, New York 10023, by certified mail, return receipt requested, and by regular mail to Seth M. Guggenheim, Assistant Bar Counsel, Virginia State Bar, 100 North Pitt Street, Suite 310, Alexandria, Virginia 32314.

ENTERED this 21st day of October, 2005
VIRGINIA STATE BAR DISCIPLINARY BOARD
BY: James L. Banks, Jr., Acting Chair

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
CHARLES EVERETT MALONE
VSB DOCKET NO. 06-000-0648

ORDER OF SUSPENSION

THIS MATTER came before the Board, pursuant to a duly issued notice, issued according to Part 6, Section IV, Paragraph 13.I.2.G. of the Rules of the Supreme Court of Virginia, requiring Charles Everett Malone to show cause why the alternative disposition contained in the Disciplinary Board determination (Order of Suspension with Terms) dated December 7, 2004 should not be imposed for his failure to abide by the required terms.

A hearing was held at 9:00 A.M. on Friday, October 28, 2005 in the General Assembly Building, House Room C, First Floor, 910 Capital Street, Richmond, Virginia 23219. The Virginia State Bar was represented by Assistant Bar Counsel Edward L. Davis. Mr. Malone did not appear, despite his case being called both in the hearing room and the adjacent hall. The Bar proceeded in his absence.

The Board consisted of James L. Banks Jr., Second Vice Chair; Stephen A. Wannall (lay member); William C. Boyce Jr.; Glenn M. Hodge; and H. Taylor Williams IV. The members of the Board were polled as to whether any conflict or bias existed which would affect their ability to hear the case fairly, and all including the Chairman answered in the negative. The hearing was recorded and reported by Tracy J. Stroh, RPR, of the firm of Chandler and Halasz, P.O. Box 9349, Richmond, Virginia, (804) 730-1222.

I. FINDINGS OF FACT

The Board found the following to be matters of fact:

1. Mr. Malone was suspended on December 7, 2004 for several instances of misconduct relating to trust account violations, fees, competence, and diligence.

2. Mr. Malone's suspension was subject to a term which provided that he would issue a refund in the amount of $3,060.00 to Vivian L. Warren no later than June 10, 2005. Subsequently, Mr. Malone requested and received an extension of the time within which he was required to pay the refund to August 31, 2005.

3. As of the date of this hearing, Ms. Warren has received no refund.

4. The alternate sanction, should Mr. Malone fail to satisfy this term, was an additional two year suspension.

II. DISPOSITION

The burden is on Mr. Malone to show cause why the alternate sanction should not be imposed. Mr. Malone has failed to meet his burden and the alternate sanction of an additional suspension of two years is hereby imposed. The additional suspension will be effective December 7, 2006 it being the intent of the Board to run the additional suspension consecutive to the original suspension.

The Respondent must comply with the requirements of Part 6, Section IV, Paragraph 13.M. of the Rules of the Supreme Court of Virginia and notify all appropriate persons about the suspension of his license if he is handling any client matters at this time. If the Respondent is not handling any client matters on the effective date of his license suspension, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13.M shall be determined by the Virginia State Disciplinary Board, unless the Respondent makes a timely request for hearing before a three-judge court.

III. COSTS

Pursuant to Part 6, Section IV, Paragraph 13.B.8c of the Rules, the clerk of the Disciplinary System shall assess costs.

It is further **ORDERED** that the Clerk of the Disciplinary System shall mail an attested copy of this order to respondent at his address of record with the Virginia State Bar, being The Law Firm of Charles E. Malone, 500 East Main Street, Suite 1218, Norfolk, Virginia 23510, by certified mail, return receipt requested, and by regular mail to Edward L. Davis, Assistant Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

ENTERED this 16th day of November, 2005
VIRGINIA STATE BAR DISCIPLINARY BOARD
BY: James L. Banks Jr., 2nd Vice Chair

(**Editor's Note:** *Respondent has noted an appeal with the Virginia Supreme Court.*)
VIRGINIA

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
WILLIAM P. ROBINSON, JR.
VSB Docket No. 04-022-2192

SUSPENSION ORDER

THIS MATTER came on to be heard on October 28, 2005, before a panel of the Disciplinary Board consisting of Robert L. Freed, Chair, Bruce T. Clark, Esquire, W. Jefferson O'Flaherty, Lay member, David R. Schultz, Esquire, and Rhysa Griffith South, Esquire. The Virginia State Bar ("VSB" or "the Bar") was represented by Paul D. Georgiadis, Esquire. The Respondent, William P. Robinson, Jr., appeared in person and was represented by Michael L. Rigsby, Esquire. The Chair polled the members of the Board Panel as to whether any of them was conscious of any personal or financial interest or bias which would preclude any of them from fairly hearing this matter and serving on the panel, to which inquiry each member responded in the negative. Teresa L. McLean, court reporter, P.O. Box 9349 Richmond, VA 23227, (telephone: 804-730-1222), after being duly sworn, reported the hearing and transcribed the proceedings.

The matter came before the Board on the Second District Committee Section II Subcommittee's Determination for Certification.

I. FINDINGS OF FACT

On July 6, 2005, the Board entered a Pre-Hearing Order, which among other things, set deadlines for filing witness lists and exhibits. The Clerk of the Disciplinary System served the Pre-Hearing Order on the Respondent. The Respondent and the Bar filed witness lists. The Respondent did not file any exhibits. The VSB Exhibits were admitted without objection during the Pre-Trial Conference conducted by telephone on October 19, 2005. During the October 28, 2005 hearing, counsel for the Bar and Respondent's counsel presented for the Board's consideration, witnesses *ore tenus*, additional exhibits and oral argument. Based on all the evidence before it, the Board makes the following findings of fact on the basis of clear and convincing evidence:

1. At all times relevant hereto, William P. Robinson, Jr., hereinafter the "Respondent", has been an attorney licensed to practice law in the Commonwealth of Virginia and his address of record with the Virginia State Bar has been 256 West Freemason Street, Norfolk, VA 23510-1221. The Respondent received proper notice of this proceeding as required by Part Six, § IV, ¶ 13 (E) and (I)(a) of the Rules of Virginia Supreme Court.

2. On July 11, 2005, Peter A. Dingman, Esquire, Second Vice Chair acting as Presiding Board Member of the VSB Disciplinary Board entered an Order denying Respondent's request that these proceedings be terminated in favor of a Three-judge Panel. On July 15, 2005, Respondent, by counsel, filed a Petition for a Writ of Prohibition appealing this decision. The Virginia Supreme Court has refused the Petition. During the October 28, 2005 preceding before the Disciplinary Board, Respondent's counsel renewed his objection to the jurisdiction of the Board, which objection was overruled by Robert L. Freed, Chair.

3. On November 2, 1996, the Complainant, Nathaniel Langston and his wife Elsie Langston retained Respondent to represent them in a personal injury action arising out of a three-vehicle accident that occurred in the City of Norfolk. At the time of the accident, Langstons were in route to an appointment with Respondent on an unrelated matter. Langstons related to the Respondent that at the time of the accident Mr. Langston was driving and Mrs. Langston was his passenger and while they were stopped at a red light, a Mr. Johnson drove his vehicle through a red light striking a vehicle operated by Mr. Spivey causing Spivey's vehicle to collide with Langston's vehicle.

4. Allstate Insurance's representative testified that Allstate had determined that neither of the Langstons nor Spivey (who was also an Allstate insured) were at fault in causing the accident and because the at-fault driver was uninsured, on or about May 20, 1997 Allstate settled the UM claim as presented by Spivey's attorney Hawkins.

5. On January 5, 1998[1], Respondent sent Langstons' insurance carrier "Allstate Insurance Company" a letter advising that he represented Langstons and asserting a potential claim under Langstons' uninsured motorist coverage, as it appeared that Johnson was an uninsured motorist.

