Respondent's Name	Address of Record (City/County)	Action	Effective Date	Page
Circuit Court				
Charles V. Bashara	Norfolk, VA	Thirty Day Suspension w/ Terms	November 9, 2006	2
Walter Franklin Green, IV*	Harrisonburg, VA	Six Month Suspension	January 1, 2007	5
Michael Morchower	Richmond, VA	Admonition	December 18, 2006	11
Disciplinary Board				
Claude Alexander Allen	Gaithersburg, MD	Ninety Day Suspension w/ Terms	November 17, 2006	13
Meek Daniel Clark	Richmond, VA	Suspension	January 26, 2007	n/a
Walter Franklin Green, IV	Harrisonburg, VA	Forty-five Day Suspension	July 1, 2007	n/a
Robert John Harris	Lovettsville, VA	Sixty Day Suspension	December 15, 2006	n/a
Robert Joseph Hill	Fairfax, VA	Sixty Day Suspension	February 5, 2007	n/a
Catherine Ann Lee	Mechanicsville, VA	Suspension	January 4, 2007	n/a
Andrew Mark Steinberg	Woodbridge, VA	Suspension	January 4, 2007	n/a
Dwayne Bernard Strothers	Suffolk, VA	Revocation	December 15, 2006	15
Alan S. Toppelberg	Alexandria, VA	Sixty Day Suspension w/ Thirty Days Suspended w/ Terms	December 15, 2006	17
John Joseph Vavala	Virginia Beach, VA	Consent to Revocation	December 15, 2006	n/a
District Committees				
James Drewry Hudkins Hill	Glen Allen, VA	Public Reprimand	January 16, 2007	19
Disciplinary Board Reinstatement Recommendations				
Charles Daugherty Fugate, II***	Bristol, VA	Recommend Reinstatement to VSC	November 17, 2006	21
James E. Ghee***	Farmville, VA	Recommend Denial of Reinstatement to VSC	October 27, 2006	24
Cost Suspension				
Joseph Louis Tantoh Tibui	Arlington, VA	Disciplinary Board	December 8, 2006	n/a
Interim Suspensions — Failure to Comply w/Order				
Marc James Small	Chester, VA	Disciplinary Board	January 4, 2007	n/a
Interim Suspensions — Failure to Comply w/Subpoena				
Michael John Denney	Warrenton, VA	Disciplinary Board	January 23, 2007	n/a
Stacy F. Garrett, III	Richmond, VA	Disciplinary Board	January 22, 2007 Lifted January 25, 2007	n/a

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

VIRGINIA:
BEFORE THE CIRCUIT COURT FOR THE CITY OF NORFOLK
IN THE MATTER OF
CHARLES V. BASHARA
Case: VSB No. CL06-4823

ORDER

THIS MATTER came to be heard on November 9, 2006, upon an Agreed Disposition between the Virginia State Bar and the Respondent, Charles V. Bashara, Esquire.

A Three-Judge Court impaneled by the Supreme Court of Virginia on October 5, 2006, 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 E. Kulp, Retired Judge of the Fourteenth Judicial Circuit, the Honorable Von L. Pearsall, Jr., Retired Judge of the Third Judicial Circuit, and the Honorable Carl Edward Eason, Jr., Judge of the Fifth Judicial Circuit, designated Chief Judge, considered the matter by telephone conference. The Virginia State Bar appeared through its Assistant Bar Counsel, Edward L. Davis. The Respondent, Charles V. Bashara, participated in the telephone conference *pro se*.

Upon due deliberation, it is the decision of the Three-Judge Court to accept the Agreed Disposition. The Stipulations of Fact, Disciplinary Rule Violations, and Disposition agreed to by the Virginia State Bar, the Respondent, and his counsel, are incorporated herein as follows:

I. STIPULATIONS OF FACT

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

2. The complainant, Stefan D. Murza, D.C., a chiropractor, treated Charlie Artis for injuries sustained in a fall at a Wal-Mart store on January 30, 2003.

3. Dr. Murza would say that on March 11, 2003, following 24 visits, he released his patient from treatment with a total bill of $1,990.

4. The same date, Mr. Artis executed an assignment directing his attorney to pay Dr. Murza's bill directly from any judgment or settlement.

5. Dr. Murza would say that in reliance of the terms of the assignment, he refrained from billing his patient directly pending resolution of the personal injury case. Mr. Bashara would say that he requested payment in full.

6. On an unknown date, but while he was treating with Dr. Murza, Mr. Artis hired Mr. Bashara to pursue a personal injury claim for him relating to the Wal-Mart accident.

7. By letter, dated February 6, 2003, Mr. Bashara asked Dr. Murza for a copy of the medical report and the bill for his services, and he agreed to send his assignment with the patient. Mr. Bashara would say that the client had some preexisting injuries that he needed the doctor to separate from the injuries sustained in the fall at Wal-Mart.

8. Dr. Murza responded by sending a copy of his medical charts and a bill that was stamped, "NOTICE OF LIEN FROM VA CODE Section 8.01-66.2," but no report.

9. On July 15, 2003, Mr. Bashara won a $6,000 judgment for his client against Wal-Mart in the General District Court for the City of Norfolk.

10. Wal-Mart appealed the judgment to the circuit court, where the parties settled the case for $3,000.

11. On July 22, 2003, Wal-Mart's claims service issued a check for $3,000 payable to Mr. Bashara and Mr. Artis.

12. On August 6, 2003, Mr. Artis executed a release and a personal injury settlement sheet prepared by Mr. Bashara that listed Dr. Murza's bill, but excluded it from payment. The statement bore the inscription, "not paid by this office/client responsible."

13. The same date, Mr. Bashara disbursed $1,251.83, representing his 33% contingent fee and costs, and disbursed the remaining funds, $1,748.17, to his client.

14. Mr. Bashara paid none of the settlement to Dr. Murza, the client having said that the bills and records submitted by Dr. Murza were full of inaccuracies, and no report having been furnished in accordance with the terms of the assignment.

15. Dr. Murza kept a log of telephonic inquiries to Mr. Bashara. One annotation, dated 6-6-03, states, "Representing him, Pending." The rest of the annotations are dated August 27, 2003 and later, through the year 2004, and into 2005, all indicating that the matter is pending or that Mr. Bashara will look into it, although the matter had been closed on August 6, 2003. Mr. Bashara would say that no one on his staff is authorized to give such information about clients to anyone on the telephone.

16. Dr. Murza also sent letters of inquiry to Mr. Bashara on January 19, 2005 and February 7, 2005 demanding payment in full, the second letter threatening a complaint to the bar and Better Business Bureau. Receiving no reply, he complained to the bar on February 28, 2005. Mr. Bashara would say that he felt no obligation to pay in light of the threats and the fact that he had not received the report requested by his letter, dated February 17, 2003.

17. Mr. Bashara admitted to the bar that he received Dr. Murza's bill, but explained that he had asked Dr. Murza for an opinion concerning whether the injuries resulted from the accident at Wal-Mart, and that Dr. Murza had failed to do so. His letter to Dr. Murza, dated March 17, 2003, asked Dr. Murza to provide a report addressing this issue.

18. Dr. Murza, on the other hand, said that he never received the letter, although he did receive Mr. Bashara's first letter, dated February 6, 2003, asking for an opinion. Dr. Murza said that he would have been happy to compromise his lien as low as $500. Mr. Bashara would say he never received a direct report from Dr. Murza that he would compromise his lien as low as $500.

19. On February 6, 2006, after the bar investigated the matter, Mr. Bashara, having learned that Dr. Murza was willing to compromise his lien to $500, issued Dr. Murza a check in that amount drawn from his law firm's IOLTA account accordingly.

II. RULE VIOLATIONS

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

RULE 1.15 Safekeeping Property

(c) A lawyer shall:

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

III. STIPULATION AS TO DISPOSITION

In accordance with the Agreed Disposition, it is the decision of this Court to **suspend the license of the Respondent, Charles V. Bashara, to practice law in the Commonwealth of Virginia for a period of thirty (30) days,** with execution of the law license suspension suspended for a period of one (1) year subject to the following terms and conditions:

1. The Respondent, Charles V. Bashara is placed on disciplinary probation for a period of one (1) year, said period to begin on November 9, 2006, the date that this Honorable Court approved the Agreed Disposition. Mr. Bashara will engage in no professional misconduct as defined by the Virginia Rules of Professional Conduct during such one-year probationary period. Any final determination of misconduct determined by any District Committee of the Virginia State Bar, the Disciplinary Board, or a three-judge court to have occurred during such period will be deemed a violation of the terms and conditions of this Agreed Disposition and will result in the imposition of the Thirty-Day Suspension of the Respondent's license to practice law in the Commonwealth of Virginia. The Thirty-Day Suspension will not be imposed while Mr. Bashara is appealing any adverse decision that might result in a probation violation.

2. Within one (1) year of the date that this Honorable Court approved this Agreed Disposition, or by November 8, 2007, the Respondent will attend an additional **six (6) hours of Continuing Legal Education (CLE) on the subject of ethics** for no annual CLE credit, and **one (1) or more additional hours of CLE in a course that includes at least one block of instruction on the subject of settling personal injury cases** for no annual CLE credit. The Respondent will certify his attendance at said course or courses in writing to the Bar Counsel's Office at the Virginia State Bar by the date specified.

Upon satisfactory proof that the terms and conditions of this Agreed Disposition have been met, this matter shall be closed. Failure to comply with any of the foregoing terms and conditions will result in the imposition of the alternate sanction: the suspension of the Respondent's license to practice law for a period of thirty (30) days.

The imposition of the alternate sanction will not require a hearing before the Virginia State Bar Disciplinary Board or a three-judge court on the underlying charges of misconduct stipulated to in this Agreed Disposition if the Virginia State Bar discovers that the Respondent has violated any of the foregoing terms and conditions. Instead, the Virginia State Bar shall issue and serve upon the Respondent a Notice of Hearing to Show Cause why the alternate sanction should not be imposed. The sole factual issue will be whether the Respondent has violated the terms of this Agreed Disposition without legal justification or excuse. All issues concerning the Respondent's compliance with the terms of this Agreed Disposition shall be determined by the Virginia State Bar Disciplinary Board, unless the Respondent makes a timely request for hearing before a three-judge court. Pursuant to Part 6, Sec. IV, Para. 13. B.8 (c) of the Rules, the Clerk of the Disciplinary System shall assess costs.

The court reporter who transcribed these proceedings is Leann Hettrick of Chandler and Halasz, Registered Professional Reporters, P. O. Box 9349, Richmond, Virginia 23227, (804) 730-1222.

ENTERED THIS 28th DAY OF November, 2006
CIRCUIT COURT FOR THE CITY OF NORFOLK

Carl Edward Eason, Jr., Chief Judge
Three-Judge Court

Von L. Pearsall, Retired Judge
Three-Judge Court

James E. Kulp, Judge
Three-Judge Court

Editor's Note: Respondent has noted an appeal to Virginia Supreme Court.

VIRGINIA
IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY

CASE NO. CL06-00507
WALTER F. GREEN, IV
VSB Docket Nos. 02-070-3523
05-070-0206
05-070-2448
05-070-2450
05-070-3011
05-070-3625

MEMORANDUM ORDER

This cause came on for hearing on September 14, 2006, and continued on November 14, 2006, before a duly appointed Three-Judge Court consisting of the HONORABLE THOMAS A. FORTKORT, retired, the HONORABLE DIANE McQ. STRICKLAND, retired, and the HONORABLE CLEO E. POWELL, Chief Judge Designate; upon the Rule to Show Cause of this Court; pursuant to Va. Code §§ 54.1-3935 and 8.01-261(17) and Rules of the Supreme Court, Part Six, § IV, Paragraph 13.

The Virginia State Bar was represented by ALFRED L. CARR, Assistant Bar Counsel, and SETH M. GUGGENHEIM, Assistant Bar Counsel. The Respondent, WALTER F. GREEN, IV appeared, *pro se*.

Plea in Bar for Lack of Jurisdiction

Respondent argues that the Virginia State Bar was required to schedule his hearing no more than 120 days from his March 28, 2006 demand, pursuant to Part Six, § IV, Paragraph 13(H)(1)(a)(2)(b) of the Rules of the Supreme Court of Virginia, and that, therefore, this Court lacks jurisdiction. Specifically the rule states:

> After the Respondent has been served with the Charge of Misconduct, the Respondent shall, within 21 days after service of the Charge of Misconduct, file an answer to the Charge of Misconduct and a demand with the Clerk of the Disciplinary System that the proceedings before the District Committee be terminated and that further proceedings be conducted pursuant to Va. Code § 54.1-3935; and simultaneously provide available dates for a hearing to be scheduled not less than 30 nor more than 120 days from the demand.

Respondent argues that the rule places a duty on the Bar to hold the hearing within the rule's 30 to 120 day time frame. As such, for the hearing to fall within the mandated time limit, Respondent argues it must have been held by July 26, 2006, 120 days from the March 28, 2006 demand. The hearing was in fact held on September 14, 2006, and continued on November 14, 2006.

This Court holds that the rule does not require the Bar to hold a hearing within the time frame as stated in Part Six, § IV, Paragraph 13(H)(1)(a)(2)(b) of the Rules of the Supreme Court. As the rule is designed to protect the public, who then come to lawyers for their services, the rule only imposes a duty on the Respondent to submit available dates within the four-month window of time, and does not impose a duty on the Bar. As such, this Court holds that it does have jurisdiction.

Plea in Bar for Violation of the Statute of Limitations

Respondent argues that the Virginia State Bar is subject to a statute of limitations because it is an agency of the Commonwealth. He further argues that because the Virginia State Bar is not specifically exempted from the bar of the statute of limitations, the applicable statute of limitations is then Virginia Code Section 8.01-248, which states: "Every personal action accruing on or after July 1, 1995, for which no limitation is otherwise

prescribed, shall be brought within two years after the right to bring such action has accrued." Va. Code § 8.01-248 (2006).

This Court holds that the statute of limitations does not run against the Commonwealth, or its agencies, and therefore, does not run against the Virginia State Bar. *See Delon Hampton & Assoc. v. Wash. Metro. Area Transit Auth.*, 943 F.2d 355 (4th Cir. 1991).

Plea in Bar for Failure to Possess a Valid Complaint

Respondent argues that in order to proceed against an attorney, the Bar must receive a complaint and Bar Counsel must determine that the conduct questioned or alleged presents an issue under the Disciplinary Rules. Respondent is not aware of any written complaint received by the Bar that alleges misconduct in regards to Docket No. 05-070-2448 (Ron Haynes) and Docket No. 05-070-2450 (Ron Haynes), and, therefore, asks that they be dismissed. Respondent bases his argument solely on the definition of "complaint" as found in Part Six, Section IV, Paragraph 13(A) of the Rules of the Supreme Court, which states: "any written communication to the Bar alleging Misconduct or from which allegations of Misconduct reasonably may be inferred."

This Court holds that the Rules of the Supreme Court provide that the Bar can proceed on a basis other than a complaint.

Plea in Bar for Res Judicata

Respondent argues that the doctrine of Res Judicata precludes further litigation of Docket No. 05-070-0206 (Frank James), because all issues were litigated on March 4, 2005, and judgment was entered in Respondent's favor.

This Court holds that the doctrine of Res Judicata does not apply to a Bar proceeding when a previous civil proceeding has been held.

Certification of Complaints

Docket No. 02-070-3523 (Peter Schwartz)

1. Peter Schwartz was an associate for Respondent from January of 2000 to May of 2002.

2. Due to irreconcilable differences, Schwartz departed from the firm on May 7, 2002.

3. Upon the departure, some of the clients chose to continue to be represented by Schwartz.

4. Schwartz alleges that those clients paid advance fees to Respondent's firm in excess of $30,000, but that only $5,675.00 was in the firm's trust account, although all the cases were still open.

5. When Schwartz asked Respondent about the fees, the Respondent claimed the fees were flat fees which he deposited directly into the firm's operating account upon receipt, and that they could not be refunded.

6. Schwartz removed the $5,675.00 in advance fees from the trust account that could be traced to those clients who followed Schwartz when he left the firm.

7. Respondent filed a warrant in debt against Schwartz for the return of the $5,675.00.

8. Schwartz's clients then executed letters demanding the Respondent account for and return their advance fees.

9. Respondent did not comply with the requests, but did non-suit the warrant in debt on the day of the hearing.

Docket No. 05-070-0206 (Frank James)

1. On or about October 3, 2003, Frank James hired Respondent to represent him in a custody and visitation matter.

2. James paid Respondent an advance fee (stated as being $4000 in one part of the bar's complaint, $5000 in another part of the bar's complaint).

3. Respondent deposited the advance fee into his operating account, and not into his trust account.

4. James later reconciled with his wife.

5. James informed Respondent that he was terminating Respondent's services and demanded a full refund of the advanced fees paid to Respondent, alleging that Respondent had not performed any legal work on his behalf.

6. In a letter dated July 9, 2004, Respondent informed James that due to the flat fee retainer agreement, James was not entitled to a refund, and, furthermore, that he could not be terminated at that time because there was a return date at the end of July of 2004, and that representation had to continue until at least that date.

7. James alleges that Respondent did not explain to him the flat fee or advance fee arrangement.

8. In a letter dated October 8, 2004, Assistant Bar Counsel Linda Berry directed Respondent to respond to James' request for an accounting of the advance fees paid.

9. Respondent then mailed James an hourly breakdown of fees.

10. James alleges that the hourly breakdown contains false information.

Docket No. 05-070-2448 (Ron Haynes)

1. Respondent represented Haynes on two felony charges and a civil forfeiture.

2. Haynes plead guilty and was sentenced on June 7, 2002.

3. Respondent then filed an appeal on the guilty plea, in the wrong court.

4. The appeal was dismissed.

5. Respondent did not inform Haynes that the appeal had been dismissed.

6. Respondent's ledger card reflects a flat fee payment of $6,000.00 on April 6, 2001.

7. Respondent paid himself the $6,000.00 before little, if any, work had been done.

Docket No. 05-070-2450 (Ron Haynes)

1. Respondent represented Haynes on a number of criminal charges on October 8, 2002.

2. Haynes was found guilty, and Haynes then retained Respondent to appeal his convictions.

3. Respondent did not timely file the Notice of Appeal.

4. Respondent did not inform Haynes that the appeal was dismissed for failure to timely file.

5. Respondent's ledger card reflects a flat fee payment of $7,500.00 on March 6, 2002, to handle the Circuit Court case, and a flat fee payment of $15,000.00 on October 15, 2002, to handle the appeal.

6. Respondent paid himself both the $7,500.00 and $15,000.00 amounts before little, if any, work was done.

Docket No. 05-070-3011 (Michael Foltz)

1. Michael Foltz was sentenced to a lengthy period of incarceration.

2. Foltz's mother, Linda Cubbage, hired Respondent to represent Foltz in filing a *habeas corpus* petition.

3. Respondent was paid $2,500.00 in advance fees.

4. It is then alleged that Respondent did not perform any legal work on Foltz's behalf after accepting the fees.

5. Foltz demanded a refund by letter.

6. Respondent did not respond to the demand.

7. Respondent states that he had never spoken to Foltz or his mother, nor had Respondent agreed to file a *habeas corpus* petition, despite his ledger card reflecting the payment from Cubbage.

8. Respondent believes Schwartz, who was an associate of Respondent's at that time, must have been who Cubbage hired, though neither Cubbage nor Schwartz agree with Respondent's belief.

Docket No. 05-070-3625 (Bonnie Zigler)

1. In August of 2004, Zigler hired Respondent to represent her elderly father in a divorce.

2. Respondent was paid a flat fee of $5,000.00, which he placed into his operating account and then immediately removed before little, if any, work had been done.

3. Respondent did some work on the case over a four-month period, but not to Zigler's satisfaction.

4. In December of 2004, Zigler fired Respondent and hired Earl Burns, Esq. to handle her father's divorce.

5. Burns sent a letter to Respondent requesting an itemization of the work that Respondent had performed, and requested a refund of $2,500.00.

6. Respondent provided neither an itemization nor a refund.

Facts Found

Upon the evidence presented and arguments of counsel, the Court finds by clear and convincing evidence the following facts:

1. Respondent has been an attorney licensed to practice law in the Commonwealth of Virginia at all times relevant hereto.

2. The complaint in Docket No. 02-070-3523 (Peter Schwartz) was certified by a subcommittee on November 19, 2003, and therefore the Virginia State Bar did not act promptly as required by Part Six, § IV, Paragraph 13(G)(4) of the Rules of the Supreme Court, thereby prejudicing the Respondent with the delay.

3. The complaints in Docket Nos. 05-070-2448 (Ron Haynes), 05-070-2450 (Ron Haynes), and 05-070-3625 (Bonnie Zigler) were certified on February 24, 2006, and not February 24, 2005, as erroneously stated in the Bar's complaint.

Violations Found

Upon the evidence presented and arguments of counsel, the Court finds that the Virginia State Bar has proved by clear and convincing evidence the facts necessary to find violations of the following provisions of the Virginia Rules of Professional Conduct.

Docket No. 05-070-2448 (Ron Haynes)

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.

Docket No. 05-070-2450 (Ron Haynes)

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.

Docket No. 05-070-3011 (Michael Foltz)

RULE 1.3 Diligence

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

RULE 1.4 Communication

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

RULE 1.4 Communication

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

RULE 1.15 Safekeeping Property

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

Docket No. 05-070-3625 (Bonnie Zigler)

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.

RULE 8.4 Misconduct

(b) It is professional misconduct for a lawyer to commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law.

It is the finding of this Court that the Virginia State Bar failed to prove by the required evidentiary standard of clear and convincing evidence any of the remaining alleged violations of the Virginia Rules of Professional Conduct and said alleged violations are dismissed.

Evidence was presented and arguments by counsel were made on the issue of an appropriate sanction. The prior record of the Respondent was presented by the Bar. The Bar also presented relevant provisions of the most recent ABA Standards for Imposing Lawyer Sanctions. The Respondent presented one character witness, Gordon Poindexter.

Accordingly, IT IS ORDERED, that the Respondent's license to practice law in the Commonwealth of Virginia is SUSPENDED, effective January 1, 2007, for a period of SIX (6) MONTHS.

IT IS FURTHER ORDERED, pursuant to Rules of Court, Part Six, § IV, Paragraph 13(M), that 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 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 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 Virginia State Bar within 60 days of the effective date of the Suspension that such notices have been timely given and such arrangements made for the disposition of matters.

IT IS FURTHER ORDERED that costs shall be assessed by the Clerk of the Disciplinary System pursuant to Rules of Court, Part Six, § IV, Paragraph 13(B)(8)(c).

IT IS FURTHER ORDERED that certified copies of this order shall be mailed by the Clerk of the Circuit Court to the counsel of record.

IT IS FURTHER ORDERED that the Clerk of the Circuit Court shall send a certified copy of this order to the Clerk of the Disciplinary System, at Suite 1500, 707 East Main Street, Richmond, VA 23219.

IT IS FURTHER ORDERED that upon the end of all proceedings in this matter, the Clerk of the Disciplinary System shall maintain the complete file of this matter in accordance with the file retention policies and requirements of the Bar.

ENTERED December 29, 2006

VIRGINIA:
BEFORE THE CIRCUIT COURT FOR THE CITY OF NORFOLK
IN THE MATTER OF
MICHAEL MORCHOWER
Case: VSB No. CL06-3627-1

DETERMINATION OF THREE JUDGE PANEL
(ADMONITION WITHOUT TERMS)

The Complaint against Respondent was certified to the Virginia State Bar Disciplinary Board alleging violations of the Virginia Rules of Professional Conduct ("RPC") 1.6(a), 1.8(b), 1.9(c) and 3.6 by a subcommittee of the Third District Committee, Section I on April 6, 2006. Respondent filed an answer to the Certification and requested that the matter be heard by a three-judge panel pursuant to his right under Va. Code Ann. § 54.1-3935. In response to that request, the Virginia Supreme Court designated the Honorable Pamela S. Baskervill, Chief Judge Designate, the Honorable Walter J. Ford, and the Honorable H. Thomas Padrick, Jr. to hear the case. The case was initially set to be heard on September 20, 2006, but was continued to November 3, 2006, upon a joint motion due to the unavailability of witness Learned Barry. Prior to trial, the Bar advised Respondent that it did not intend to pursue charges in the Certification pursuant to RPC 3.6.

On October 31, 2006, by agreement, the Honorable Pamela S. Baskervill heard argument on (1) the Motion in Limine of the Bar to exclude proffered expert testimony and certain exhibits, and (2) Respondent's motion for leave to amend his answer to the Certification. The Court granted the Bar's motion to exclude the expert testimony and denied the motion to exclude the exhibits. The motion to amend the answer to the Certification was granted, and the Court received a signed Amended Answer to the Certification in open court at trial of this matter. The Court reserved all objections to its rulings.

On November 3, 2006, this matter was tried before a three judge panel pursuant to Virginia Code § 54.1-3935 and Part 6, Section IV, Paragraph 13 of the Rules of the Virginia Supreme Court. Presiding were the Honorable Pamela S. Baskervill, Chief Judge Designate, the Honorable Walter J. Ford, and the Honorable H. Thomas Padrick, Jr. The Virginia State Bar was represented by Assistant Bar Counsel Paulo E. Franco, Jr. and Assistant Bar Counsel Paul D. Georgiadis. The Respondent was present and represented by Murray J. Janus, Esquire and Russell V. Palmore, Jr., Esquire.

At the conclusion of the Bar's case in chief, the Respondent moved to strike the bar's case. The Court denied said motion. The Respondent then put on its case in chief and rested, and thereafter the parties each made closing argument. Prior to the Court concluding its deliberation on misconduct, the parties announced to the Court that they had reached a resolution of the matter by way of an agreed disposition of an admonition without terms. The parties disclosed their accord for an agreed upon disposition in open court.

Pursuant to an Agreed Disposition of the parties, Virginia Code Annotated § 54.1-3935 and Part 6, Section IV, Paragraph 13 of the Rules of the Virginia Supreme Court, the Respondent, Michael Morchower, is hereby served with the following Public Admonition, without terms:

I. FINDINGS OF FACT

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

2. On or about October 20, 2005, Janet Pelasara retained Respondent to represent her interests in connection with the investigation and prosecution Office of the Richmond Commonwealth's Attorney as it investigated and prosecuted the homicide of Pelasara's daughter, Taylor Behl, as well as assisting Pelasara with the media.

3. On or about October 26, 2005, Respondent met with a Deputy Commonwealth's Attorney who agreed to meet with Respondent because he represented the victim's mother.

4. During said meeting, the Deputy Commonwealth's Attorney disclosed to Respondent specific information about the Deputy's analysis of the Commonwealth's strengths and weaknesses in its case against suspect Ben Fawley.

5. Prior information about the case that was in the public domain and that Respondent had learned had been confined to facts of the police investigation and independent legal analysis, and had not included the prosecution's own analysis.

6. On or about October 31, 2005, Ms. Pelasara terminated Respondent's representation.

7. On November 1 and 2 of 2005, Respondent sent letters and emails to various media advising that he had been monitoring the anticipated prosecution of Mr. Fawley on Ms. Pelasara's behalf, that he was no longer serving in that capacity, and that he would be available for independent analysis of Mr. Fawley's prosecution.

8. As a result of said communication, Respondent was contacted by and gave an interview to the *Washington Times*. In the interview, Respondent disclosed information received in his October 26, 2005 meeting with the Deputy Commonwealth's Attorney.

9. On November 3, 2005, the Washington Times published an article containing comments from said interview.

10. At no time had Respondent requested Ms. Pelasara's consent to disclose said information nor did Pelasara ever grant such consent to do so.

11. On November 3, 2005, Ms. Pelasara through other counsel telephoned and wrote Respondent and requested that Respondent not speak to the media regarding the case.

12. After Ms. Pelasara filed the instant complaint with the Virginia State Bar, Respondent agreed on December 14, 2005, that he would not grant any media interviews or discuss anything pertaining to the Taylor Behl murder investigation with anyone.

II. NATURE OF MISCONDUCT

The Court 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 1.6 Confidentiality of Information

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

RULE 1.8 Conflict of Interest: Prohibited Transactions

(b) A lawyer shall not use information relating to representation of a client for the advantage of the lawyer or of a third person or to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.

The Virginia State Bar and the Respondent have stipulated that while the Subcommittee certified violations of Rules 1.9(c) and 3.6(a), the foregoing agreed findings of fact would not result in findings of violations of said Rule.

III. ADMONITION WITHOUT TERMS

Accordingly, the Court hereby imposes an **ADMONITION WITHOUT TERMS** on Respondent Michael Morchower, and he is so admonished.

The Clerk of the Disciplinary System shall assess costs.

The proceedings of October 31, 2006 and November 3, 2006 were transcribed by Donna Chandler of Chandler & Halasz, P.O. Box 9349, Richmond, VA 23227.

In accordance with the stipulation of counsel for the Bar and for the Respondent, the parties hereby waive endorsement of all three members of the three-judge panel and accept endorsement by the Chief Judge Designate on behalf of the three-judge panel.

Wherefore, having considered and disposed of all of the issues before it, the Court doth order and decree this matter is dismissed and hereby stricken from the Court's docket.

Let the Clerk of the Court send a copy *teste* to all Counsel of Record.

Enter 12/18/06

The Hon. Pamela S. Baskervill
Chief Judge Designate

VIRGINIA:
BEFORE THE VIGINIA STATE BAR DISCIPLINARY BOARD
IN THE MATTER OF
CLAUDE ALEXANDER ALLEN
VSB Docket Number 07-000-0372

ORDER OF SUSPENSION, WITH TERMS

This matter came on December 8, 2006, to be heard on the Agreed Disposition of the Virginia State Bar and the Respondent, relative to the matter contained in the Rule to Show Cause and Order of Suspension and Hearing issued by this Board on the 17th day of November, 2006. The Agreed Disposition was considered by a duly convened panel of the Virginia State Bar Disciplinary Board consisting of Robert E. Eicher, 2nd Vice Chair, V. Max Beard, lay member, William E. Glover, Esquire, Rhysa Griffith South, Esquire, and Glenn M. Hodge, Esquire.