FOOTNOTES

1 The parties agree that the letter incorrectly shows a January 5, 1997 date.

6. On June 22, 1998, Respondent sent Allstate Insurance another letter asserting Langstons claim and enclosing draft motions for judgment. The letter stated, "… this claim is being made pursuant to the uninsured motorist provisions of the Langston's policy."

7. On or about July 7, 1998, Respondent filed two motions for judgment in the Norfolk Circuit Court styled *Nathaniel Langston v. Tremayne D. Johnson and Rudolph Spivey*, and *Elsie M. Langston v. Tremayne D. Johnson and Rudolph Spivey*. Notwithstanding the requirements of Virginia Code § 38.2-2206 F[1], Respondent at no time served Allstate with the Langstons' motions for judgment.

8. Between August 11, 1998 and September 4, 1998, Allstate Insurance's representative called Respondent at his office on at least six occasions in an attempt to reach Respondent and discuss the merits of the Langston claims and a potential resolution of them. Respondent failed to respond on five occasions, and on the sixth occasion refused to give any information, stating that he would provide a demand package which he sent on September 16, 1998. During the aforesaid time and thereafter, Respondent never attempted to and in fact conducted no negotiations with Allstate Insurance to resolve the Langstons' claims.

9. After Respondent caused the Langstons' motions for judgment to be served upon the named defendants and trial was set for September 23, 1999, defendant Spivey's counsel on July 26, 1999 took the depositions of the Langstons. Respondent failed to notice either of the defendants for their depositions at that time and failed to take any depositions or propound discovery.

10. On August 19, 1999 Respondent corresponded with Mr. Langston stating that "I am recommending that we non-suit your wife's case because I do not believe she will be in a position to testify in a sufficiently cogent manner in connection with her case." Respondent admits that it was a mistake for him to have failed to advise the Langstons that as an injured passenger, Mrs. Langston's claim was viable even though she suffered from a non-accident related disability and may not have been able to testify as to the events or her medical bills.

11. On or about October 1, 1999, Respondent non-suited each of the Langston suits without advising the Langstons of the non-suits, of the import of the non-suits, of the possibility of a second opinion by other counsel, nor of the possibility of taking other steps and approaches to prosecuting or resolving the Langstons' claims.

12. Thereafter, Respondent failed to take any actions to protect the Langstons interests in pursuing their personal injury claim. Respondent by letter dated February 6, 2002 and referenced "Langston v. Johnson" assured Mr. Langston "We certainly intend to take care of your situation as expeditiously as possible." By this time, Langstons had been sued and a judgment taken against them for medical treatment related to the accident. Respondent assisted the Langtons in corresponding with the judgment creditor's attorney and Langstons paid the medical bills over time and the judgments were released in 2003.

13. At no time during Respondent's course of representing Langstons from 1996 when he was retained in the personal injury case through 2003 when the accident-related medical bills judgments were satisfied, did he ever advise them of their right to collect under their medical payments coverage although Respondent had had in his possession a copy of the Langstons' insurance policy as referenced in his January 5, 1997 transmittal letter to Allstate Insurance.

14. In response to Mr. Langston's inquiry about the status of the Langstons' personal injury case, Respondent sent Langston a letter dated February 10, 2004 advising that Respondent had not pursued Langstons' cases because Respondent had only gotten door (posted) service on the negligent party Johnson; that the second defendant Respondent had named in the suit Spivey had not been negligent; that because it appeared that Johnson lacked insurance there were no funds available to pay the award; and that Mrs. Langston's mental capacity issues caused her case to be terminated. Again, Respondent did not advise the Langstons of their right to collect under their medical payments coverage although Respondent had had in his possession a copy of the Langstons' insurance policy as referenced in his January 5, 1997 transmittal letter to Allstate Insurance.

II. MISCONDUCT

The Certification charged violations of the following provisions of the Rules of the Virginia Code of Professional Responsibility (for actions prior to January 1, 2000) and the Virginia Rules of Professional Conduct (for actions after January 1, 2000):

FOOTNOTES

1 If any action is instituted against the owner or operator of an uninsured or underinsured motor vehicle by any insured intending to rely on the uninsured or underinsured coverage provision or endorsement of this policy under which the insured is making a claim, then the insured shall serve a copy of the process upon this insurer in the manner prescribed by law, as though the insurer were a party defendant. The provisions of § 8.01-288 shall not be applicable to the service of process required in this subsection. Virginia Code § 38.2-2206(F).

DR 6-101. Competence and Promptness.

(A) A lawyer shall undertake representation only in matter in which:
(1) The lawyer can act with competence and demonstrate the specific legal knowledge, skill, efficiency, and thoroughness in preparation employed in acceptable practice by lawyers undertaking similar matters, or
(2) The lawyer has associated with another lawyer who is competent in those matters.
(B) A lawyer shall attend promptly to matters undertaken for a client until completed or until the lawyer has properly and completely withdrawn from representing the client.
(C) A lawyer shall keep a client reasonably informed about matters in which the lawyer's services are being rendered.

RULE 1.1 Competence

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

RULE 1.3 Diligence

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

RULE 1.4 Communication

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

DR 2-108 Terminating Representation

(D) Upon termination of representation, a lawyer shall take reasonable steps for the continued protection of a client's interests, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering all papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by applicable law.

RULE 1.16 Declining Or Terminating Representation

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

III. DISPOSITION

Upon review of the foregoing findings of fact, upon review of exhibits presented by Bar Counsel and the Respondent, upon evidence from witnesses presented on behalf of the Bar and upon evidence presented by Respondent in the form of his own testimony, and at the conclusion of the evidence regarding misconduct, the Board recessed to deliberate. After due deliberation the Board reconvened and stated its unanimous findings as follows:

1. The Board determined that the Bar failed to prove by clear and convincing evidence a violation of DR 6-101 (A).

2. The Board determined that the Bar did prove by clear and convincing evidence that the Respondent was in violation of DR 6-101 (B) by failing to attend promptly to the Langstons' personal injury cases until completed.

3. The Board determined that the Bar did prove by clear and convincing evidence that the Respondent was in violation of DR 6-101 (C) by failing to keep Langstons reasonably informed about the status of their cases until eight years after he accepted the representation and that when he did finally advise them of the status of the cases, Respondent misrepresented the grounds for his failures to timely advance their cases.

4. The Board determined that the Bar did prove by clear and convincing evidence that the Respondent was in violation of Rule 1.1 in failing to advise the Langstons of their rights to medical payments coverage, even though Respondent was aware that Langstons were subject to collection actions for accident related medical bills through 2003 and Respondent knew or should have known that Langstons' had medical payments coverage available to them.

5. The Board determined that the Bar did prove by clear and convincing evidence that the Respondent was in violation of Rule 1.3 in that Respondent failed to act diligently and promptly in handling Langstons' personal injury case or to re-file the non-suited cases within six months (i.e., by April 1, 2000) or to advise Langstons of the need to do so.

6. The Board determined that the Bar did prove by clear and convincing evidence that the Respondent was in violation of Rule DR 2-108(D) when he admittedly non-suited and then abandoned Mrs. Langstons' case in 1999, and knowing that she had a diminished mental capacity, took no steps to re-file her case or any other actions to protect her interests.

7. The Board determined that the Bar did prove by clear and convincing evidence that the Respondent was in violation of Rule 1.16 (d) in effectively terminating his representation of Langstons and not timely advising them of the many mistakes he made during the course of his representation, and thereby prejudicing them and preventing them from pursuing their viable claims.

SANCTION

Thereafter, the Board received further evidence of aggravation and mitigation from the Bar and Respondent, including Respondent's prior disciplinary record. The Board recessed to deliberate what sanction to impose upon its findings of misconduct by Respondent. After due deliberation the Board reconvened to announce the sanction imposed. The Chair announced the sanction as a **THREE (3) YEAR SUSPENSION** of the Respondent's license to practice law in the Commonwealth of Virginia with such suspension effective October 28, 2005.