Seth M. Guggenheim, Esquire, representing the Bar, and the Respondent, Claude Alexander Allen, Esquire, by and through his attorneys, Gregory B. Craig, Esquire (appearing *pro hac vice*), and Beth A. Stewart, Esquire, presented an endorsed Agreed Disposition, dated December 7, 2006, reflecting the terms of the Agreed Disposition. The court reporter for the proceeding was Donna Chandler, of Chandler & Halaaz, Richmond, Virginia 23227, telephone (804) 730-1222.

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

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

2. On August 4, 2006, the Respondent personally appeared in the Circuit Court of Montgomery County, Maryland, and entered a plea of guilty to a misdemeanor charge brought upon a criminal information, alleging that on or about December 24, 2005, the Respondent stole a Kodak printer valued at less than $500.00 from the Target Corporation.

3. Following the Respondent's guilty plea, the Circuit Court entered an Order on August 4, 2006, imposing a disposition of "probation before judgment" under Maryland law. Under such a disposition, the Respondent will be discharged from probation upon his fulfillment of the terms thereof, and no judgment of conviction of a crime shall be entered against him.

4. The Respondent's court-ordered probation is supervised, and its duration is two years. *Inter alia*, the terms of Respondent's probation are that he make restitution to the Target Corporation, pay a fine and court costs, and perform forty (40) hours of community service by the time his supervised probation is scheduled to end.

In approving the Agreed Disposition, the Board gave due consideration to evidence furnished by and on behalf of the Respondent, to representations made by the Respondent and his counsel, and to representations made by Bar Counsel. The Board finds as applicable mitigating factors contained in the *Standards for Imposing Lawyer Sanctions*, published by the American Bar Association, as follows:

a. absence of a prior disciplinary record;

b. personal [and] emotional problems;

c. full and free disclosure to disciplinary board [and] cooperative attitude toward proceedings; character [and] reputation; imposition of other penalties or sanctions; and

d. character [and] reputation;

e. imposition of other penalties or sanctions; and

f. remorse.

The Board also gave due regard to the findings of Thomas C. Goldman, M.D., who conducted a forensic psychiatric examination of the Respondent on April 10 and 24, and on May 31, 2006, and reported, *inter alia*, that the Respondent's behavior was "clearly in response to acute situational stress and [is] not expected to be a chronic problem" and that "[t]here is excellent reason to believe that a course of individual psychotherapy could be quite useful in guarding against any possibility of recurrence in the future."

The Board finds by clear and convincing evidence that the Respondent has pled guilty to a crime as defined in the Rules of the Supreme Court of Virginia, Part 6, Section IV, Paragraph 13.A., and is thus subject to the imposition of discipline by the Virginia State Bar Disciplinary Board pursuant to the Rules of the Supreme Court of Virginia, Part 6, Section IV, Paragraph 13.I.5.c.

Upon consideration whereof, it is ORDERED as follows:

1. The Respondent's license to practice law in the Commonwealth of Virginia be, and it hereby is, suspended for a period of ninety (90) days, effective *nunc pro tunc* November 17, 2006, the date upon which this Board entered an order in the referenced matter suspending the Respondent's license due to his guilty plea referred to above.

2. The Respondent shall comply fully with each and every term of the "Probation/Supervision Order" entered by the Circuit Court of Montgomery County, Maryland, on August 4, 2006, in *State of Maryland vs. Claude Allen,* Case No. 105714-C.

3. At the conclusion of the Respondent's supervised probation, as referred to above, the Respondent shall promptly furnish the Virginia State Bar c/o Seth M. Guggenheim, Assistant Bar Counsel, 100 North Pitt Street, Suite 310, Alexandria, Virginia 22314, with documents certified by the Clerk of the Circuit Court of Montgomery County, Maryland, establishing that Respondent has successfully fulfilled all of his obligations imposed by the "Probation/Supervision Order" referred to above and that the said Court has discharged him from probation as a final disposition of the criminal charge to which he had entered the guilty plea, as aforesaid.

4. Should the Respondent fail to comply with the terms set forth in the immediately preceding Paragraphs 2 and 3, he shall receive a three (3) year suspension of his license to practice law in the Commonwealth of Virginia, *in addition to* the ninety (90) day suspension referred to above, as an alternative disposition of this matter.

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

6. The provisions of Part 6, Section IV, Paragraph 13.M. of the Rules of the Supreme Court of Virginia are inapplicable to this matter because the Respondent is not engaged in the practice of law as of the time of entry of this Order, and he was not so engaged at the time this Board entered the suspension order in this matter on November 17, 2006.

7. Pursuant to Part 6, Section IV, Paragraph 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 a copy *teste* of this Order shall be mailed by Certified Mail, Return Receipt Requested, to the Respondent, at his address of record with the Virginia State Bar, and by first class, regular mail, to counsel for the parties appearing in this matter.

ENTERED this 8th day of December, 2006.
Robert E. Eicher
2nd Vice Chair
Virginia State Bar Disciplinary Board

VIRGINIA:
BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
DWAYNE BERNARD STROTHERS
VSB DOCKET NO. 07-000-1016

ORDER OF REVOCATION

This matter came before the Virginia State Bar Disciplinary Board on December 15, 2006, pursuant to a Notice of Noncompliance issued in accordance with the Rules of the Supreme Court of Virginia Part Six, Section IV, Paragraph 13.M. The hearing was held before a duly convened panel of the Board consisting of David R. Schultz, William C. Boyce, Jr., John W. Richardson, Dr. Theodore Smith, Lay member, and James L. Banks, Jr., 1st Vice Chair.

All required notices were sent by the Clerk of the Disciplinary System. The Virginia State Bar was represented by Richard E. Slaney, Assistant Bar Counsel. Neither the Respondent nor any counsel action on his behalf appeared. Donna T. Chandler, Chandler & Halasz, P.O. Box 9349, Richmond, VA 23227, (804) 730-1222, having been duly sworn, reported the hearing.

The Chair opened the hearing by calling the case both in the hearing room and in the adjacent hall. The Respondent did not answer or appear. The panel was then polled as to whether any member had any conflict of interest or other reason why the member should not participate in the hearing. Each member, including the Chair, answered in the negative.

The Prior Proceedings

This matter arises out of a Notice of Noncompliance and Request for Revocation of Respondent's License to Practice Law for Failure to Comply with Paragraph 13.M filed with the Board by Bar Counsel on November 15, 2006, based upon Respondent's failure to comply with several orders of this Board and the aforesaid provisions of Part Six, Section IV, Paragraph 13.M of the Rules of Court. More particularly the Bar in its Notice of Noncompliance, alleged as follows:

The First Order

1. On May 3, 2006, the Board entered a Memorandum Order (the First Order) suspending Strothers' license to practice law in the Commonwealth of Virginia for two years, effective June 12, 2006. The First Order represented acceptance by the Board of an Agreed Disposition between Strothers and the Bar.

2. The Clerk's Office sent the First Order to Strothers' then address of record by certified mail, return receipt requested on May 4, 2006. Both the First Order and the cover letter from the Clerk referenced Strothers' duty to comply with Paragraph 13(M). This certified mailing was returned to the Clerk as "unclaimed." A copy of that mailing to Strothers, including the cover letter, the First Order, sample notice of affidavit forms and the mailing receipt and envelope are attached collectively as Exhibit A.

3. The Clerk then re-mailed the Exhibit A by regular mail to Strothers' new and current address of record on June 2, 2006. A copy of that cover letter is attached as Exhibit B.

4. On August 22, 2006, the Clerk also sent a reminder letter to Strothers, a copy of which is attached as Exhibit C.

The Second Order

5. On August 23, 3006, the Board entered an Order of Administrative Suspension (the Second Order) suspending Strothers' license for failure to pay costs associated with the First Order.

6. The Clerk's Office sent the Second Order to Strothers' address of record by certified mail, return receipt requested on August 23, 2006. Both the Second Order and the cover letter from the Clerk referenced Strothers' duty to comply with Paragraph 13(M). A copy of that mailing to Strothers, including the cover letter, the Second Order and sample notice and affidavit forms are attached collectively as Exhibit D. This certified mailing was also returned to the Clerk as "unclaimed."

7. The Clerk then re-mailed Exhibit D by regular mail to Strothers' current address of record by regular mail on September 14, 2006. A copy of that letter is attached as Exhibit E.

No Proof of Compliance with Either Order

8. In October, the Bar asked the Clerk whether she received any materials from Strothers purporting to demonstrate compliance with Paragraph 13(M). The Clerk responded that nothing had been received. An affidavit from the Clerk attesting to the fact Strothers filed nothing demonstrating compliance with Paragraph 13(M) in regard to either Order is attached as Exhibit F.

Proof of Non-Compliance

9. Since his suspension on June 12th, the Bar received additional complaints about Strothers from clients. In at least two of those cases, the clients were not contacted by Strothers, nor did he provide them with their file or make arrangements for the handling of their cases. See affidavit of Juliana Freeman, attached as Exhibit G, and affidavit of Joseph Booth, attached as Exhibit H.

10. An affidavit from the Membership Department of the Bar confirming Strothers current address of record as P.O. 3540, Suffolk, VA 23439 is attached as Exhibit I.

Evidence Presented to the Board

In addition to the Exhibits set forth in Bar Counsel's Notice of Noncompliance (A-I), Bar Counsel introduced an additional Exhibit J, which consisted of an affidavit from one of Respondent's clients stating he had not received notice from Respondent of his license suspension. The Board, after receiving into evidence Exhibits A-J and hearing arguments of Bar Counsel, adjourned to determine whether Respondent had failed to comply with Rule 13(M).

Findings

The Board finds that the Bar has furnished uncontroverted clear and convincing evidence to substantiate the allegations set forth in it's Notice of Noncompliance and the Board further finds that the Respondent has failed to show cause as to why his license to practice law should not be revoked.

Sanction

Because of the Respondent's total disregard of the Board's prior orders and non-compliance with the Rules of Court over an extended period of time and his prior disciplinary record which was introduced after the Board's finding of noncompliance, the Board believes the appropriate sanction to protect the public and the integrity of the Bar is the revocation of the Respondent's license, and it is so ORDERED that the license of Dwayne Bernard Strothers to practice law in the Commonwealth of Virginia is hereby REVOKED, effective December 15, 2006.

It is further ORDERED that, pursuant to Part Six, Section IV, Paragraph 13(M) of the Rules of the Supreme Court of Virginia, Respondent shall forthwith give notice, by certified mail, return receipt requested, of the revocation of his license to practice law in the Commonwealth of Virginia to all clients for whom he is currently handling any matters, to all Judges and the Clerk of the Court before which Respondent may have any pending cases and to opposing counsel in all such cases. Respondent shall also make appropriate arrangements for the disposition of matters not in his care, in conformity with the wishes of his clients.

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 P.O. Box 3540, Suffolk, VA 23439, by certified mail, return receipt requested, and by regular mail to Richard E. Slaney, Assistant Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

ENTERED this 21st day of December 2006
VIRGINIA STATE BAR DISCIPLINARY BOARD

James L. Banks, Jr., 1st Vice Chair

VIRGINIA:
BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN RE:
ALAN S. TOPPELBERG
VSB. DOCKET Nos. 07-000-1375

ORDER

This matter came before the Virginia State Bar Disciplinary Board pursuant to Part Six, Section IV, Paragraph 13.I.7, of the Rules of the Supreme Court of Virginia, "Proceedings Upon Disbarment, Revocation, or Suspension in Another Jurisdiction."

On November 17, 2006, the Disciplinary Board issued a Rule to Show Cause to Alan S. Toppelberg in which it was alleged that Mr. Toppelberg's license to practice law in the District of Columbia had been suspended for a period of sixty (60) days, with thirty (30) days stayed, effective October 21, 2006, and in which Mr. Toppelberg was required to show cause why the Board should not impose the same discipline. The hearing was held on December 15, 2006, in Courtroom A of the Virginia Workers' Compensation Commission, 1000 DMV Drive, Richmond, Virginia 23220, at 9:00 a.m.

The Disciplinary Board Panel consisted of James L. Banks, Jr., 1st Vice Chair, William C. Boyce, Jr., John W. Richardson, David R. Schultz, and Theodore Smith (lay member). The Bar was represented by Bar Counsel George W. Chabalewski, and the Respondent did not appear and was not represented by counsel. The proceedings were recorded by Donna T. Chandler, Chandler & Halasz, P.O. Box 9349, Richmond, Virginia 23227, (804) 730-1222.

Chair Banks convened the hearing and polled the Panel as to whether any conflicts or biases existed which would prevent them from hearing the matter fairly and objectively. All members answered in the negative, including the Chair.

It being apparent that Mr. Toppelberg was not present, Chair Banks asked the Clerk to call Mr. Toppelberg's name three times in the hall. The Clerk did so with no response.

Mr. Chabalewski then informed the Board that he had spoken with Mr. Toppelberg and that Mr. Toppelberg had stipulated to the accuracy of the allegations in the Rule to Show Cause and that he did not plan to attend the hearing.

Evidence was then presented by the State Bar consisting of a certified copy of an Order of the District of Columbia Court of Appeals in which the Court suspended Mr. Toppelberg's license to practice law for sixty days and held in abeyance thirty days of the suspension in lieu of one year of supervised probation. The State Bar also introduced the report and recommendation of the Board of Professional Responsibility of the District of Columbia Court of Appeals.

The Board finds as follows:

1. All notices required by the Rules of the Supreme Court were issued and properly served. Mr. Toppelberg's license to practice law was suspended by the District of Columbia Court of Appeals effective thirty days from the Court's Order, which is dated September 21, 2006. Thirty days of the suspension was held in abeyance in lieu of one year of supervised probation, during which Mr. Toppelberg was required to consult with the Practice Management Advisory Service, implement its recommendations, and submit a compliance report to the D.C. Board and Bar Counsel.

2. The Court's ruling was final.

3. Mr. Toppelberg presented no evidence which would establish that: (i) the record of the proceeding in the other jurisdiction would clearly show that such proceeding was so lacking in notice or opportunity to be heard as to constitute a denial of due process; (ii) the imposition by the Board of the same discipline, upon the same proof, would result in a grave injustice; or (iii) the same conduct would not be grounds for disciplinary action or for the same discipline in Virginia.

Accordingly, the Board hereby suspends Respondent's license to practice law in the Commonwealth of Virginia for a period of sixty (60) days with thirty (30) days held in abeyance under the same conditions as enumerated in the Order of the District of Columbia Court of Appeals, effective December 15, 2006.

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 the 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.

COSTS

Pursuant to Part 6, Section IV, Paragraph 13.B.8(c) 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 the respondent at his address of record with the Virginia State Bar, being Alan S. Toppelberg, 6236 Mary Meindi Court, Alexandria, Virginia 22312, by certified mail, return receipt requested, and by regular mail to George W. Chabalewski, Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

ENTERED this 4th day of January, 2006.
VIRGINIA STATE BAR DISCIPLINARY BOARD

James L. Banks, Jr., 1st Vice Chair

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

IN THE MATTER OF
JAMES DREWRY HUDKINS HILL, ESQUIRE
VSB Docket No. 06-060-0465

AGREED DISPOSITION

Pursuant to Part Six, § IV, ¶ 13(G)(1)(d) of the Rules of Virginia Supreme Court, the Virginia State Bar, by Assistant Bar Counsel Marian L. Beckett, and the Respondent, James Drewry Hudkins Hill, Esq., hereby enter into an Agreed Disposition arising out of the above-referenced matter. Both parties affirm that the proposed Subcommittee Determination of a Public Reprimand, a true copy of which is attached hereto and incorporated herein by reference, reflects the stipulated facts, violations, and disposition for the above-referenced matter.

Respondent understands that should the Subcommittee accept this agreed disposition by unanimous vote, the Subcommittee Determination will be signed by the Chair or Chair Designate and thereafter mailed without the necessity of any hearing or further notice to the parties. Further, it is understood and agreed by the parties hereto that should the Subcommittee refuse the agreed disposition neither party shall be bound by the stipulations or findings contained herein and this matter shall be forthwith scheduled for a hearing by the full Committee.

SEEN AND AGREED TO:
THE VIRGINIA STATE BAR

Marian L. Beckett
Assistant Bar Counsel

James Drewry Hudkins Hill
Respondent

SUBCOMMITTEE ACTION

Pursuant to Part Six, § IV, ¶ 13(G)(1)(d) of the Rules of Virginia Supreme Court, the duly convened subcommittee of the Sixth District Committee of the Virginia State Bar hereby accepts the Agreed Disposition in this matter.

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

IN THE MATTER OF
JAMES DREWRY HUDKINS HILL, ESQUIRE
VSB Docket No. 06-060-0465

SUBCOMMITTEE DETERMINATION
PUBLIC REPRIMAND

On the 12th day of December, 2006, a meeting in this matter was held before a duly convened subcommittee of the Sixth District Committee consisting of Jean Dahnk, Esquire, Kay Forrest, and Richard Stuart, Esquire, presiding.

Pursuant to Part 6, § IV, ¶ 13(G)(1)(d) of the Rules of Virginia Supreme Court, a subcommittee of the Sixth District Committee of the Virginia State Bar hereby serves upon the Respondent the following Agreed Disposition, a Public Reprimand:

I. FINDINGS OF FACT

1. At all times relevant hereto the Respondent, James Drewry Hudkins Hill, Esq. (hereinafter the Respondent), has been an attorney licensed to practice law in the Commonwealth of Virginia.

2. In the case of the estate of Laura Horton, the executor named in the will failed to fulfill her responsibilities. The Respondent was then court appointed as the administrator c.t.a.

3. On December 4, 2003, the Respondent qualified as the administrator of the estate, posted the required bond, and submitted a timely inventory to the Complainant, Mervin C. Withers, Esquire, Commissioner of Accounts of the County of Northumberland.

4. Thereafter the Respondent failed to submit timely reports regarding the estate. The settlement of accounts was due in April of 2004. Commissioner Withers sent notices of delinquency to the Respondent in April and September of 2004 and in February and May of 2005. The Respondent failed to respond to these notices.

5. The Respondent was subsequently held in contempt by the Circuit Court of Northumberland County. He was also denied fees for his work on the estate and ordered to pay approximately $700.00 in fees and penalties out-of-pocket rather than charging them against the estate.

6. The first and second (which was the final) accountings were submitted on September 15, 2005, and approved by the Commissioner in November of 2005. The matter is now closed.

7. The Respondent ceased practicing law on December 31, 2004, and changed his membership from active to associate status the following month. He now operates a title and settlement company, but his activities do not constitute the practice of law.

II. NATURE OF MISCONDUCT

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

RULE 1.3 Diligence

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

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

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:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

III. PUBLIC REPRIMAND

Accordingly, it is the decision of the Subcommittee to impose a Public Reprimand on the Respondent, James Drewry Hudkins Hill, Esq., and he is so reprimanded.

IV. COSTS

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

SIXTH DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

VIRGINIA:
BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD
IN RE:
CHARLES DAUGHERTY FUGATE, II
VSB DOCKET NO. 06-000-2393

ORDER AND RECOMMENDATION

This matter came before the Virginia State Bar Disciplinary Board, pursuant to notice, on November 17, 2006 upon a referral to the Disciplinary Board from the Virginia Supreme Court. The purpose of the referral from the Virginia Supreme Court was to consider the petition for reinstatement of the license of Charles Daugherty Fugate, II, and to make a recommendation to the Virginia Supreme Court as to whether that petition should be granted or denied.

Hearing Procedure and Evidence

The Disciplinary Board panel was composed of Peter A. Dingman, Chair, David R. Schultz, William C. Boyce, William E. Glover, and W. Jefferson O'Flaherty, lay member. The Petitioner was present and *pro se*. The Petitioner was also assisted in the matter by Roy Jessee. The Bar was represented by Richard E. Slaney, Assistant Bar Counsel. The Chair of the panel convened the hearing at 9:00 a.m. The matter was reported by Donna Chandler, of Chandler & Halasz, Registered Court Reporters, Post Office Box 9349, Richmond, Virginia, 23227, (804) 730-1222.. The Chair swore the court reporter and introduced the panel. The Chairman canvassed the panel to determine if any member of the panel had a bias or conflict. Each member of the panel identified himself and stated that he had no bias or conflict.

The Chair then summarized the procedure to be followed in the hearing of the matter. Both the Petitioner and the Bar Counsel stated that they understood the procedure and were satisfied with the Chair's explanation.

The Petitioner moved the admission of two exhibits, comprising all of the documents previously provided to (and read by) the panel, and that motion was granted without objection by Bar Counsel. Exhibit 1 consists of a November 6, 2006 letter and enclosures from Barbara Lanier, Clerk of the Disciplinary System, to the members of the panel conveying copies of various documents more fully detailed in her letter, including the record of the prior disciplinary case (VSB Docket No. 00-000-1475) and related proceeding (Record No. 022259) in the Virginia Supreme Court which resulted in the revocation of Petitioner's license together with the pleadings and papers related to the current proceeding.

Prior to the Board hearing, on or about October 11, 2006, the Virginia State Bar issued a press release to various media companies (print, broadcast and radio) and sent notices to persons and institutions likely to have an interest announcing the pendency of Fugate's petition for reinstatement. The Board received letters in support of Fugate's petition and one letter in opposition. Those letters were disclosed to the Petitioner and provided to the Bar and the Board. Those letters not included in Exhibit 1 comprise Exhibit 2. The Bar had previously received numerous letters prior to the initial sanctions hearing on May 17, 2002. Each of those letters was included in Exhibit 1 and admitted as evidence in this proceeding.

The Petitioner then inquired of the Chair as to whether the Petitioner should be sworn prior to opening argument. The Chair responded that the Petitioner, as well as any other witness, would be sworn prior to testifying, but no oath was required for purposes of opening statement.

The Bar then moved for a rule on witnesses. The Petitioner identified four witnesses other than himself who he intended to call in the proceeding. One of those four witnesses was not present; the other three were called before the Court and sworn. The three witnesses so sworn were then admonished not to discuss the matter between them while they were excluded from the courtroom and were sent out of the courtroom. The Petitioner also agreed to ensure that the witness who was not present would not enter the courtroom during the testimony of any other witness.

The Petitioner then gave an opening statement. The Bar responded in opening statement stating that the Bar took, at the outset of the hearing, no position on the request for reinstatement and did not intend to present evidence in opposition to the petition.

The Petitioner testified as his first witness. Following his testimony, he responded to the questions of Bar Counsel and the Board. The Petitioner did not restate all of the facts recited in the petition and Bill of Particulars, but did discuss the changes he had experienced in his life since

his guilty plea and incarceration on the felony charges, and his subsequent release and employment in risk management for a grocery store chain. The Petitioner detailed his activities to stay abreast of the law, including a continuing subscription to *Virginia Lawyer*, *Virginia Lawyer Register*, and *Lawyer's Weekly*. He detailed his CLE classes and his examination and passage of the MPRE. He recited that his civil rights have been restored and detailed his community service and volunteer activities during the six years since his suspension and revocation.

The Petitioner then called Lloyd C. (Sonny) Martin as his witness. Mr. Martin is the president of a bank in Pennington Gap, and has known Charles Fugate since Fugate was a child. Martin testified that Fugate's reputation in his community for honesty and trustworthiness was very good. He further testified that the community in which his bank was located and in which he lived was, he believed, hopeful that the Bar would reinstate Fugate's license.

The next witness was Sheriff Gary Parson, Sheriff of Lee County. He testified that he was aware of the nature of the criminal charges of which Mr. Fugate had been convicted. He, in fact, stated that his office had instigated the original investigation which ultimately led (through further investigation by the FBI) to the charges against Mr. Fugate. Sheriff Parson testified that he believed that Petitioner was honest and trustworthy, and further believed that the community in which he served as Sheriff was hopeful that the Bar would grant the request for reinstatement of Fugate's license.

The next witness called by the Petitioner was Jerry Kilgore. Mr. Kilgore, a former prosecutor in Lee County, as well as the former Secretary of Public Safety and former Attorney General of Virginia, testified that he had known Mr. Fugate and his family since childhood; that he was well aware of Mr. Fugate's reputation in the community and further that he was certain that the community favored the return of Mr. Fugate to the practice of law.

Finally, the Petitioner called Steven Smith, Chief Executive Officer of the grocery store chain which employs the Petitioner. Smith testified that he did not know the Petitioner prior to his criminal conviction, but hired the Petitioner on a part-time basis after the Petitioner was released from prison and was living in a halfway house. Smith described the Petitioner's promotion to a position of trust within the company, and expressed his confidence in the Petitioner and the Petitioner's honesty and trustworthiness. Smith also extolled the Petitioner's character and relationships with other people within the company and its customers and vendors.

At the close of the Petitioner's evidence, the Bar made no motion and presented no evidence. The panel then heard closing statements from the Petitioner and the Bar. Following the closing statements, the panel deliberated to determine what recommendation should be made upon the petition.

Discussion

Paragraph 13(I)(8), Part VI, Section IV, Rules of the Supreme Court of Virginia, provide that an attorney whose license has been revoked may petition for reinstatement, setting forth in his petition the reasons why he should be reinstated. Whether or not the petition is to be granted is for the Supreme Court to decide after receiving the recommendation of this Board. The rules do not provide any mandatory waiting period and the language of the rules and prior decisions of this body dictate that the Board evaluate each case on its own merits. Factors which may be considered in reinstatement cases are clearly set out *"in the matter of Albert L. Hiss"*, Docket No. 83-26, Opinion of the Board dated May 24, 1984 and they are:

1. The severity of the Petitioner's conduct including but not limited to the nature and circumstances of the Misconduct.
2. The Petitioner's character, maturity and experience at the time of his or her Disbarment.
3. The time elapsed since the Petitioner's Disbarment.
4. Restitution to clients and/or the Bar.
5. The Petitioner's activities since Disbarment including but not limited to his or her conduct and attitude during that period of time.
6. The Petitioner's present reputation and standing in the community.
7. The Petitioner's familiarity with the Rules of Professional Conduct and his current proficiency in the law.
8. The sufficiency of the punishment undergone by the Petitioner.
9. The Petitioner's sincerity, frankness and truthfulness in presenting and discussing factors relating to his or her Disbarment and Reinstatement.
10. The impact upon public confidence in the administration of justice if the Petitioner's License to practice law is restored.

In this case, the panel determined that the evidence submitted by the Petitioner addressed each of the ten factors of *Hiss*.

The severity of the Petitioner's conduct which led to his disbarment was grave. He betrayed both the trust vested in him as a lawyer and as an officer of the hospital, upon whose Board of Directors he served. He pled guilty to, and was convicted of felony charges in Federal Court and served prison time as a result of that misconduct.

The Petitioner's character, maturity and experience at the time of his disbarment was also considered by the panel. The Petitioner cooperated with Federal investigators in connection with their investigation of others involved in the same set of operative events. Nearly six years have elapsed since his disbarment and restitution has been made as required by his plea agreement.

Much of the evidence submitted by the Petitioner in his papers and in Court addressed his activities since his disbarment and his present reputation and standing in the community. The Petitioner has worked diligently to restore his reputation serving as a volunteer, participating in church activities, and in his children's school activities. With one exception, all of the letters written to the Bar in connection with his current application supported the Petitioner's request for reinstatement. Among the materials received and reviewed by the Board were letters of support from two Commonwealth's Attorney's, a Senior United States District Judge, the Clerk of the Circuit Court and scores of lawyers practicing in Petitioner's home area. Three voluntary Bar Associations (Wise County, Lee County and the City of Norton) endorsed Petitioner's request. All of the witnesses testified that the Petitioner's reputation and standing in the community were excellent.

The Board was persuaded that the Petitioner remained familiar with the rules of professional conduct and that he had maintained his proficiency in the law. Further, the Board believes that the punishment undergone by the Petitioner was sufficient and had addressed the concerns of both the community and the Bar.

Further, the Petitioner's sincerity, frankness and truthfulness as he discussed the matters that lead to his convictions and the revocation of his license left the panel with the unanimous opinion that the Petitioner understood and regretted his actions, made no excuses for his past conduct, and would be unlikely to repeat the misconduct.

The witnesses, including a community banker, the CEO of a local grocery store chain, the Sheriff of Lee County and the former Attorney General for the Commonwealth of Virginia, discussed the impact upon public confidence in the administration of justice if the Petitioner's license to practice law was restored. Those witnesses, and the persons who wrote letters to the Bar, expressed an overwhelming sense that the community would support and, in fact, participate with the return of Mr. Fugate to the practice of law.

For all of these reasons, the panel unanimously found that the Petitioner had established by clear and convincing evidence that each of the ten factors in *Hiss* has been satisfactorily addressed, that the testimony and exhibits received in evidence demonstrate that his license to practice law in the Commonwealth of Virginia should be reinstated, that, upon complying with the further requirements of the Court (including, without limitation, successfully completing the Virginia State Bar Exam) Petitioner ought to be again permitted to take the oath and be admitted to the bar of the Supreme Court of Virginia; and it is, therefore,

The respectful recommendation of the Disciplinary Board of the Virginia State Bar that the Virginia Supreme Court grant the petition and provide for the reinstatement of the license of Charles Daugherty Fugate, II.

As required in Paragraph 13.B.8.(c) of the Rules of Court, Part VI, Section IV, the Board finds the costs in the proceeding to be as follows:

Copying	$602.10
Court Reporter Fees	$ 89.00
Transcript and hearing fee	$478.50
Mailing of Notice and Postage	$718.33
Administrative Fee	$750.00
Bristol Courier Newspaper and Press Release	$251.40
Certifieds	$ 13.92
Total	$2,903.25

It is requested and ordered that the Clerk of the Disciplinary System forward this Order of Recommendation to the Virginia Supreme Court for its consideration and disposition; and

Further requested and ordered that the Clerk forward certified copies of this Order of Recommendation to Charles Daugherty Fugate, II, by certified mail, return receipt requested, at his address of record with the Virginia State Bar, 20233 Colony Lane, Bristol, Virginia 24202 and to Richard E. Slaney, assistant Bar Counsel, by hand delivery to 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

Entered this 7th day of December, 2006.

Peter A. Dingman, Chair

VIRGINIA:
BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD
IN THE MATTER OF
JAMES E. GHEE
VSB DOCKET NO.: 06-000-0836

ORDER OF RECOMMENDATION

This matter came on to be heard on October 27, 2006 before a panel of the Virginia State Bar Disciplinary Board (the "Board") consisting of Robert E. Eicher, 2nd Vice-Chair, (the "Chair") Joseph R. Lassiter, Jr., William H. Monroe, Jr., Russell W. Updike, and V. Max Beard, lay member. The Virginia State Bar ("VSB" or the "Bar") was represented by Harry M. Hirsch. Charlotte Peoples Hodges represented the petitioner, James E. Ghee ("Ghee").