The Board's unanimous finding is based upon the totality of the circumstances, including Respondent's failure to take any actions to protect the legal rights of the Langstons, his actions to cover up his mistakes and neglect in handling the Langston's case and the Respondent's lengthy and significant disciplinary record.

Accordingly, it is **ORDERED** that the Respondent, William P. Robinson, Jr.'s, license to practice law in the Commonwealth of Virginia is hereby suspended for three (3) years effective October 28, 2005.

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

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

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

It is further **ORDERED** that the Clerk of the Disciplinary System shall mail an attested copy of this order to Respondent at his address of record with the Virginia State Bar, being 256 West Freemason Street, Norfolk, VA 23510-1221, by certified mail, return receipt requested, and by regular mail to his counsel, Michael L. Rigsby, Esquire, Carrol, Rice & Rigsby, 7275 Glen Forest Drive, Forest Plaza II, Suite 310, Richmond, Virginia, 23226, by first-class mail, and a copy to Paul D. Georgiadis, Esquire, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

ENTERED this 3rd day of November, 2005
VIRGINIA STATE BAR DISCIPLINARY BOARD
Robert L. Freed, Chair

VIRGINIA

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
ANDREW MARK STEINBERG, ESQUIRE
VSB Docket No. 06-000-0083

ORDER OF SUSPENSION

THIS MATTER came on to be heard on September 23, 2005 before a panel of the Virginia State Bar Disciplinary Board convening at the Lewis F. Powell United States Courthouse, Tweed Courtroom, 1100 East Main Street, Richmond, Virginia 23219 on Friday, September 23, 2005. The Board was comprised of Joseph Roy Lassiter, Jr., Chair Designate, Theodore Smith, Ph.D., Lay member, Bruce Taylor Clark, Esquire, James Rudy Austin, Esquire, and Sandra Lea Havrilak, Attorney at Law. Proceedings in this matter were transcribed by Theresa Griffith, a registered professional reporter, Post Office Box 9349, Richmond, Virginia 23227, (804) 730-1222. The court reporter was sworn by the Chair, who then inquired of each member of the panel as to whether they had any personal or financial interest or bias which would interfere with or influence that member's determination of the matter. Each member, including the Chair, answered in the negative; the matter proceeded. The Respondent, Andrew Mark Steinberg, was present in person and proceeded *pro se*. The Virginia State Bar appeared by its counsel, Kathryn R. Montgomery, Esquire.

This matter came before the Disciplinary Board as a result of the Respondent being suspended from practicing law in the District of Columbia effective December 30, 2004, by order of the District of Columbia Court of Appeals, docket number 03-BG-801, decided December 30, 2004. A Rule to Show Cause and Order of Suspension and Hearing was entered on July 26, 2005. Subsequently, an Amended Rule to Show Cause and Order of Suspension and Continuance of Hearing from the Virginia State Bar Disciplinary Board was entered on August 30, 2005 at the request of the Respondent and agreement of Bar Counsel.

I. FINDINGS OF FACT

The Board makes the following findings of fact on the basis of clear and convincing evidence, to-wit:
During all times relevant hereto the Respondent, Andrew Mark Steinberg, was an attorney licensed to practice in the Commonwealth of Virginia (except for the period beginning July 26, 2005 to September 23, 2005, when his license to practice law was summarily suspended) and his address of record through July 28, 2005 was 7767 Asterella Court, Springfield, Virginia 22152. Further, on August 10, 2005 Respondent's address of record changed to 3581 Sherbrooke Circle, Woodbridge, Virginia 22192. (VSB Exhibit 1). The Respondent received proper notice of this proceeding as required by Part Six, § IV, ¶ 13(E) and (I)(a) of the *Rules of the Virginia Supreme Court*.

While practicing law in the District of Columbia, Respondent was found to have violated Rules 8.4(d), 8.1(b) and Rule XI, Section 2(b)(3) by failing to cooperate with Bar Counsel and to comply with an order of the Board issued in connection with the investigation of the ethics complaint underlying the matter. At the conclusion of all of his appeals, the District of Columbia Court of Appeals found that clear and convincing evidence existed that the Respondent had, in fact, violated the Rules and suspended Respondent from the practice of law for thirty (30) days and conditioned reinstatement upon proof of fitness to practice law. This order was final and entered on December 20, 2004.

By Rule to Show Cause and Order of Suspension and Hearing dated July 28, 2005, Respondent's license to practice law in Virginia was immediately suspended pursuant to Rules of Court, Part Six, § IV, ¶ 13(I)(7). Respondent was ordered to appear before the Virginia State Bar Disciplinary Board on August 26, 2005 at 9:00 A.M. to show cause why his license to practice law within the Commonwealth of Virginia should not be further suspended.

On August 26, 2005 the matter came on for a hearing and, at that time, said Rule contained an error regarding the sanction imposed by the District of Columbia. At the request of the Respondent and consent of Bar Counsel, the Amended Rule to Show Cause and Order of Suspension and Continuance of Hearing was issued requiring Respondent to appear on September 23, 2005 to show cause why his license to practice law within the Commonwealth of Virginia should not be further suspended until such time as his license to practice law in the District of Columbia is reinstated.

Virginia State Bar Exhibits 1, 2, 4, 5, 8, and 9 were received without objection. Virginia State Bar Exhibit 7 was admitted over Respondent's objection and Virginia State Bar Exhibits 3 and 6 were not admitted into evidence. Respondent stipulated that he was suspended by the State of Maryland indefinitely until he was reinstated to practice law in the District of Columbia.

II. DISPOSITION

Upon review of the foregoing findings of fact, of the exhibits presented by Bar Counsel on behalf of the Virginia State Bar, upon evidence presented by Respondent in the form of his own testimony, and at the conclusion of the evidence regarding the misconduct, the Board recessed to deliberate. After due deliberation, the Board reconvened and stated its findings as follows:

A) Paragraph 13(I)(7)(e), Part Six, § IV of the *Rules of the Supreme Court of Virgini*a, entitled "Disbarment or Suspension in Another Jurisdiction" provides in relevant part:

(e) The Respondent shall have the burden of proof, by clear and convincing evidentiary standard, and the burden of producing the record upon which the Respondent relies to support the Respondent's contentions, the Record is and shall be limited at the hearing to proof of the specific contentions raised in any written response. Except to the extent the allegations of the written response are established, the findings in the other jurisdictions shall be conclusive of all matters for purposes of the Proceedings before the Board.

Further, pursuant to ¶ 13(I)(7)(b)(3), Respondent relies upon the fact that the same conduct would not be grounds for disciplinary action or for the same discipline in Virginia. The Board finds that Respondent has met his burden of proof by clear and convincing evidentiary standard establishing the Virginia State Bar Disciplinary Board would not impose the same discipline as imposed by the District of Columbia Court of Appeals.

The Board further finds that the Commonwealth of Virginia could only impose the thirty (30) days suspension imposed July 26, 2005, on the issuance of the Rule to Show Cause, which Respondent has completed.

It is therefore **ORDERED** the suspension effective July 26, 2005 order is hereby terminated effective September 23, 2005.

It is further **ORDERED** that pursuant to ¶ 13(I)(2)(f)(2)(c) that Respondent's license was suspended for thirty (30) days and Respondent has completed said suspension.

It is further **ORDERED** that Respondent be reinstated to practice law in the Commonwealth of Virginia forthwith.

It is further **ORDERED** that, as directed in the Board's August 20, 2005 Summary Order in this matter, Respondent must comply with the requirements of Part Six, § IV, ¶ 13(M) of the *Rules of the Supreme Court of Virginia*. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the suspension of thirty (30) days of his license to practice law in the Commonwealth of Virginia to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall give notice within fourteen (14) days of the effective date of the Summary Order and make such arrangements as are required within forty-five (45) days of the effective date of the order. The Respondent shall also furnish proof to the Bar within sixty (60) days, or on or before October 26, 2005, that such notices have been timely given and such arrangements made for the disposition of matters.