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, including the Chair, responded in the negative. Tracy J. Stroh, RPR, with Chandler & Halasz, P.O. Box 9349, Richmond, Virginia 23227, (804-730-1222) after being duly sworn, reported the hearing and transcribed the proceedings.

All notices required by the Rules of the Virginia Supreme Court were sent by the Clerk of the Disciplinary System.

Ghee petitions for reinstatement of his Bar license, which was revoked by the Board on October 19, 1995, following Ghee's surrender of his license. Ghee offered into evidence seven exhibits, which were admitted without objection, and presented five witnesses, including himself. The Bar opposed the petition for reinstatement, and offered into evidence six exhibits, all but one of which were admitted without objection. The sixth was offered subject to verification by witnesses, and was later admitted into evidence. The parties offered into the record a Stipulation, which was admitted. The parties stipulated that Ghee has met all of the objective criteria for reinstatement found in Part 6, Section IV, Paragraph 13.I.8.b., including passing the Multi-State Exam with a score of 85 or higher, reimbursing sums paid by the Client Protection Fund, paying the cost of prior proceedings, and completing the necessary mandatory continuing legal education. A petitioner for reinstatement is also required to prove by clear and convincing evidence that he is a person of honest demeanor and good moral character and possesses the requisite fitness to practice law. Part 6, Section V., Paragraph 13.h., provides that in making its recommendation to the Virginia Supreme Court, the Board may consider but is not bound by the factors spelled out *In the matter of Alfred Lee Hiss,* VSB Docket No. 83-26 (Sup. Ct. July 2, 1984), commonly referred to as the *Hiss* factors.

By their nature, reinstatement hearings raise difficult questions. Lord Mansfield noted over two hundred years ago that disbarment is not punishment. *Ex parte Brounsall*, 98 Eng. Rep. 138 (1778). Commentary to the ABA Standards, Para. 2-10, states that since the purpose of lawyer discipline is not punishment, readmission may be appropriate; the presumption, however, is against reinstatement. The burden of proof for reinstatement is clear and convincing evidence. Attorney discipline is always forward-looking. In short, (1) Virginia does not subscribe to permanent disbarment, (2) disbarment is not discipline, and (3) the applicant for readmission bears a heavy burden of proving by clear and convincing evidence that he is presently fit to practice law and that the public's interests are safeguarded and the public's confidence in the administration of justice is preserved. *In re Edmunds*, Order of Recommendation, VSB No. 95-000-1155 (1995).

The Board, after consideration of all of the documentary evidence, the testimony of the witnesses, the ten *Hiss* factors, and argument of counsel, decided by majority vote not to recommend that Ghee's petition for reinstatement be approved. The Board's reasons for this decision are found in the following discussion of the ten *Hiss* factors.

***Hiss* Factor No. 1.** The Severity of the Petitioner's Misconduct Including, but not Limited to, the Nature and Circumstances of the Misconduct.

In 1995 Ghee was indicted by Nottoway County for one count of felony embezzlement of $38,517.10 from an estate trust account which he opened after qualifying as administrator of the John Jasper Redd estate ("Redd Estate"). Subsequently he entered into a plea agreement and pled guilty to eleven counts of misdemeanor embezzlement. Ghee was sentenced to twelve months in jail on ten counts, all suspended, and twelve months in jail with six months suspended on the remaining count, all sentences to run consecutively. Ghee reported to jail on May 20, 1996, and was subsequently assigned to work release, and thereafter to home electronic monitoring. He was released from supervised probation on November 28, 1996, and from unsupervised probation on May 15, 1998. See Stipulation.

A review of Ghee's prior disciplinary record and the misconduct that gave rise to his embezzlement convictions bears scrutiny.

Ghee received a private reprimand with terms by the Fifth District Committee, effective September 24, 1990. The private reprimand arose from Ghee's failure to adequately keep trust account records, being out of trust on at least one occasion during the months of March through May, 1989, and intermingling his personal funds in his trust account during that same period. Ghee successfully completed the terms by February 3, 1992, which included unannounced audits, a certification by a certified public accountant that his trust account records conformed with the regulations of the Virginia State Bar, and quarterly audited statements from his CPA for a period of two years that his trust accounts were in trust. See Bar Ex. 5, pg 3–8.

Ghee received two dismissals with terms from the Fifth District Committee effective June 25, 1992. One arose from a malpractice case where Ghee was retained as counsel, and did an inaccurate accounting and had record keeping violations. The other dismissal with terms involved refund of an unearned fee in a bankruptcy case from his operating account and included record keeping violations. The terms for these two cases included participation in a training session in the Safeguard system and meetings with a Virginia State Bar investigator to review Ghee's trust account records and reconciliations immediately after October 31, 1992, January 31, 1993, and July 31, 1993. See Bar Ex. 5, pgs. 15 and 22.

Ghee received a five year suspension with terms effective March 1, 1995, based upon a real estate closing which occurred on or about November 25, 1992, at which time Ghee received $44,990.75 in settlement funds. On November 30, 1992, Ghee wrote checks in the amount of $35,570.24 to Joan Walker, $7,420.51 to Denise George and $2,000.00 to himself. As of February 1, 1994, the $7,420.51 check had still not cleared the trust account. From November 30, 1992 until February 1, 1994, the trust account balance fell below that amount on 32 separate occasions. On eight separate occasions during that period, the trust account had a negative balance. As of February 2, 1994, the trust account was out of trust $5,035.37. Once again it was found that Ghee had failed to maintain the required books, failed to identify to the appropriate case $30,000 paid to him, and failed to contemporaneously record information as to the source of funds deposited to the trust account. In several instances Ghee failed to prevent or promptly detect and correct the deposit of fiduciary funds to his operating account. Finally, Ghee had written checks for costs against the trust account when there were no client funds to cover those costs. Ghee entered into an Agreed Disposition whereby his license to practice law was suspended effective March 1, 1995, for a period of five years, with half of that suspension suspended upon various conditions. Bar Ex. 5, pgs 23–29.

Thus, when Ghee surrendered his license on October 19, 1995, his license had already been suspended for a period of two and one-half years. Furthermore, the eleven embezzlements for which he pled guilty occurred on 3/26/93 ($2,000), 5/20/93 ($2,000), 6/4/93 ($2,000), 6/25/93 ($5,000), 7/8/93 ($4,500), 7/16/93 ($4,500), 7/23/93 ($2,500), 9/29/93 (sic) ($3,500), 8/2/93 ($4,500), 10/22/93 ($8,000), and 11/16/94 ($10,000). The dates are taken from Ghee's amended indictment (Ex. G to Petitioner's Bill of Particulars), and from an investigator's reconstruction of the estate account activity in question, contained in VSB Ex. 6. (Copies of these documents are appended to the original copy of this Order for ease of reference.) The dates in question make it clear that Ghee's defalcations were premeditated. The first eight defalcations from the Redd Estate fiduciary account occurred during the period when his attorney fiduciary account was still being reviewed periodically by a bar investigator as a result of his June 25, 1992, discipline, which effectively prevented Ghee from making unauthorized withdrawals from his attorney fiduciary

account. (Tr. P. 138). During this same period, Ghee engaged in the misconduct that gave rise to his five year suspension with terms, which resulted from his trust account being out of trust on numerous occasions up until February 2, 1994. The suspension order cited Ghee's "cooperative attitude toward these proceedings". Unfortunately Ghee's cooperative attitude did not include advising the Bar of the ten defalcations that had already occurred from the Redd Estate account prior to endorsement of the Agreed Disposition. Ghee initially deposited $39,511.35 to the Redd estate account on March 25, 1993, and by his ten unauthorized withdrawals, he reduced the account to $804.25 on October 22, 1993. Ghee testified that he replaced $20,000 in the account from the proceeds of a personal injury settlement on November 8, 1994, and that he was unable to resist withdrawing $10,000 of those funds from the account eight days later on November 16, 1994.

Subsequent gifts or loans from friends reduced the ultimate loss, and the surety took judgment against Ghee in the amount of $28,117.12. Ghee satisfied the bonding company's judgment against him for the discounted sum of $19,461.92.

Ghee's trust account problems occurred over an extended period of time from 1988 to 1995. The defalcations were deliberate and repeated. The nature and circumstances of Ghee's criminal acts can only be described as severe.

***Hiss* Factor No. 2.** The Petitioner's Character, Maturity and Experience at the Time of his Disbarment.

Ghee was an experienced attorney at the time of his defalcations. He graduated from law school in 1973, was an Earl Warren Legal Fellow of the NAACP Legal Defense and Education Fund with the Hill, Tucker and Marsh firm in Richmond, Virginia, from 1973–1975, and was in solo private practice in Farmville from 1975 until his suspension and disbarment in 1995. He was and is a national director of the NAACP, and a member of its executive committee. This was not a case of a young attorney getting into trouble, nor a case of an elderly attorney who was becoming incapacitated.

***Hiss* Factor No. 3.** The Time Elapsed Since the Petitioner's Disbarment.

It has been 11 years since Ghee surrendered his license and it was then revoked. Ghee has not previously applied for reinstatement.

***Hiss* Factor No. 4.** Restitution to Clients and/or the Bar.

Ghee has made restitution to the Bar and to all of his clients that were harmed as a result of his acts. He paid the surety an agreed sum to satisfy the surety's judgment against him only four months after the judgment was entered against him. He did not seek relief from his debts via the bankruptcy court. Ghee's efforts to make restitution are commendable.

***Hiss* Factor No. 5.** The Petitioner's Activities Since Disbarment Including, but not Limited to, his Conduct and Attitude During that Period.

From all evidence, Ghee has undertaken to lead an exemplary life since his disbarment and he appears to have succeeded in this effort. Ghee has been very active in his church and with the NAACP. He has been the recipient of many honors and awards, including Outstanding Virginian Award at the annual conference of the A.M.E. Church (1995), Man of the Year for his district of the A.M.E. Church, and was honored by the NAACP in 2003 for lifetime achievement.

Since his disbarment, Ghee has worked as a paralegal at the Williams, Luck and Williams law firm in Martinsville, Virginia. According to Robert A. Williams, the partner for whom he primarily works, his performance has been exemplary.

***Hiss* Factor No. 6.** The Petitioner's Present Reputation and Standing in the Community.

Ghee is obviously held in high esteem and thought of with love and affection in his community. The letters of support for the reinstatement of his license to practice law are almost too numerous to count. They come from all walks of life, and include national figures well known to all. Julian Bond, currently a professor at the University of Virginia and American University and formerly chairman of the board of directors of the NAACP, testified by deposition. He described Ghee's fine character, his role on the executive committee as one who easily reads trends and directions, his knowledge of the institutional history of the organization, ability to evaluate candidates for board committees, and his ability to go quickly to the heart of a matter. In addition to the many fine recommendations from national, state and community leaders, the Board must also take note of the numerous letters, often unsolicited, from ordinary citizens who took the time to share personal knowledge and relate the high

esteem in which they hold Ghee. Only two letters in opposition to Ghee's reinstatement were received by the Bar, one of a general nature from an attorney who does not know Ghee personally, and one from a lay person. Many attorneys, including prosecutors, wrote letters in support of Ghee's reinstatement.

***Hiss* Factor No. 7.** The Petitioner's Familiarity with the Virginia Code of Professional Responsibility and his Current Proficiency in the Law.

Ghee has fulfilled all of the requirements for Continuing Legal Education since his disbarment in 1995. He twice passed the Ethics exam required for reinstatement with a score of 94, well in excess of the requirement. Robert Williams of the Williams law firm unequivocally testified as to Ghee's current proficiency in the law in the area in which he has been focusing as a paralegal. Furthermore, Williams indicated that they will hire Ghee as an attorney if his license is reinstated. Bonds' testimony further corroborated Ghee's continuing proficiency and judgment.

***Hiss* Factor No. 8.** The Sufficiency of the Punishment Undergone by the Petitioner.

Ghee's punishment would appear to be an appropriate one. Counsel for Ghee spoke of his long fall from grace. The loss of his Bar license, the shame and humiliation resulting from the criminal convictions and having to live under this cloud, unquestionably were a severe punishment. Although his actual days incarcerated were limited, they were undoubtedly sufficient. The Commonwealth's Attorney stated, in the stipulation that was admitted into evidence, that the reduction of Ghee's charges from a felony to 11 misdemeanor counts was done not to lighten the punishment or because Ghee was an attorney, but solely to permit him to retain his right to vote, the significance of which is quite understandable. Ghee has undergone more than sufficient punishment.

***Hiss* Factor No. 9.** The Petitioner's Sincerity, Frankness and Truthfulness in Presenting and Discussing Factors Relating to Disbarment and Reinstatement.

The Board is troubled by Ghee's apparent failure to recognize the true extent of his criminal activity, and by Ghee's testimony and the testimony of several of his character witnesses who suggest that he should not be entrusted with the responsibility for handling client funds.

Ghee's testimony, that of his witnesses, and many of his letters of recommendation characterize his theft from the Redd Estate account as a one time aberration, considered by them to be inexplicable and totally out of character. In truth, as noted above under Hiss Factor No. 1, Ghee's repeated defalcations from the Redd Estate account were not a one time occurrence. There were eleven separate defalcations over a two year period, and continued so long as there was money to take. Furthermore, Ghee testified that he had never previously taken client funds from his trust account. No less than four prior disciplinary proceedings for trust account violations belie that assertion.

Ghee and several of his witnesses were asked why he took the money. The only explanations offered were that at that time, Ghee was married to a wife who had expensive tastes and that she quit her employment to start her own business (Tr. P. 41), that he was heavily involved in preparation for an anniversary celebration of the landmark decision in *Brown v Board of Education* to the sacrifice of his law practice (Tr. P. 124), that creditors were calling him about payments of debts (Tr. P. 124), that clients were not paying their fees, that he had already borrowed money from friends and could not go back to them (Tr. P. 125), and that out of pride (which he now sees as wrong), he did what he needed to keep afloat. The explanations indicate that Ghee has not fully taken upon himself the blame for his actions.

Ghee called five witnesses on his own behalf, including himself. All of them testified at least to some extent that if Ghee got his license back, he should be monitored. Ghee himself testified that if his license were reinstated, he would practice only as an associate with a law firm, and would not have access to trust account funds. (Tr. P. 214). Ghee testified that he is a "horrible bookkeeper." (Tr. P. 124). Ghee testified that he would not practice law as a sole practitioner, or handle a trust account without supervision. (Tr. P. 139–140). Williams, who currently employs Ghee as a paralegal, testified that if his firm employed Ghee as an associate attorney, Ghee would not have access to the trust account (Tr. P. 37), which is understandable for a non-equity attorney. James H. Lyle, an entrepreneur called as a character witness by Ghee, testified that he knew of Ghee's financial problems and had lent money to Ghee to permit him to makeup shortfalls in his attorney trust account (Tr. P. 81–86), to the extent that Ghee's bank would call Lyle to see if he would agree to make good on shortfalls in Ghee's account. (Tr. P. 86–87, 98–99, 110–112). Lyle agreed that Ghee might be better off if he didn't handle money when he got his license back. (Tr. P. 104–105). E. M. Wright, Jr., Esquire, testified that Ghee should be monitored if he got his license back. Unfortunately, a license to practice law cannot be partially reinstated. If reinstated, it must be

done so without terms. The attorney is free to practice in any area of law, and the Board cannot bar him from handling client funds. When Ghee and his own witnesses express reservations about his ability to handle client funds, it is difficult for the Board to reach a conclusion that he should be reinstated.

***Hiss* Factor No. 10.** The Impact Upon Confidence in the Administration of Justice if the Petitioner's License to Practice Law was Restored.

This factor is always difficult. In the abstract, most members of the general public have severe difficulty understanding why the license of any attorney who stole money would ever be reinstated. On the other hand, the cases and commentators dealing with reinstatement have made it clear that disbarment is not punishment, and that one who has been disbarred can be rehabilitated and should be permitted to have his or her license reinstated, even in cases involving theft. The response from Ghee's own community is overwhelmingly in favor of reinstatement.

After correctly noting that reinstatement cases must be considered on a case by case basis and are not easily decided on precedent, counsel for petitioner argues that the case of *In re James T. Edmunds*, VSB Docket No. 95-000-1155 (1995) is instructive when considering Ghee's case. The Board finds that Ghee's petition has more in common with *In re William McMillan Powers*, VSB Docket No. 05-000-3014 (2005). In the Powers case, the Board recommended reinstatement, but noted that, at a prior reinstatement hearing in 1999, Powers had failed to convince the Board that he had accepted responsibility for his conduct, and may in fact have blamed others for it. The Board cannot find that Ghee appreciates the severity and magnitude of, and has accepted responsibility for, the misconduct resulting in the revocation of his license to practice law in 1995. The lapse of time alone does not commend reinstatement. Ghee testified that he intended to replace the money when he misappropriated it from the Redd Estate. The Board notes that he deposited $20,000 from his personal funds into the Redd Estate on November 8, 1994, and eight days later wrongfully took $10,000. (VSB Ex. 11) The Board notes, too, that Ghee sent the heirs of the Redd Estate a Final Accounting as of November 1, 1994, setting forth the amount each heir was to receive. (VSB Ex. 9) Ghee's Final Accounting was fraudulent. It did not show the thousands of dollars he had misappropriated that otherwise would have been distributed to the heirs.

Upon consideration of the foregoing, the Board by majority vote recommends to the Supreme Court of Virginia that the petition for reinstatement not be approved.

As required by Part 6, Section IV, Paragraph 13.8.c.(5), the Board finds that the costs of this proceeding are as follows:

Copying Invoices:	$ 331.19
Court Reporter Fees:	$1,354.50
Mailing Fees:	$ 58.43
Mailing Notice:	$ 440.62
Legal Notices:	$ 94.39
Administrative Fee:	$ 750.00
Total Costs:	$3,029.13

It is ORDERED that the Clerk of the Disciplinary System forward this order of Recommendation and the record to the Virginia Supreme Court for its consideration and disposition. It is further ORDERED that the Clerk of the Disciplinary System forward an attested copy of this Order of Recommendation by certified mail return receipt requested, to Charlotte Peoples Hodges, Counsel for the Petitioner, P.O. Box 4302, Midlothian, Virginia 23112-4302 and shall deliver the same by hand to Harry M. Hirsch, Deputy Bar Counsel, Virginia State Bar, Eighth and Main Building, 707 East Main Street, Richmond, Virginia 23219-2803.

Entered this 6th day of December, 2006.

Virginia State Bar Disciplinary Board
By: Robert E. Eicher
2nd Vice Chair

VIRGINIA:
BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD
IN RE:
CHARLES DAUGHERTY FUGATE, II
VSB DOCKET NO. 06-000-2393

ORDER AND RECOMMENDATION

This matter came before the Virginia State Bar Disciplinary Board, pursuant to notice, on November 17, 2006 upon a referral to the Disciplinary Board from the Virginia Supreme Court. The purpose of the referral from the Virginia Supreme Court was to consider the petition for reinstatement of the license of Charles Daugherty Fugate, II, and to make a recommendation to the Virginia Supreme Court as to whether that petition should be granted or denied.

Hearing Procedure and Evidence

The Disciplinary Board panel was composed of Peter A. Dingman, Chair, David R. Schultz, William C. Boyce, William E. Glover, and W. Jefferson O'Flaherty, lay member. The Petitioner was present and *pro se*. The Petitioner was also assisted in the matter by Roy Jessee. The Bar was represented by Richard E. Slaney, Assistant Bar Counsel. The Chair of the panel convened the hearing at 9:00 a.m. The matter was reported by Donna Chandler, of Chandler & Halasz, Registered Court Reporters, Post Office Box 9349, Richmond, Virginia, 23227, (804) 730-1222.. The Chair swore the court reporter and introduced the panel. The Chairman canvassed the panel to determine if any member of the panel had a bias or conflict. Each member of the panel identified himself and stated that he had no bias or conflict.

The Chair then summarized the procedure to be followed in the hearing of the matter. Both the Petitioner and the Bar Counsel stated that they understood the procedure and were satisfied with the Chair's explanation.

The Petitioner moved the admission of two exhibits, comprising all of the documents previously provided to (and read by) the panel, and that motion was granted without objection by Bar Counsel. Exhibit 1 consists of a November 6, 2006 letter and enclosures from Barbara Lanier, Clerk of the Disciplinary System, to the members of the panel conveying copies of various documents more fully detailed in her letter, including the record of the prior disciplinary case (VSB Docket No. 00-000-1475) and related proceeding (Record No. 022259) in the Virginia Supreme Court which resulted in the revocation of Petitioner's license together with the pleadings and papers related to the current proceeding.

Prior to the Board hearing, on or about October 11, 2006, the Virginia State Bar issued a press release to various media companies (print, broadcast and radio) and sent notices to persons and institutions likely to have an interest announcing the pendency of Fugate's petition for reinstatement. The Board received letters in support of Fugate's petition and one letter in opposition. Those letters were disclosed to the Petitioner and provided to the Bar and the Board. Those letters not included in Exhibit 1 comprise Exhibit 2. The Bar had previously received numerous letters prior to the initial sanctions hearing on May 17, 2002. Each of those letters was included in Exhibit 1 and admitted as evidence in this proceeding.

The Petitioner then inquired of the Chair as to whether the Petitioner should be sworn prior to opening argument. The Chair responded that the Petitioner, as well as any other witness, would be sworn prior to testifying, but no oath was required for purposes of opening statement.

The Bar then moved for a rule on witnesses. The Petitioner identified four witnesses other than himself who he intended to call in the proceeding. One of those four witnesses was not present; the other three were called before the Court and sworn. The three witnesses so sworn were then admonished not to discuss the matter between them while they were excluded from the courtroom and were sent out of the courtroom. The Petitioner also agreed to ensure that the witness who was not present would not enter the courtroom during the testimony of any other witness.

The Petitioner then gave an opening statement. The Bar responded in opening statement stating that the Bar took, at the outset of the hearing, no position on the request for reinstatement and did not intend to present evidence in opposition to the petition.

The Petitioner testified as his first witness. Following his testimony, he responded to the questions of Bar Counsel and the Board. The Petitioner did not restate all of the facts recited in the petition and Bill of Particulars, but did discuss the changes he had experienced in his life since

his guilty plea and incarceration on the felony charges, and his subsequent release and employment in risk management for a grocery store chain. The Petitioner detailed his activities to stay abreast of the law, including a continuing subscription to *Virginia Lawyer*, *Virginia Lawyer Register*, and *Lawyer's Weekly*. He detailed his CLE classes and his examination and passage of the MPRE. He recited that his civil rights have been restored and detailed his community service and volunteer activities during the six years since his suspension and revocation.

The Petitioner then called Lloyd C. (Sonny) Martin as his witness. Mr. Martin is the president of a bank in Pennington Gap, and has known Charles Fugate since Fugate was a child. Martin testified that Fugate's reputation in his community for honesty and trustworthiness was very good. He further testified that the community in which his bank was located and in which he lived was, he believed, hopeful that the Bar would reinstate Fugate's license.

The next witness was Sheriff Gary Parson, Sheriff of Lee County. He testified that he was aware of the nature of the criminal charges of which Mr. Fugate had been convicted. He, in fact, stated that his office had instigated the original investigation which ultimately led (through further investigation by the FBI) to the charges against Mr. Fugate. Sheriff Parson testified that he believed that Petitioner was honest and trustworthy, and further believed that the community in which he served as Sheriff was hopeful that the Bar would grant the request for reinstatement of Fugate's license.

The next witness called by the Petitioner was Jerry Kilgore. Mr. Kilgore, a former prosecutor in Lee County, as well as the former Secretary of Public Safety and former Attorney General of Virginia, testified that he had known Mr. Fugate and his family since childhood; that he was well aware of Mr. Fugate's reputation in the community and further that he was certain that the community favored the return of Mr. Fugate to the practice of law.

Finally, the Petitioner called Steven Smith, Chief Executive Officer of the grocery store chain which employs the Petitioner. Smith testified that he did not know the Petitioner prior to his criminal conviction, but hired the Petitioner on a part-time basis after the Petitioner was released from prison and was living in a halfway house. Smith described the Petitioner's promotion to a position of trust within the company, and expressed his confidence in the Petitioner and the Petitioner's honesty and trustworthiness. Smith also extolled the Petitioner's character and relationships with other people within the company and its customers and vendors.

At the close of the Petitioner's evidence, the Bar made no motion and presented no evidence. The panel then heard closing statements from the Petitioner and the Bar. Following the closing statements, the panel deliberated to determine what recommendation should be made upon the petition.

Discussion

Paragraph 13(I)(8), Part VI, Section IV, Rules of the Supreme Court of Virginia, provide that an attorney whose license has been revoked may petition for reinstatement, setting forth in his petition the reasons why he should be reinstated. Whether or not the petition is to be granted is for the Supreme Court to decide after receiving the recommendation of this Board. The rules do not provide any mandatory waiting period and the language of the rules and prior decisions of this body dictate that the Board evaluate each case on its own merits. Factors which may be considered in reinstatement cases are clearly set out *"in the matter of Albert L. Hiss"*, Docket No. 83-26, Opinion of the Board dated May 24, 1984 and they are:

1. The severity of the Petitioner's conduct including but not limited to the nature and circumstances of the Misconduct.
2. The Petitioner's character, maturity and experience at the time of his or her Disbarment.
3. The time elapsed since the Petitioner's Disbarment.
4. Restitution to clients and/or the Bar.
5. The Petitioner's activities since Disbarment including but not limited to his or her conduct and attitude during that period of time.
6. The Petitioner's present reputation and standing in the community.
7. The Petitioner's familiarity with the Rules of Professional Conduct and his current proficiency in the law.
8. The sufficiency of the punishment undergone by the Petitioner.
9. The Petitioner's sincerity, frankness and truthfulness in presenting and discussing factors relating to his or her Disbarment and Reinstatement.
10. The impact upon public confidence in the administration of justice if the Petitioner's License to practice law is restored.

In this case, the panel determined that the evidence submitted by the Petitioner addressed each of the ten factors of *Hiss*.

The severity of the Petitioner's conduct which led to his disbarment was grave. He betrayed both the trust vested in him as a lawyer and as an officer of the hospital, upon whose Board of Directors he served. He pled guilty to, and was convicted of felony charges in Federal Court and served prison time as a result of that misconduct.

The Petitioner's character, maturity and experience at the time of his disbarment was also considered by the panel. The Petitioner cooperated with Federal investigators in connection with their investigation of others involved in the same set of operative events. Nearly six years have elapsed since his disbarment and restitution has been made as required by his plea agreement.

Much of the evidence submitted by the Petitioner in his papers and in Court addressed his activities since his disbarment and his present reputation and standing in the community. The Petitioner has worked diligently to restore his reputation serving as a volunteer, participating in church activities, and in his children's school activities. With one exception, all of the letters written to the Bar in connection with his current application supported the Petitioner's request for reinstatement. Among the materials received and reviewed by the Board were letters of support from two Commonwealth's Attorney's, a Senior United States District Judge, the Clerk of the Circuit Court and scores of lawyers practicing in Petitioner's home area. Three voluntary Bar Associations (Wise County, Lee County and the City of Norton) endorsed Petitioner's request. All of the witnesses testified that the Petitioner's reputation and standing in the community were excellent.

The Board was persuaded that the Petitioner remained familiar with the rules of professional conduct and that he had maintained his proficiency in the law. Further, the Board believes that the punishment undergone by the Petitioner was sufficient and had addressed the concerns of both the community and the Bar.

Further, the Petitioner's sincerity, frankness and truthfulness as he discussed the matters that lead to his convictions and the revocation of his license left the panel with the unanimous opinion that the Petitioner understood and regretted his actions, made no excuses for his past conduct, and would be unlikely to repeat the misconduct.

The witnesses, including a community banker, the CEO of a local grocery store chain, the Sheriff of Lee County and the former Attorney General for the Commonwealth of Virginia, discussed the impact upon public confidence in the administration of justice if the Petitioner's license to practice law was restored. Those witnesses, and the persons who wrote letters to the Bar, expressed an overwhelming sense that the community would support and, in fact, participate with the return of Mr. Fugate to the practice of law.

For all of these reasons, the panel unanimously found that the Petitioner had established by clear and convincing evidence that each of the ten factors in *Hiss* has been satisfactorily addressed, that the testimony and exhibits received in evidence demonstrate that his license to practice law in the Commonwealth of Virginia should be reinstated, that, upon complying with the further requirements of the Court (including, without limitation, successfully completing the Virginia State Bar Exam) Petitioner ought to be again permitted to take the oath and be admitted to the bar of the Supreme Court of Virginia; and it is, therefore,

The respectful recommendation of the Disciplinary Board of the Virginia State Bar that the Virginia Supreme Court grant the petition and provide for the reinstatement of the license of Charles Daugherty Fugate, II.

As required in Paragraph 13.B.8.(c) of the Rules of Court, Part VI, Section IV, the Board finds the costs in the proceeding to be as follows:

Copying	$602.10
Court Reporter Fees	$ 89.00
Transcript and hearing fee	$478.50
Mailing of Notice and Postage	$718.33
Administrative Fee	$750.00
Bristol Courier Newspaper and Press Release	$251.40
Certifieds	$ 13.92
Total	$2,903.25

It is requested and ordered that the Clerk of the Disciplinary System forward this Order of Recommendation to the Virginia Supreme Court for its consideration and disposition; and

Further requested and ordered that the Clerk forward certified copies of this Order of Recommendation to Charles Daugherty Fugate, II, by certified mail, return receipt requested, at his address of record with the Virginia State Bar, 20233 Colony Lane, Bristol, Virginia 24202 and to Richard E. Slaney, assistant Bar Counsel, by hand delivery to 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

Entered this 7th day of December, 2006.

Peter A. Dingman, Chair

VIRGINIA:
BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD
IN THE MATTER OF
JAMES E. GHEE
VSB DOCKET NO.: 06-000-0836

ORDER OF RECOMMENDATION

This matter came on to be heard on October 27, 2006 before a panel of the Virginia State Bar Disciplinary Board (the "Board") consisting of Robert E. Eicher, 2nd Vice-Chair, (the "Chair") Joseph R. Lassiter, Jr., William H. Monroe, Jr., Russell W. Updike, and V. Max Beard, lay member. The Virginia State Bar ("VSB" or the "Bar") was represented by Harry M. Hirsch. Charlotte Peoples Hodges represented the petitioner, James E. Ghee ("Ghee").