It is further **ORDERED** that if the Respondent is not handling any client matters on the effective date of the suspension, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by ¶ 13(M) shall be determined by the Virginia State Bar Disciplinary Board, unless Respondent makes a timely request for a hearing before a three (3) judge court.

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

It is further **ORDERED** that the Clerk of the Disciplinary System shall mail an attested copy of this Order to Respondent at his address of record with the Virginia State Bar, being 3581 Sherbrooke Circle, Woodbridge, Virginia 22192, by certified mail, return receipt requested, and by regular mail to Kathryn R. Montgomery, Assistant Virginia State Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

Entered this 3rd day of November, 2005.
VIRGINIA STATE BAR DISCIPLINARY BOARD
Joseph R. Lassiter, Jr., Chair Designate

VIRGINIA:

BEFORE THE DISCIPLINARY BOARD OF THE VIRGINIA STATE BAR

IN THE MATTERS OF
GEORGE E. TALBOT, JR.
VSB Docket Nos. 05-010-1360 and 05-010-1361

MEMORANDUM ORDER

THESE MATTERS came to be heard on November 8, 2005, by the Disciplinary Board of the Virginia State Bar (the Board) by teleconference upon an Agreed Disposition between the parties, which was presented to a panel of the Board consisting of V. Max Beard, lay member, Sandra Lea Havrilak, Esq., Glenn W. Hodge, Esq., Robert E. Eicher, Esq., and Robert L. Freed, Esq., Chair presiding (the Panel). The Virginia State Bar appeared through its Assistant Bar Counsel, Richard E. Slaney (the Bar). The Respondent, George E. Talbot, Jr., Esq. (Mr. Talbot), was not able to be contacted in time to be present during the conference call but did sign and return the Agreed Disposition to the Bar.

Pursuant to the Rules of the Supreme Court of Virginia, Part 6, Section IV, Paragraph 13(B)(5)(c), the Bar and Mr. Talbot entered into a written proposed Agreed Disposition and the Bar presented same to the Panel.

The Chair swore the Court Reporter and polled the members of the Panel to determine whether any member had a personal or financial interest that might affect or reasonably be perceived to affect his ability to be impartial in these matters. Each member, including the Chair, verified they had no such interests.

The Panel heard argument from the Bar, was advised of Mr. Talbot's prior disciplinary record with the Bar and thereafter retired to deliberate on the Agreed Disposition. The Panel then accepted the Agreed Disposition by a majority decision. One panel member, V. Max Beard, voiced his dissent and indicated he felt the facts set forth in the Agreed Disposition combined with Mr. Talbot's prior disciplinary record merited a longer suspension. The Agreed Disposition having been accepted and approved by a majority of the panel; accordingly, the Board FINDS as follows:

I. FINDINGS OF FACT

1. At all times material to this Certification, the Respondent, George E. Talbot, Jr. (Talbot) was an attorney licensed to practice law in the Commonwealth of Virginia.

The Patrick Hill Appeal – 05-010-1360

2. Talbot was appointed to represent one Patrick Hill (Hill) in an appeal of his criminal conviction of possession of cocaine with intent to distribute in Portsmouth Circuit Court.

3. Talbot filed a motion seeking additional time in which to file the Petition for Appeal; however, the motion was filed after the time for filing the Petition for Appeal had expired. Accordingly, on July 27, 2004, the Court of Appeals of Virginia (the Court of Appeals) entered an order dismissing Hill's appeal.

4. The Bar opened a complaint file and on October 12, 2004, wrote Talbot enclosing the Notice of Appeal and the dismissal order and asking for a written answer. Although the Bar's letter referenced Talbot's duty under Rule 8.1(c), Talbot failed to respond to the Bar's inquiry. Thereafter, the matter was referred to Bar Investigator Eugene Reagan (Reagan).

5. Talbot acknowledged to Reagan that he did not advise Hill of the dismissal of the appeal or how to seek a delayed appeal, although he believes he advised a relative of Hill's of the dismissal of the appeal. Hill advised Reagan that he did learn of the dismissal of the appeal, although he says he learned that through another attorney.

6. During the summer of 2004, Talbot's brother, Fred Talbot, was in the hospital dying of cancer. Talbot was at the hospital on a daily basis and was also assisting his brother and his brother's family. This information was related to the Court of Appeals in the motion to extend the time for filing the Petition for Appeal.
[Rules applicable: 1.3(a), 1.4(a) and 8.1(c)]

The Larry Samuels Appeal – 05-010-1361

7. Talbot was appointed to represent one Larry Samuels (Samuels) in an appeal of his criminal conviction of possession of heroin with intent to distribute in Portsmouth Circuit Court.

8. Talbot failed to timely file the Petition for Appeal with the Court of Appeals. Accordingly, on August 8, 2002, the Court of Appeals entered an order dismissing Samuels' appeal.

9. The Bar opened a complaint file and on October 12, 2004, wrote Talbot enclosing the Notice of Appeal and the dismissal order and asking for a written answer. Although the Bar's letter referenced Talbot's duty under Rule 8.1(c), Talbot failed to respond to the Bar's inquiry. Thereafter, the matter was referred to Bar Investigator Eugene Reagan (Reagan).

10. In discussing the matter with Reagan, Talbot said he mailed the Petition for Appeal several days before the due date but believes that the Clerk's Office of the Court of Appeals subsequently called to request an omitted certificate, and Talbot's secretary instead sent a second copy of the full Petition for Appeal which may have been marked as late. In any event, Talbot acknowledged to Reagan that at that time he did not advise Samuels of the dismissal of the appeal or how to seek a delayed appeal.

11. Samuels served his time and was released in November of 2003. Talbot would testify Samuels came by the law office to pick up a jacket and Talbot advised him of the problem and the dismissal, but Samuels was not interested in pursuing the matter further. [Rules applicable: 1.3(a), 1.4(a), 8.1(c)]

12. In addition to mitigating facts as set forth above, Talbot is semi-retired, has taken himself off of criminal defense court appointment lists and limits his practice. He spends a fair portion of time now caring for his wife, who is suffering from a long-term illness.

II. NATURE OF MISCONDUCT

The Board finds that such conduct of Mr. Talbot constitutes a violation of the following Disciplinary Rules:

RULE 1.3 Diligence

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

RULE 1.4 Communication

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

RULE 8.1 Bar Admission And Disciplinary Matters

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

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

III. IMPOSITION OF SANCTION

A majority of the Board, having considered all the evidence before it, accepted and approved the Agreed Disposition. Having made that decision, the Board **ORDERS** that

Pursuant to Part 6, Section IV, Paragraph 13(I)(2)(f)(2)(c) of the Rules of the Supreme Court of Virginia, the license of the Respondent, George E. Talbot, Jr., to practice law in the Commonwealth of Virginia be, and the same is, hereby **SUSPENDED** for a period of sixty (60) days, effective December 1, 2005.

It is further **ORDERED** that costs shall be assessed by the Clerk of the Disciplinary System pursuant to the Rules of the Supreme Court of Virginia, Part Six, Section IV, Paragraph 13(B)(8)(c).

It is further **ORDERED** that the Clerk of the Disciplinary System shall deliver a copy of this order to the Bar and send a certified copy of this order by certified mail, return receipt requested, to the Respondent, George E. Talbot, Jr., Esq., at Suite 408, High & Crawford Streets, P.O. Box 1203, Portsmouth, Virginia 23705-1203, his last address of record with the Virginia State Bar, and to Richard E. Slaney, Assistant Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

It is further **ORDERED** that the Respondent shall comply with the requirements of Part 6, Section IV, Paragraph 13 (M) of the Rules of the Supreme Court of Virginia. The time for compliance with said requirements runs from December 1, 2005, the effective date of the suspension in these matters. 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.

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

Entered this the 10th day of November, 2005.
VIRGINIA STATE BAR DISCIPLINARY BOARD
Robert L Freed, Chair Presiding

VIRGINIA:
BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
STARR ILENE YODER
VSB Docket Nos. 05-010-0499 and 05-010-0500

ORDER

THIS MATTER was certified to the Board by a subcommittee of First District Disciplinary Committee. The hearing was held on September 23, 2005, in Courtroom A of the State Corporation Commission, 1300 E. Main Street, Richmond, Virginia 23219. The Respondent, Starr Ilene Yoder, was present, *pro se*. The Bar was represented by Richard E. Slaney, Assistant Bar Counsel. The Board consisted of William C. Boyce, Jr., William M. Moffet, W. Jefferson O'Flaherty, lay member; Russell W. Updike and Peter A. Dingman, First Vice Chair. The proceedings were reported and transcribed by Valarie L. Schmit, court reporter, Chandler & Halasz, P. O. Box 9349, Richmond, Virginia 23227, phone number (804) 730-1222.

Chairman Dingman polled the members of the board as to whether any conflict or bias existed which would prevent the members from fairly and impartially hearing the matter. Each member, including Mr. Dingman, answered in the negative.

The Bar's exhibits, numbered 1 through 17, were admitted without objection. Ms. Yoder submitted no list of proposed exhibits or witnesses, and offered none during the hearing.

Prior to the Bar presenting its case, Ms. Yoder admitted all alleged violations and stated her case would focus on mitigation.

The Bar called two witnesses: Bar Investigator Ronald Pohrivchak and Ms. Yoder. The Bar then rested, and Ms. Yoder presented no evidence.

A. FINDINGS OF FACT

AFTER GIVING due consideration to the Bar's evidence and the argument of the parties, the Board finds the following facts to have proven by clear and convincing evidence:

1. Ms. Yoder was admitted to practice on October 14, 1998, and has been a member of the Bar at all times relevant to this proceeding.

2. Ms. Yoder began practice with a multi-lawyer firm, at which she was not directly responsible for trust account matters and reconciliations.

3. She entered the solo practice of law, under the name of Tidewater Legal Clinic.

4. Ms. Yoder was solely responsible for the firm's accounting and banking matters, including the required trust account reconciliations.

5. In August of 2004, the Bar received notice from Wachovia Bank that four checks had been presented on the trust account of Tidewater Legal Clinic, for which there were insufficient funds as follows: a check dated 7/19/04 in the amount of $403.00; a check dated 7/20/04 in the amount of $69.00; a check dated 7/22/04 in the amount of $601; and a check dated 7/26/04 in the amount of $51.63.

6. As a result, the Bar sent four letters to Ms. Yoder at her address of record, two of which were dated August 9, 2004 and two of which were dated August 17, 2004 regarding these overdrafts and requesting a response and explanation. No response was received by the Bar.

7. On September 15, 2004, Ms. Yoder was contacted by Bar Investigator Ronald Pohrivchak. From that point forward, Ms. Yoder was fully cooperative with the Bar's Investigation and responsive to all requests.

8. Ms. Yoder failed to respond to the Bar's initial inquiries because she had moved her practice, but had failed to notify the Bar of her new address of record. As a result, she received no correspondence from the Bar, and was unaware of the complaint until she spoke with Mr. Pohrivchak.

9. The investigation revealed that Ms. Yoder had failed to pay federal and state employment taxes in 2002, 2003, and 2004. As a result, federal and state tax liens were filed against Ms. Yoder's operating account.

10. Believing that liens could not be filed against her trust account, Ms. Yoder began using her trust account as both escrow and operating accounts. Payroll, expenses, and other costs of operation were paid out of the trust account.

11. Ms. Yoder acknowledged that she would deposit flat fees into her escrow account immediately upon receipt, but before all work was performed.

12. Further, during this period, Ms. Yoder failed to perform the reconciliations required by the rules of professional conduct. Ms. Yoder claimed that she was balancing her checkbook on a monthly basis, but admitted that she was not performing the required quarterly reconciliations. She was unable to distinguish between funds belonging to the firm and funds belonging to clients. The account became over drawn on more than one occasion.

13. Despite Ms. Yoder's lack of diligence in maintaining her accounts, no client suffered a loss as a result.

B. MISCONDUCT

The Bar has alleged violations of the following rules:

RULE 1.15 Safekeeping Property

(a) All funds received or held by a layer or law firm on behalf of a client, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
  (1) funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution may be deposited therein; or
  (2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event, the disputed portion shall not be withdrawn until the dispute is finally resolved

(e) Record-Keeping Requirements, Required Books and Records. As a minimum requirement every lawyer engaged in the private practice of law in Virginia, hereinafter called "lawyer," shall maintain or cause to be maintained, on a current basis, book and records which establish compliance with Rule 1.15(a) and (c). Whether a lawyer or law firm maintains computerized records or a manual accounting system, such system must produce the records and information required by this Rule.
  (1) In the case of funds held in an escrow account subject to this Rule, the required books and records include:

(i) a cash receipts journal or journals listing all funds received, the sources of the receipts and the date of receipts. Checkbook entries of receipts and deposits, if adequately detailed and bound, may constitute a journal for this purpose. If separate cash receipts journals are not maintained for escrow and non-escrow funds, then the consolidated cash receipts journal shall contain separate columns for escrow and non-escrow receipts;

(ii) a cash disbursements journal listing and identifying all disbursements from the escrow account. Checkbook entries of disbursements, if adequately detailed and bound, may constitute a journal for this purpose. If separate disbursements journals are not maintained for escrow and non-escrow disbursements then the consolidated disbursements journal shall contain separate columns for escrow and non-escrow disbursements

(iii) subsidiary ledger. A subsidiary ledger containing a separate account for each client and for every other person or entity from whom money has been received in escrow shall be maintained. The ledger account shall by separate columns or otherwise clearly identify escrow funds disbursed, and escrow funds balance on hand. The ledger account for a client or separate subsidiary ledger account for a client shall clearly indicate all fees paid from trust accounts;

(iv) reconciliations and supporting records required under this Rule;

(v) the records required under this paragraph shall be preserved for at least five full calendar years following the termination of the fiduciary relationship.

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

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

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

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

(5) Reconciliations.

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

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

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

The Board finds that the Bar has proven by clear and convincing evidence a violation of this rule, owing to Ms. Yoder's use of the trust account as an operating account, thereby mingling firm funds and client funds; her failure to perform the required balances and reconciliations; and her failure to withdraw firm funds at the time they were earned.

The evidence also strongly indicated that Ms. Yoder regarded "flat fees" as earned even when some tasks remained to be completed in cases for which those fees were paid. The commingling of funds belonging to the firm and monies belonging to clients in a single account somewhat obscured this violation of the Rules, and the Board was not presented with a specific charge regarding this conduct, but we will not pass over the matter without noting that it is prohibited conduct. Ms. Yoder's ignorance on this point was troubling to the Board.

RULE 8.1 Bar Admission And Disciplinary Matters

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

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

The Board finds that an intentional violation of this rule was not proven by clear and convincing evidence. While it is true that Ms. Yoder failed to respond to the Bar's letters regarding her dishonored checks, it is clear that that failure was not volitional. While it was irresponsible for Ms. Yoder to fail to change her address of record with the Bar, it is also significant that Ms. Yoder was fully cooperative upon learning of the investigation. We feel that the spirit of this rule requires cooperation and that Ms. Yoder's initial lack of response was not due to an intent to be uncooperative. Her failure to notify the Bar of her correct address was relatively short lived (approximately four months), and she corrected her error promptly.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:
(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer;
(c) engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation;

The Board finds that violation of section (b) of this rule has been proven by clear and convincing evidence. Ms. Yoder's decision to use the former trust account as a combination trust and operating account was taken so as to avoid federal and state tax liens and to stay in business. The board finds that in doing so, Ms. Yoder has committed a deliberately wrongful act that reflects adversely on the Ms. Yoder's honesty, trustworthiness or fitness as a lawyer. The Board does not find a violation of section (c).