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, including the Chair, responded in the negative. Tracy J. Stroh, RPR, with Chandler & Halasz, P.O. Box 9349, Richmond, Virginia 23227, (804-730-1222) after being duly sworn, reported the hearing and transcribed the proceedings.

All notices required by the Rules of the Virginia Supreme Court were sent by the Clerk of the Disciplinary System.

Ghee petitions for reinstatement of his Bar license, which was revoked by the Board on October 19, 1995, following Ghee's surrender of his license. Ghee offered into evidence seven exhibits, which were admitted without objection, and presented five witnesses, including himself. The Bar opposed the petition for reinstatement, and offered into evidence six exhibits, all but one of which were admitted without objection. The sixth was offered subject to verification by witnesses, and was later admitted into evidence. The parties offered into the record a Stipulation, which was admitted. The parties stipulated that Ghee has met all of the objective criteria for reinstatement found in Part 6, Section IV, Paragraph 13.I.8.b., including passing the Multi-State Exam with a score of 85 or higher, reimbursing sums paid by the Client Protection Fund, paying the cost of prior proceedings, and completing the necessary mandatory continuing legal education. A petitioner for reinstatement is also required to prove by clear and convincing evidence that he is a person of honest demeanor and good moral character and possesses the requisite fitness to practice law. Part 6, Section V., Paragraph 13.h., provides that in making its recommendation to the Virginia Supreme Court, the Board may consider but is not bound by the factors spelled out *In the matter of Alfred Lee Hiss,* VSB Docket No. 83-26 (Sup. Ct. July 2, 1984), commonly referred to as the *Hiss* factors.

By their nature, reinstatement hearings raise difficult questions. Lord Mansfield noted over two hundred years ago that disbarment is not punishment. *Ex parte Brounsall*, 98 Eng. Rep. 138 (1778). Commentary to the ABA Standards, Para. 2-10, states that since the purpose of lawyer discipline is not punishment, readmission may be appropriate; the presumption, however, is against reinstatement. The burden of proof for reinstatement is clear and convincing evidence. Attorney discipline is always forward-looking. In short, (1) Virginia does not subscribe to permanent disbarment, (2) disbarment is not discipline, and (3) the applicant for readmission bears a heavy burden of proving by clear and convincing evidence that he is presently fit to practice law and that the public's interests are safeguarded and the public's confidence in the administration of justice is preserved. *In re Edmunds*, Order of Recommendation, VSB No. 95-000-1155 (1995).

The Board, after consideration of all of the documentary evidence, the testimony of the witnesses, the ten *Hiss* factors, and argument of counsel, decided by majority vote not to recommend that Ghee's petition for reinstatement be approved. The Board's reasons for this decision are found in the following discussion of the ten *Hiss* factors.

***Hiss* Factor No. 1.** The Severity of the Petitioner's Misconduct Including, but not Limited to, the Nature and Circumstances of the Misconduct.

In 1995 Ghee was indicted by Nottoway County for one count of felony embezzlement of $38,517.10 from an estate trust account which he opened after qualifying as administrator of the John Jasper Redd estate ("Redd Estate"). Subsequently he entered into a plea agreement and pled guilty to eleven counts of misdemeanor embezzlement. Ghee was sentenced to twelve months in jail on ten counts, all suspended, and twelve months in jail with six months suspended on the remaining count, all sentences to run consecutively. Ghee reported to jail on May 20, 1996, and was subsequently assigned to work release, and thereafter to home electronic monitoring. He was released from supervised probation on November 28, 1996, and from unsupervised probation on May 15, 1998. See Stipulation.

A review of Ghee's prior disciplinary record and the misconduct that gave rise to his embezzlement convictions bears scrutiny.

Ghee received a private reprimand with terms by the Fifth District Committee, effective September 24, 1990. The private reprimand arose from Ghee's failure to adequately keep trust account records, being out of trust on at least one occasion during the months of March through May, 1989, and intermingling his personal funds in his trust account during that same period. Ghee successfully completed the terms by February 3, 1992, which included unannounced audits, a certification by a certified public accountant that his trust account records conformed with the regulations of the Virginia State Bar, and quarterly audited statements from his CPA for a period of two years that his trust accounts were in trust. See Bar Ex. 5, pg 3–8.

Ghee received two dismissals with terms from the Fifth District Committee effective June 25, 1992. One arose from a malpractice case where Ghee was retained as counsel, and did an inaccurate accounting and had record keeping violations. The other dismissal with terms involved refund of an unearned fee in a bankruptcy case from his operating account and included record keeping violations. The terms for these two cases included participation in a training session in the Safeguard system and meetings with a Virginia State Bar investigator to review Ghee's trust account records and reconciliations immediately after October 31, 1992, January 31, 1993, and July 31, 1993. See Bar Ex. 5, pgs. 15 and 22.

Ghee received a five year suspension with terms effective March 1, 1995, based upon a real estate closing which occurred on or about November 25, 1992, at which time Ghee received $44,990.75 in settlement funds. On November 30, 1992, Ghee wrote checks in the amount of $35,570.24 to Joan Walker, $7,420.51 to Denise George and $2,000.00 to himself. As of February 1, 1994, the $7,420.51 check had still not cleared the trust account. From November 30, 1992 until February 1, 1994, the trust account balance fell below that amount on 32 separate occasions. On eight separate occasions during that period, the trust account had a negative balance. As of February 2, 1994, the trust account was out of trust $5,035.37. Once again it was found that Ghee had failed to maintain the required books, failed to identify to the appropriate case $30,000 paid to him, and failed to contemporaneously record information as to the source of funds deposited to the trust account. In several instances Ghee failed to prevent or promptly detect and correct the deposit of fiduciary funds to his operating account. Finally, Ghee had written checks for costs against the trust account when there were no client funds to cover those costs. Ghee entered into an Agreed Disposition whereby his license to practice law was suspended effective March 1, 1995, for a period of five years, with half of that suspension suspended upon various conditions. Bar Ex. 5, pgs 23–29.

Thus, when Ghee surrendered his license on October 19, 1995, his license had already been suspended for a period of two and one-half years. Furthermore, the eleven embezzlements for which he pled guilty occurred on 3/26/93 ($2,000), 5/20/93 ($2,000), 6/4/93 ($2,000), 6/25/93 ($5,000), 7/8/93 ($4,500), 7/16/93 ($4,500), 7/23/93 ($2,500), 9/29/93 (sic) ($3,500), 8/2/93 ($4,500), 10/22/93 ($8,000), and 11/16/94 ($10,000). The dates are taken from Ghee's amended indictment (Ex. G to Petitioner's Bill of Particulars), and from an investigator's reconstruction of the estate account activity in question, contained in VSB Ex. 6. (Copies of these documents are appended to the original copy of this Order for ease of reference.) The dates in question make it clear that Ghee's defalcations were premeditated. The first eight defalcations from the Redd Estate fiduciary account occurred during the period when his attorney fiduciary account was still being reviewed periodically by a bar investigator as a result of his June 25, 1992, discipline, which effectively prevented Ghee from making unauthorized withdrawals from his attorney fiduciary

account. (Tr. P. 138). During this same period, Ghee engaged in the misconduct that gave rise to his five year suspension with terms, which resulted from his trust account being out of trust on numerous occasions up until February 2, 1994. The suspension order cited Ghee's "cooperative attitude toward these proceedings". Unfortunately Ghee's cooperative attitude did not include advising the Bar of the ten defalcations that had already occurred from the Redd Estate account prior to endorsement of the Agreed Disposition. Ghee initially deposited $39,511.35 to the Redd estate account on March 25, 1993, and by his ten unauthorized withdrawals, he reduced the account to $804.25 on October 22, 1993. Ghee testified that he replaced $20,000 in the account from the proceeds of a personal injury settlement on November 8, 1994, and that he was unable to resist withdrawing $10,000 of those funds from the account eight days later on November 16, 1994.

Subsequent gifts or loans from friends reduced the ultimate loss, and the surety took judgment against Ghee in the amount of $28,117.12. Ghee satisfied the bonding company's judgment against him for the discounted sum of $19,461.92.

Ghee's trust account problems occurred over an extended period of time from 1988 to 1995. The defalcations were deliberate and repeated. The nature and circumstances of Ghee's criminal acts can only be described as severe.

***Hiss* Factor No. 2.** The Petitioner's Character, Maturity and Experience at the Time of his Disbarment.

Ghee was an experienced attorney at the time of his defalcations. He graduated from law school in 1973, was an Earl Warren Legal Fellow of the NAACP Legal Defense and Education Fund with the Hill, Tucker and Marsh firm in Richmond, Virginia, from 1973–1975, and was in solo private practice in Farmville from 1975 until his suspension and disbarment in 1995. He was and is a national director of the NAACP, and a member of its executive committee. This was not a case of a young attorney getting into trouble, nor a case of an elderly attorney who was becoming incapacitated.

***Hiss* Factor No. 3.** The Time Elapsed Since the Petitioner's Disbarment.

It has been 11 years since Ghee surrendered his license and it was then revoked. Ghee has not previously applied for reinstatement.

***Hiss* Factor No. 4.** Restitution to Clients and/or the Bar.

Ghee has made restitution to the Bar and to all of his clients that were harmed as a result of his acts. He paid the surety an agreed sum to satisfy the surety's judgment against him only four months after the judgment was entered against him. He did not seek relief from his debts via the bankruptcy court. Ghee's efforts to make restitution are commendable.

***Hiss* Factor No. 5.** The Petitioner's Activities Since Disbarment Including, but not Limited to, his Conduct and Attitude During that Period.

From all evidence, Ghee has undertaken to lead an exemplary life since his disbarment and he appears to have succeeded in this effort. Ghee has been very active in his church and with the NAACP. He has been the recipient of many honors and awards, including Outstanding Virginian Award at the annual conference of the A.M.E. Church (1995), Man of the Year for his district of the A.M.E. Church, and was honored by the NAACP in 2003 for lifetime achievement.

Since his disbarment, Ghee has worked as a paralegal at the Williams, Luck and Williams law firm in Martinsville, Virginia. According to Robert A. Williams, the partner for whom he primarily works, his performance has been exemplary.

***Hiss* Factor No. 6.** The Petitioner's Present Reputation and Standing in the Community.

Ghee is obviously held in high esteem and thought of with love and affection in his community. The letters of support for the reinstatement of his license to practice law are almost too numerous to count. They come from all walks of life, and include national figures well known to all. Julian Bond, currently a professor at the University of Virginia and American University and formerly chairman of the board of directors of the NAACP, testified by deposition. He described Ghee's fine character, his role on the executive committee as one who easily reads trends and directions, his knowledge of the institutional history of the organization, ability to evaluate candidates for board committees, and his ability to go quickly to the heart of a matter. In addition to the many fine recommendations from national, state and community leaders, the Board must also take note of the numerous letters, often unsolicited, from ordinary citizens who took the time to share personal knowledge and relate the high

esteem in which they hold Ghee. Only two letters in opposition to Ghee's reinstatement were received by the Bar, one of a general nature from an attorney who does not know Ghee personally, and one from a lay person. Many attorneys, including prosecutors, wrote letters in support of Ghee's reinstatement.

***Hiss* Factor No. 7.** The Petitioner's Familiarity with the Virginia Code of Professional Responsibility and his Current Proficiency in the Law.

Ghee has fulfilled all of the requirements for Continuing Legal Education since his disbarment in 1995. He twice passed the Ethics exam required for reinstatement with a score of 94, well in excess of the requirement. Robert Williams of the Williams law firm unequivocally testified as to Ghee's current proficiency in the law in the area in which he has been focusing as a paralegal. Furthermore, Williams indicated that they will hire Ghee as an attorney if his license is reinstated. Bonds' testimony further corroborated Ghee's continuing proficiency and judgment.

***Hiss* Factor No. 8.** The Sufficiency of the Punishment Undergone by the Petitioner.

Ghee's punishment would appear to be an appropriate one. Counsel for Ghee spoke of his long fall from grace. The loss of his Bar license, the shame and humiliation resulting from the criminal convictions and having to live under this cloud, unquestionably were a severe punishment. Although his actual days incarcerated were limited, they were undoubtedly sufficient. The Commonwealth's Attorney stated, in the stipulation that was admitted into evidence, that the reduction of Ghee's charges from a felony to 11 misdemeanor counts was done not to lighten the punishment or because Ghee was an attorney, but solely to permit him to retain his right to vote, the significance of which is quite understandable. Ghee has undergone more than sufficient punishment.

***Hiss* Factor No. 9.** The Petitioner's Sincerity, Frankness and Truthfulness in Presenting and Discussing Factors Relating to Disbarment and Reinstatement.

The Board is troubled by Ghee's apparent failure to recognize the true extent of his criminal activity, and by Ghee's testimony and the testimony of several of his character witnesses who suggest that he should not be entrusted with the responsibility for handling client funds.

Ghee's testimony, that of his witnesses, and many of his letters of recommendation characterize his theft from the Redd Estate account as a one time aberration, considered by them to be inexplicable and totally out of character. In truth, as noted above under Hiss Factor No. 1, Ghee's repeated defalcations from the Redd Estate account were not a one time occurrence. There were eleven separate defalcations over a two year period, and continued so long as there was money to take. Furthermore, Ghee testified that he had never previously taken client funds from his trust account. No less than four prior disciplinary proceedings for trust account violations belie that assertion.

Ghee and several of his witnesses were asked why he took the money. The only explanations offered were that at that time, Ghee was married to a wife who had expensive tastes and that she quit her employment to start her own business (Tr. P. 41), that he was heavily involved in preparation for an anniversary celebration of the landmark decision in *Brown v Board of Education* to the sacrifice of his law practice (Tr. P. 124), that creditors were calling him about payments of debts (Tr. P. 124), that clients were not paying their fees, that he had already borrowed money from friends and could not go back to them (Tr. P. 125), and that out of pride (which he now sees as wrong), he did what he needed to keep afloat. The explanations indicate that Ghee has not fully taken upon himself the blame for his actions.

Ghee called five witnesses on his own behalf, including himself. All of them testified at least to some extent that if Ghee got his license back, he should be monitored. Ghee himself testified that if his license were reinstated, he would practice only as an associate with a law firm, and would not have access to trust account funds. (Tr. P. 214). Ghee testified that he is a "horrible bookkeeper." (Tr. P. 124). Ghee testified that he would not practice law as a sole practitioner, or handle a trust account without supervision. (Tr. P. 139–140). Williams, who currently employs Ghee as a paralegal, testified that if his firm employed Ghee as an associate attorney, Ghee would not have access to the trust account (Tr. P. 37), which is understandable for a non-equity attorney. James H. Lyle, an entrepreneur called as a character witness by Ghee, testified that he knew of Ghee's financial problems and had lent money to Ghee to permit him to makeup shortfalls in his attorney trust account (Tr. P. 81–86), to the extent that Ghee's bank would call Lyle to see if he would agree to make good on shortfalls in Ghee's account. (Tr. P. 86–87, 98–99, 110–112). Lyle agreed that Ghee might be better off if he didn't handle money when he got his license back. (Tr. P. 104–105). E. M. Wright, Jr., Esquire, testified that Ghee should be monitored if he got his license back. Unfortunately, a license to practice law cannot be partially reinstated. If reinstated, it must be

done so without terms. The attorney is free to practice in any area of law, and the Board cannot bar him from handling client funds. When Ghee and his own witnesses express reservations about his ability to handle client funds, it is difficult for the Board to reach a conclusion that he should be reinstated.