C. SANCTIONS

The Board is disturbed by Ms. Yoder's cavalier attitude toward the handling of other people's money. Likewise, the Board is quite concerned over Ms. Yoder's attempt to avoid paying the government its due. Such actions would, in most cases, justify a suspension or revocation.

Nevertheless, the Board feels as though Ms. Yoder's actions are mitigated by several factors:

1. Ms. Yoder has no disciplinary record.

2. Ms. Yoder's lack of experience, particularly as a solo practitioner.

3. The fact that no clients were harmed.

4. Ms. Yoder's remorse.

5. Ms. Yoder's high level of cooperation with the Bar, once she became aware of the investigation.

6. Ms. Yoder's payment of the taxes.

7. Ms. Yoder's recognition of her wrongdoing and acceptance of responsibility

The Board felt it was important to place terms on any discipline imposed upon Ms. Yoder and was frustrated by the inability to do so should a suspension be imposed. For this reason, as well as the mitigating factors listed above, the Board has determined to impose and hereby imposes a public reprimand with terms. The terms are as follows:

1. Ms. Yoder will attend six hours of continuing legal education relating to trust account matters and the handling of client funds. These credits will be earned within 12 months of this order. Ms. Yoder must certify to the Bar within 12 months of this order that she has satisfied this term. The continuing legal education credits earned pursuant to this term will not count toward those otherwise required to remain in good standing.

2. Ms. Yoder will hire a certified public accountant, who must certify that Ms. Yoder's accounting procedures are in compliance with Rule 1.15 (a), (e), and (f). This certification must be filed with the Bar within 30 days of this order. Such a certification must be filed quarterly thereafter, for a period of two years.

3. Ms. Yoder must read and certify that she has read and understood Legal Ethics Opinion 1322, which relates to types of fees and how they are handled.

4. Ms. Yoder must be without further violations of the Rules of Professional Conduct for one year.

Should Ms. Yoder fail to abide by these terms, an alternate sanction of suspension for one year and one day will be imposed.

D. 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 against the Respondent.

It is further **ORDERED** that the Clerk of the Disciplinary System shall mail an attested copy of this order to Respondent as her address of record with the Virginia State Bar, being 2704 Elizabeth Harbor Drive, Chesapeake, Virginia 23321, by certified mail, return receipt requested.

ENTERED this 10th day of October, 2005.
VIRGINIA STATE BAR DISCIPLINARY BOARD
Peter A. Dingman, First Vice Chair

VIRGINIA:

BEFORE THE SECOND DISTRICT COMMITTEE—SECTION II
OF THE VIRGINIA STATE BAR

IN THE MATTERS OF
TINYA LYNNETTE BANKS
VSB Docket Nos. 04-022-3710 (Cuffee), 04-022-2651 (Michailow), and 04-022-2501 (Pretlow)

SUBCOMMITTEE DETERMINATION (PUBLIC REPRIMAND)

On September 14, 2005, a meeting in these matters was held before a duly convened Subcommittee of the Second District Committee—Section II, consisting of Bobby Wayne Davis, Esquire, Mr. David M. Jones, (Lay Member), and Bretta Zimmer Lewis, Attorney at Law, Chair presiding.

Pursuant to an Agreed Disposition of the parties and Part 6, Section IV, ¶ 13G1c.(3) of the Virginia Supreme Court Rules of Court, the Second District—Section II Subcommittee of the Virginia State Bar hereby serves upon the Respondent, Tinya Lynette Banks, the following Public Reprimand:

VSB Docket No. 04-022-3710 (Cuffee)

I. FINDINGS OF FACT

1. At all times material to these allegations, the Respondent, Tinya Lynnette Banks, hereinafter "Respondent", has been an attorney licensed to practice law in the Commonwealth of Virginia.

2. Following Respondent's appointment as counsel for Guy R. Cuffee in January, 2004, Cuffee filed a complaint with the Virginia State Bar alleging Respondent's lack of diligence and failure to communicate.

3. In the course of its investigation, the Virginia State Bar wrote Respondent on June 29, 2004 to advise that the matter was referred for a Committee investigation. It further advised Respondent that "an investigator's demands for information constitute lawful demands under Rule 8.1(c)."

4. On August 13, August 19, and August 28, 2004, the bar's investigator left messages with Respondent at her office in the form of a voice mail message, a note, and a letter requesting that Respondent contact him regarding this and the other matters pending with Respondent.

5. Notwithstanding said notice and said demands for information, Respondent failed to respond to the bar until the bar moved to suspend Respondent's license for failure to respond to the bar's subpoena *duces tecum*.

II. NATURE OF MISCONDUCT

The Subcommittee finds that such conduct on the part of Respondent constitutes misconduct in violation of the following Rule of the Virginia Rules of Professional Conduct:

RULE 8.1 Bar Admission And Disciplinary Matters

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

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

VSB Docket No. 04-022-2651 (Michailow)

I. FINDINGS OF FACT

1. At all times material to these allegations, the Respondent, Tinya Lynnette Banks, hereinafter "Respondent", has been an attorney licensed to practice law in the Commonwealth of Virginia.

2. Respondent was retained by George Michailow on February 24, 2003 for post-divorce representation against Michailow's former spouse. At that time, Michailow paid Respondent $1,500, which she deposited into trust.

3. Michailow last had substantive contact with Respondent in an office visit on August 18, 2003 at which time Respondent agreed to proceed on a show-cause. Shortly thereafter Michailow asked Respondent for a copy of a letter from adverse counsel which Respondent never provided.

4. On October 22, 2003, Michailow wrote Respondent advising that he was terminating her, requesting that Respondent forward his file to successor counsel David Good, requesting a refund of unearned fees, and requesting that Respondent call him. Michailow's successor counsel repeated the request to Respondent for his client file on November 19, 2003 and on January 9, 2004. Through August 31, 2004, Respondent had not contacted Michailow, had not provided his file, and had not provided a refund or an explanation of his account balance.

5. Respondent's July 31, 2003 statement of account for Michailow reflected a credit balance of $882.50. Her final statement of account, dated September 10, 2004, reduced the credit balance to $732.50. Notwithstanding said balances, Respondent's trust account bank statements reflect balances dropping below the credit balance for the months of December, 2003—$211.03 total balance for the trust account, January, 2004—$203.51, February, 2004—$196.01, and March, 2004—$188.51. When Respondent finally issued a refund of $732.50 to Michailow, she paid it from her operating account.

6. After August, 2003, Respondent failed to maintain her trust account records. This included failing to reconcile her trust account.

7. With the notice of referral of this matter to the Second District Committee—Section II, Respondent was further advised that "an investigator's demands for information constitute lawful demands under Rule 8.1(c)."

8. The bar's investigator attempted to contact Respondent by leaving messages requesting that she contact him, with messages left on May 11, 2004, May 20, 2004, June 2, 2004, August 13, 2004, August 19, 2004, and August 28, 2004.

9. Notwithstanding said notice and said demands for information, Respondent failed to respond to the bar investigator until the bar moved to suspend Respondent's license for failure to respond to the bar's subpoena *duces tecum*.

II. NATURE OF MISCONDUCT

The Subcommittee finds that such conduct on the part of Respondent constitutes misconduct in violation of the following Rules of the Virginia Rules of Professional Conduct:

RULE 1.4 Communication

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

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 1.15 Safekeeping Property

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

(1) Insufficient fund check reporting.

(i) Clearly identified escrow accounts required. A lawyer or law firm shall deposit all funds held in escrow in a clearly identified account, and shall inform the financial institution in writing of the purpose and identify of such account. Lawyer escrow accounts shall be maintained only in financial institutions approved by the Virginia State Bar, except as otherwise expressly directed in writing by the client for whom the funds are being deposited;

(ii) Overdraft notification agreement required. A financial institution shall be approved as a depository for lawyer escrow accounts if it shall file with the Virginia State Bar an agreement, in a form provided by the Bar, to report to the Virginia State Bar in the event any instrument which would be properly payable if sufficient funds were available, is presented against a lawyer escrow account containing insufficient funds, irrespective of whether or not the instrument is honored. The Virginia State Bar shall establish rules governing approval and termination of approved status for financial institutions. The Virginia State Bar shall maintain and publish from time to time a list of approved financial institutions.

No escrow account shall be maintained in any financial institution which does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be canceled by the financial institution except upon thirty (30) days notice writing to the Virginia State Bar, or as otherwise agreed to by the Virginia State Bar. Any such agreement may be canceled without prior notice by the Virginia State Bar if the financial institution fails to abide by the terms of the agreement;

(ii) Overdraft reports. The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(a) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors;

(b) in the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account name, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby;

(c) such reports shall be made simultaneously with and within the time provided by law for notice of dishonor to the depositor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five (5) banking days of the date of presentation for payment against insufficient funds;

(iv) Financial institution cooperation. In addition to making the reports specified above, approved financial institutions shall agree to cooperate fully with the Virginia State Bar and to produce any lawyer escrow account or other account records upon receipt of a subpoena therefor.

A financial institution may charge for the reasonable costs of producing the records required by this Rule.

(v) Lawyer cooperation. Every lawyer or law firm shall be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule;

(ii) Definitions. “Lawyer” means a member of the Virginia State Bar, any other lawyer admitted to regular or limited practice in this State, and any member of the bar of any other jurisdiction while engaged, *pro hac vice* or otherwise, in the practice of law in Virginia;

“Lawyer escrow account” or “escrow account” means an account maintained in a financial institution for the deposit of funds received or held by a lawyer or law firm on behalf of a client;

“Client” includes any individual, firm, or entity for which a lawyer performs any legal service, including acting as an escrow agent or as legal representative of a fiduciary, but not as a fiduciary. The term does not include a public or private entity of which a lawyer is a full time employee;

"Dishonored" shall refer to instruments which have been dishonored because of insufficient funds as defined above;

"Financial institution" and "bank" include regulated state or federally chartered banks, savings institutions and credit unions which have signed the approved Notification Agreement, which are licensed and authorized to do business and in which the deposits are insured by an agency of the Federal Government;

"Insufficient Funds" refers to an overdraft in the commonly accepted sense of there being an insufficient balance as shown on the bank's accounting records; and does not include funds which at the moment may be on deposit, but uncollected;

"Law firm" incudes a partnership of lawyers, a professional or nonprofit corporation of lawyers, and a combination thereof engaged in the practice of law. In the case of a law firm with offices in this State and in other jurisdictions, these Rules apply to the offices in this State, to escrow accounts in other jurisdictions holding funds of clients who are located in this State, and to escrow accounts in other jurisdictions holding client funds from a transaction arising in this State;

"Notice of Dishonor" refers to the notice which, pursuant to Uniform Commercial Code Section 3-508(2), must be given by a bank before its midnight deadline and by any other person or institution before midnight of the third business day after dishonor or receipt of notice of dishonor. As generally used hereunder, the term notice of dishonor shall refer only to dishonor for the purpose of insufficient funds, or because the drawer of the bank has no account with the depository institution;

"Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under Uniform Commercial Code Section 4104, if sufficient funds were available.

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

(3) Deposit of mixed escrow and non-escrow funds other than fees and retainers. Mixed escrow and non-escrow funds shall be deposited intact to the escrow account. The non-escrow portion shall be withdrawn upon the clearing of the mixed fund deposit instrument;

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

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

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

(2) 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;

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

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

RULE 1.16 Declining Or Terminating Representation

(e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and shall be returned to the client upon request,

whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Upon request, the client must also be provided copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer/client relationship.

RULE 8.1 Bar Admission And Disciplinary Matters

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

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

VSB Docket No. 04-022-2501 (Pretlow)

I. FINDINGS OF FACT

1. At all times material to these allegations, the Respondent, Tinya Lynnette Banks, hereinafter "Respondent", has been an attorney licensed to practice law in the Commonwealth of Virginia.

2. Respondent was retained by Richard Pretlow on or before June 18, 2003 to pursue a used car dealer regarding a note pay-off. Pretlow paid Respondent a total of $1,500.00 by August 24, 2003, being the full initial payment requested in the retainer agreement.

3. Notwithstanding Pretlow's payment and Respondent's agreement to proceed, Respondent did not proceed in this matter. Ultimately Pretlow resolved the matter himself after his repeated messages to Respondent after Respondent failed to respond to Pretlow's repeated requests for information on the matter.

4. With the notice of referral of this matter to the Second District Committee—Section II, Respondent was further advised that "an investigator's demands for information" constitute lawful demands under Rule 8.1(c)."

5. The bar's investigator attempted to contact Respondent by leaving messages requesting that she contact him, with messages left on May 11, 2004, May 20, 2004, June 2, 2004, August 13, 2004, August 19, 2004, and August 28, 2004.

6. Notwithstanding said notice and said demands for information, Respondent failed to respond to the bar investigator until the bar moved to suspend Respondent's license for failure to respond to the bar's subpoena *duces tecum*.

II. NATURE OF MISCONDUCT

The Subcommittee finds that such conduct on the part of Respondent constitutes misconduct in violation of the following rule of the Virginia 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 8.1 Bar Admission And Disciplinary Matters

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

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

III. PUBLIC REPRIMAND

The Subcommittee notes some mitigating evidence, including refunds in full of all unearned fees in VSB Docket No. 04-022-2651 (Michailow) and in VSB Docket No. 04-022-2501 (Pretlow), and the absence of any prior discipline record. Accordingly, it is the decision of the Subcommittee to impose a PUBLIC REPRIMAND on Respondent, Tinya Lynette Banks, and she is so reprimanded.

The Clerk of the Disciplinary System shall assess costs.

SECOND DISTRICT—SECTION II SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

By: Bretta Zimmer Lewis
Subcommittee Chair

CERTIFICATE OF SERVICE

I certify that I have this 18th day of October 2005, mailed by CERTIFIED MAIL—RETURN RECEIPT REQUESTED, a true and correct copy of the executed Subcommittee Determination (Public Reprimand) to Respondent Tinya Lynette Banks, Attorney at Law, Janaf Office Building, Suite 508, 5900 East Virginia Beach Blvd., Norfolk, VA 235024, her last known address of record with the Virginia State Bar.

Paul D. Georgiadis
Assistant Bar Counsel

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

IN THE MATTER OF
JOHN EDWARD STANLEY
VSB Docket No. 04-102-3712

DISTRICT COMMITTEE DETERMINATION
(PUBLIC REPRIMAND WITH TERMS)

On October 20, 2005 a hearing in this matter was held before a duly convened Tenth District Committee, Section II, panel consisting of Gregory Dwayne Edwards, Esq., Chair Presiding; Elsey Allen Harris, III, Esq; Robert Lucas Hobbs, Esq; Stanford Thomas Mullins, Esq; Scott Wayne Mullins, Esq; Donald Merle Williams, Jr., Esq.; and Mrs. Sandra Montgomery, lay member.

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

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

I. Findings Of Fact

1. At all times relevant to this matter, Respondent John Edward Stanley (hereinafter "the Respondent") was an attorney licensed to practice law in the Commonwealth of Virginia.

2. The Respondent served as court-appointed counsel for the Complainant Donald E. Honaker (hereinafter "Mr. Honaker") in a criminal case that went to trial on July 26, 2002 in the Russell County Circuit Court. After his bench trial and conviction, Mr. Honaker was incarcerated in the Russell County Jail for grand larceny (CR02-5540) and breaking and entering (CR02-5542). According to Mr. Honaker, he was convicted for allegedly accompanying another individual, Kenny Lee Dye, in the break-in. Mr. Honaker received 10 years on each charge with 5 years suspended on each charge. The 5 years remaining on each sentence were ordered to run concurrently.

3. Mr. Honaker asked the Respondent to file an appeal on his behalf.

4. On September 24, 2002, a final judgment order was entered by the Russell County Circuit Court.

5. On October 15, 2002, the Respondent visited Mr. Honaker in jail. According to the Respondent, this is when he learned that Kenny Lee Dye had changed his testimony about Mr. Honaker's involvement in the break-in. The Respondent then met with Mr. Dye who was also incarcerated. According to the Respondent, during this meeting, Mr. Dye said that Mr. Honaker was not involved in the subject offenses.

6. On or about October 21, 2002, the Respondent timely mailed a Notice of Appeal to the Court of Appeals.

7. The Respondent's file contains a February 2003 document from Counsel Press printing service stating, in part, "[p]lease keep in mind that we will prepare your appendix and provide an advance copy to make your brief writing a bit easier."

8. On February 24, 2003, the Court of Appeals granted Mr. Honaker's petition for appeal filed by the Respondent. Per the Court's Order, Mr. Honaker was required to file an appendix with an opening brief.

9. On April 9, 2003, the Respondent moved for a 7-day Extension of Time to File Appendix and File Appellant's corrected brief. By Order, the Court of Appeals granted an extension until April 14, 2003 to file the appendix.

10. On April 14, 2003, the Respondent moved the Court for a 30-day extension to file the appendix, to file Appellant's designation, and to file a corrected brief. For the second time, the Respondent stated "[t]he appellant has not been able to arrange for the appendix to be published and make corrections to the appellant's brief."

11. On April 29, 2003, the Court of Appeals granted an extension until May 2, 2003 to file the appendix. The appellant's motion to file a corrected brief was denied with the exception that the appellant was permitted to file a replacement brief, which references the appendix pursuant to Rules 5A:20(c) and (d).

12. On May 2, 2003, the Respondent moved for Extension of Time to File Amended Appendix and file Appellant's corrected brief.

13. On May 7, 2003, by Order, the Court of Appeals recounted that on April 9, 2003, pursuant to appellant's motion for extension of time to file the appendix, the Court granted the appellant an extension of time from April 5, 2003 to April 14, 2003 to file the appendix. On April 29, 2003, pursuant to a second motion for extension of time to file the appendix, the court granted appellant additional extension from April 14, 2003 to May 2, 2003 to file the appendix. Per the Order, "[a]s it does not appear from a review of the Court's records that an appendix has been filed in this case, appellant's motion to file an amended appendix is denied." The Court further ordered appellant to show cause by May 17, 2003 as to why the appeal should not be dismissed for failure to file an appendix.

14. On May 16, 2003, the Respondent responded to the Show Cause stating, in part, "[t]he counsel for appellant failed to have the appendix properly file, but can have filed by May 24, 2003. In the interest of justice the appellant would ask for time to properly have all necessary documents filed."

15. On June 23, 2003, by Order, the Court of Appeals dismissed Mr. Honaker's appeal. According to the Court of Appeals, Appellant filed an opening brief on April 7, 2003 but failed to file an appendix. Accordingly, on May 7, 2003, after granting two extensions of time to file the appendix, the Court ordered appellant to show cause why this appeal should not be dismissed for failure to file an appendix. On May 16, 2003, appellant responded to the show cause by requesting additional time to file the appendix until May 24, 2003. As of June 23, 2003, appellant failed to file an appendix.

16. The Respondent would testify that he spoke with Mr. Honaker by phone sometime at the end of June 2003 or in early July 2003 to discuss Mr. Honaker's options upon the Court of Appeals' dismissal of the appeal. By contrast, Mr. Honaker would testify that he does not recall such a conversation occurring at this time, and he specifically denies learning that a granted appeal had been dismissed.

17. On August 29, 2003, the Respondent wrote to Mr. Honaker stating, in part, that he "will be moving to get your case back to the Court of Appeals as soon as possible. I will keep you informed on the progress of the case."

18. The Respondent did not inform Mr. Honaker of the reasons why his appeal had been dismissed, and he neither provided Mr. Honaker with copies of any of his filings in the Court of Appeals nor with a copy of the dismissal order. Mr. Honaker was unaware that his Petition for Appeal had been granted by the Court of Appeals.

19. On or about November 22, 2003, Mr. Honaker wrote the Respondent seeking assistance with his case.

20. On December 18, 2003, the Respondent wrote to Mr. Honaker stating, in part, that "I will try to get you a new trial, but I can not promise I will be able to get you a new trial. I don't know if Kenny's change in testimony will result in a new trial being granted."

21. A little over five months later, on May 24, 2004, Mr. Honaker's bar complaint was filed.

22. On or about June 2, 2004, the Respondent conducted a telephone conference with Mr. Honaker to discuss his options at that time. The Respondent informed Mr. Honaker that his appeal was not looking good, and he agreed to assist Mr. Honaker in seeking a new trial based on Mr. Dye's apparent recantation.

23. On June 21, 2004, the Respondent sent a letter and affidavit to Mr. Dye for his signature. The Affidavit states that Mr. Dye's testimony at the 7-26-02 trial was false and that Mr. Honaker was not with Mr. Dye for the breaking and entering.

24. On or about October 7, 2004, Mr. Honaker wrote to the Respondent seeking a status report of his case.

25. On or about November 29, 2004, the Respondent sent another letter and affidavit to Mr. Dye.

26. On or about January 5, 2005, the Respondent received correspondence from Mr. Honaker seeking information concerning the disposition of his state appeal.

27. On or about January 30, 2005, Mr. Honaker wrote to the Respondent seeking assistance with his case.

28. On or about February 8, 2005, the Respondent sent another letter to Mr. Dye with an affidavit for his signature.

29. On or about February 16, 2005, the Respondent received a letter from Mr. Dye in which Mr. Dye refused to contradict his trial testimony.

30. The Respondent has neither provided Mr. Honaker with any indication that he has made further headway with respect to a Writ of Actual Innocence nor has he provided any indication that Mr. Honaker is proceeding toward a delayed appeal through the habeas corpus process.

II. Nature Of Misconduct

RULE 1.3 Diligence

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

RULE 1.4 Communication

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

III. Public Reprimand With Terms

Accordingly, it is the decision of the Committee to offer the Respondent an opportunity to comply with certain terms and conditions, compliance with which will be a predicate for the disposition of a Public Reprimand with Terms of this complaint. The terms and conditions shall be:

Attend six (6) hours of MCLE-approved Continuing Legal Education in the area of criminal appellate practice and/or procedure in Virginia and certify completion to Assistant Bar Counsel Scott Kulp by **May 1, 2006**. These six (6) hours of CLE shall not count toward Respondent's annual MCLE requirement and Respondent shall not submit these hours to the MCLE Department of the Virginia State Bar or any other Bar organization.

Upon satisfactory proof that such terms and conditions have been met, this matter shall be closed. If, however, the foregoing Terms are not met by the date specified, this District Committee shall impose a Certification For Sanction Determination.

IV. Alternative Sanction

If the foregoing Terms are not met by the date specified, this District Committee shall impose a Certification For Sanction Determination as defined by Part 6, Section IV, Paragraph 13.A of the Rules of the Virginia Supreme Court and set forth Part 6, Section IV, Paragraph 13.H.2.p.2 of the Rules of the Virginia Supreme Court

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

TENTH DISTRICT COMMITTEE, SECTION II
OF THE VIRGINIA STATE BAR

By: Gregory Dwayne Edwards, Chair

CERTIFICATE OF SERVICE

I certify that on the 7th day of November 2005, I mailed by Certified Mail, Return Receipt Requested, a true copy of the District Committee Determination (Public Reprimand with Terms) to John Edward Stanley, Respondent, at 376 West Main Street, Lebannon, VA 24266, Respondent's last address of record with the Virginia State Bar.

Scott Kulp
Assistant Bar Counsel