***Hiss* Factor No. 10.** The Impact Upon Confidence in the Administration of Justice if the Petitioner's License to Practice Law was Restored.

This factor is always difficult. In the abstract, most members of the general public have severe difficulty understanding why the license of any attorney who stole money would ever be reinstated. On the other hand, the cases and commentators dealing with reinstatement have made it clear that disbarment is not punishment, and that one who has been disbarred can be rehabilitated and should be permitted to have his or her license reinstated, even in cases involving theft. The response from Ghee's own community is overwhelmingly in favor of reinstatement.

After correctly noting that reinstatement cases must be considered on a case by case basis and are not easily decided on precedent, counsel for petitioner argues that the case of *In re James T. Edmunds*, VSB Docket No. 95-000-1155 (1995) is instructive when considering Ghee's case. The Board finds that Ghee's petition has more in common with *In re William McMillan Powers*, VSB Docket No. 05-000-3014 (2005). In the Powers case, the Board recommended reinstatement, but noted that, at a prior reinstatement hearing in 1999, Powers had failed to convince the Board that he had accepted responsibility for his conduct, and may in fact have blamed others for it. The Board cannot find that Ghee appreciates the severity and magnitude of, and has accepted responsibility for, the misconduct resulting in the revocation of his license to practice law in 1995. The lapse of time alone does not commend reinstatement. Ghee testified that he intended to replace the money when he misappropriated it from the Redd Estate. The Board notes that he deposited $20,000 from his personal funds into the Redd Estate on November 8, 1994, and eight days later wrongfully took $10,000. (VSB Ex. 11) The Board notes, too, that Ghee sent the heirs of the Redd Estate a Final Accounting as of November 1, 1994, setting forth the amount each heir was to receive. (VSB Ex. 9) Ghee's Final Accounting was fraudulent. It did not show the thousands of dollars he had misappropriated that otherwise would have been distributed to the heirs.

Upon consideration of the foregoing, the Board by majority vote recommends to the Supreme Court of Virginia that the petition for reinstatement not be approved.

As required by Part 6, Section IV, Paragraph 13.8.c.(5), the Board finds that the costs of this proceeding are as follows:

Copying Invoices:	$ 331.19
Court Reporter Fees:	$1,354.50
Mailing Fees:	$ 58.43
Mailing Notice:	$ 440.62
Legal Notices:	$ 94.39
Administrative Fee:	$ 750.00
Total Costs:	$3,029.13

It is ORDERED that the Clerk of the Disciplinary System forward this order of Recommendation and the record to the Virginia Supreme Court for its consideration and disposition. It is further ORDERED that the Clerk of the Disciplinary System forward an attested copy of this Order of Recommendation by certified mail return receipt requested, to Charlotte Peoples Hodges, Counsel for the Petitioner, P.O. Box 4302, Midlothian, Virginia 23112-4302 and shall deliver the same by hand to Harry M. Hirsch, Deputy Bar Counsel, Virginia State Bar, Eighth and Main Building, 707 East Main Street, Richmond, Virginia 23219-2803.

Entered this 6th day of December, 2006.

Virginia State Bar Disciplinary Board
By: Robert E. Eicher
2nd Vice Chair

**VIRGINIA STATE BAR'S
SPECIAL COMMITTEE ON LAWYER
MALPRACTICE INSURANCE
SEEKING PUBLIC COMMENT ON PROPOSED
AMENDMENTS TO PART 6, SECTION IV, PARAGRAPH 18
OF THE RULES OF THE SUPREME COURT OF VIRGINIA**

For the past 15 years, the Virginia State Bar has collected information from each active member on the annual dues statement certifying whether the member is in private practice and, if so, whether he or she has lawyer malpractice insurance coverage. Such members are also required to report whether there are any unsatisfied judgments against them arising out of professional services they rendered.

Throughout this period of time, the bar's active membership has consistently reported that approximately 90% of those in private practice do have malpractice insurance coverage. From time to time, however, information has been received by the bar that indicates there is sometimes confusion about the kind of insurance members have and the coverage which it actually provides.

In an effort to collect more accurate data, the bar's Special Committee on Lawyer Malpractice Insurance is proposing amendments to Part 6, Section IV, Paragraph 18 of the *Rules of the Supreme Court of Virginia* which would require each active member in private practice who indicates they are covered by malpractice insurance to submit with their annual certification proof of their insurance in the form of a copy of a declarations page or a certificate of insurance containing specific information about the nature and extent of the coverage provided. The rule changes will require that the bar keep this information confidential.

These proposed rule changes will be considered by the Council of the Virginia State Bar at its next meeting on June 14, 2007, and the proposed changes are published below for comment. Any member of the bar having comments about the proposed changes may direct those to: Executive Director, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, VA 23219-2800 no later than **May 7, 2007**.

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

The foregoing shall be certified by each active member of the Virginia State Bar in such form as may be prescribed by the Virginia State Bar and shall be made available to the public by such means as may be designated by the Virginia State Bar. Those active members certifying that they are in private practice and have professional liability insurance shall furnish with their certification proof of their insurance in the form of a copy of a declarations page or certificate of insurance containing at least the following: named insured, the company issuing the policy, the type of insurance provided, the policy period, and the limits of liability. The bar is required by this rule to keep confidential and not disclose the information contained in the proof of insurance submitted.

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

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

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

# # #

**VIRGINIA STATE BAR'S
STANDING COMMITTEE ON LEGAL ETHICS
SEEKING PUBLIC COMMENT ON
LEGAL ETHICS OPINION 1829**

Pursuant to Part Six: Section IV, Paragraph 10(c)(iii) of the Rules of the Supreme Court of Virginia, the Virginia State Bar's Standing Committee on Legal Ethics ("Committee") is seeking public comment on proposed advisory Legal Ethics Opinion 1829, *Lawyers Serving on Public Bodies—Compendium Opinion.*

This proposed opinion is a compendium opinion that addresses situations in which lawyers *serve* on a public body, as opposed to situations in which a lawyer *represents* a public body. The Committee has chosen to review prior opinions on this subject as well as to address new questions. At the beginning of the opinion, the Committee establishes the basic framework for analyzing the questions presented. As this is a compendium opinion addressing numerous specific questions, the reader may wish to go to that section of the opinion that addresses a particular issue of interest.

Inspection and Comment

The proposed advisory opinion 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 advisory opinion can be obtained from the offices of the Virginia State Bar by contacting the Office of Ethics Counsel at (804) 775-0557, or can be found at the Virginia State Bar's Web site at http://www.vsb.org.

Any individual, business or other entity may file or submit written comments in support of, or in opposition to, the proposed advisory opinion by filing ten copies with Thomas A. Edmonds, the Executive Director of the Virginia State Bar, not later than **June 8, 2007**.

(DRAFT—January 23, 2007)

LEGAL ETHICS OPINION 1829
LAWYERS SERVING ON PUBLIC BODIES—
COMPENDIUM OPINION

Introduction

Members of the bar have frequent and recurring questions regarding the ethical considerations of a lawyer serving as a member of a "public body."[1] Over the past thirty years, the Committee has issued a number of opinions involving lawyers serving on public bodies while engaged in the private practice of law. Because of these continuing questions, the Committee has chosen to review those prior opinions and issue a compendium opinion, addressing not only questions raised in the past but also new ones. The Committee's review is undertaken to determine whether prior legal ethics opinions on the subject of lawyers serving on public bodies need to be overruled, clarified or reaffirmed. The Committee selects this topic for special focus due to the important public policy issues present and the unique interplay of the application of the ethical rules and the statutory provisions to this particular role of lawyer as public officer. Prior opinions expressed both a concern for the availability of lawyers for public service and for public confidence in the decisions of government. Wholesale application of the Rules of Professional Conduct to lawyers serving on public bodies may not be appropriate because the activity of the lawyer in this form of public service does not involve a traditional attorney/client relationship.[2] The Committee's review of these issues will distinguish the application of certain Rules of Professional Conduct ("RPC") that apply to lawyers serving on public bodies from the statutory requirements of the Virginia State and Government Conflicts of Interest Act, Va. Code §§ 2.2-3100 *et seq.* ("Conflicts Act" or "Act"). In some particular instances, the Act will control. However, in other instances both the Act and the RPC are complementary.

This opinion addresses only situations in which lawyers *serve* on a public body, as opposed to situations in which a lawyer *represents* a public body. At the beginning of the opinion, the Committee establishes the basic framework for analyzing the questions presented. As this is a compendium opinion addressing numerous specific questions, the reader may wish to go to that section of the opinion that addresses a particular issue of interest.

Outline of Questions Presented

Most of the questions presented arise out of a lawyer representing a client before a public body on which the lawyer or another lawyer in the lawyer's firm serves. However, a lawyer may also represent a client as a lobbyist before a public body on which she or another lawyer in her firm serves. In addition, a lawyer's connection or relationship with a public body, past or present, may present conflicts of interest issues that are addressed by either the RPC or the Conflicts Act. While specific questions and analysis appear below, the Committee notes that several important conclusions drive the discussion of these issues. First, throughout discussion of the issues below, the Committee reiterates that its purview is to interpret the Rules of Professional Conduct regarding lawyers and the practice of law. It is not within the purview of the Committee to determine whether a person may serve on a public body and when someone in that service needs to recuse himself from particular matters. The analysis in this opinion reflects that distinction. Second, many prior opinions of this Committee involve discussion of "the appearance of impropriety." While that standard was present in the former Code of Professional Responsibility, it does not appear in the current Rules of Professional Conduct. Therefore, discussion of the issues presented moves away from considerations of appearance and instead to application of specific rules and their requirements. That change leads to a third point in much of the analysis of the issues below.

FOOTNOTES

1 For purposes of this opinion, a "public body" means any board, commission, committee, authority, council, agency or other similar constituent of a local or state government.

2 The office holder's public duty is not the duty that an attorney owes to a client. It is not "representation" in the sense of an attorney-client relationship. The requirements from the RPC regarding the ethical duties of competence and diligence do not apply to the service on the public body. See Rules 1.1 and 1.3. Nor does Rule 1.6's duty of confidentiality attach to this public service. See In re: Ed Vrdolyak, 137 Ill. 2d 407, 419 (1990); Connecticut Ethics Op. 96-17.

In many of the instances at issue, the Committee does not interpret the rules as creating a *per se* prohibition, but rather, in looking at Rules 1.7, 1.9, 1.10, 1.11 and 8.4, the Committee opines repeatedly that some specific act of misconduct is required for a violation, rather than just the public service alone. Because the old "appearance of impropriety" standard has been removed from the RPC, the Committee's analysis frequently calls for case-by-case, fact-specific applications of the rules to each particular situation and the particular conduct of the lawyer or lawyers involved. These three considerations drive the discussion of the issues presented in this opinion. This opinion addresses the issues in the context of five situations:

1) Appearance Before Public Body on Which Lawyer or Firm Member Serves.

2) Appearance Before Public Body Where Lawyer or Firm Member Serves on "Parent" Body.

3) Adversity to Public Body on Which Lawyer or Firm Member Serves.

4) Connections to Member of Public Body Other Than Law Firm Membership.

5) Lobbying Activity.

Within these five situations, the opinion addresses ten specific questions under the Rules of Professional Conduct:

1) May a lawyer appear before his own public body?

2) May a lawyer appear before a public body on which a member of his firm serves?

3) May a lawyer serving on a public body participate in the discussion of and voting on an issue that, while not an actual client matter, does affect a firm client?

4) May a lawyer serving on a public body participate in the discussion of and voting on a matter involving a former client appearing before that body?

5) May a lawyer appear before a public body funded by, reporting to, established by, or with members appointed by a public body on which he or a member of his firm serves?

6) May a lawyer file or defend a lawsuit against a public body on which he serves?

7) May a lawyer challenge the decision of the public body on which he serves in a proceeding before some other public body?

8) May a lawyer serving on a city council or board of supervisors represent a criminal defendant where the charges include violations of that city or county's code? Similarly, may a member of the General Assembly represent a criminal defendant where the charges include violations of the Virginia Code?

9) May a lawyer appear before a public body where that lawyer contributed financially to the campaign of one of the elected members of the body?

10) May a lawyer lobby a public body on behalf of a client on which he or a firm member serves?

Opinion:

Topic 1: Appearance before Public Body on Which Lawyer or Firm Member Serves.

1. May a lawyer appear before his or her own public body?

Answer: In most cases, no.

Generally, there is a conflict of interest which would preclude a lawyer from representing a private client before a public body on which the lawyer serves. A number of pertinent opinions issued before January 1, 2000 relied on the ethical norm that "a lawyer should avoid even the appearance of impropriety." Such prior opinions include the following:

LEO 549, concluding that a lawyer who is a part-time appeals examiner for the Virginia Employment Commission may not represent private clients in matters before the Commission, even if the private cases are heard in locations other than where the lawyer serves as hearing officer.

LEO 632, concluding that a lawyer occasionally serving as a hearing officer may not represent a client before a state agency in a proceeding involving the same subject matter on which the lawyer serves as a hearing officer for the agency.

LEO 1278, concluding that a lawyer may not represent a client before the General Assembly if a member of the firm is elected to the General Assembly.

LEO 1611, concluding that a lawyer/legislator could vote on a matter that impacts his client indirectly, but was not actually a client matter, as such voting did not create the appearance of impropriety.

LEO 1718, concluding that a lawyer serving on a public body may not represent a client before that entity.

When the Supreme Court of Virginia adopted the RPC, effective January 1, 2000, the "appearance of impropriety" standard was removed. The Committee acknowledged this regulatory change in LEO 1763, concluding that the conflict of interest rules in the RPC were the standards applicable to analyzing the issues presented in this request. The prior opinions on this topic looked at two considerations for analysis: application of the rules and public policy. *See* LEOs 1278 and 1763. The Committee looks first at the application of the rules, with discussion of the policy considerations included with Question Two, below. The Committee notes that the current key provision is Rule

1.11(a)[3], regarding lawyers who hold public office. LEO 1763 focused especially on Comment 1 to that rule, which states:

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

In LEO 1763, the Committee adopted the position that the conflict of interest created by a lawyer's appearance on behalf of a client before a public body on which the lawyer or another lawyer in the firm sits could not be "cured" by consent and/or recusal, because withdrawal from duty would "deprive citizens of the representative elected to exercise judgment in such matters." The Committee now notes that the determination of the "official duties or obligations to the public" of a member of a public body is not within the parameters of this Committee's charge to interpret the RPC. The duties and obligations owed to the public by these public officials are governed by the Conflicts Act, [Va. Code §§ 2.2-3100 *et seq.*].[4] Thus, the Committee overrules that particular conclusion from LEO 1763.

When a lawyer serves on a public body, the lawyer must consider whether there will be any overlap between his public service and his private practice. Specifically, will the lawyer ever want to represent clients before that particular body? If so, the lawyer must consider application of the Conflicts Act to determine if the private representation would be contrary to his public role as defined by the provisions of the Act. While application of the Conflicts Act in any particular instance for any particular lawyer/public officer is outside the purview of this Committee, the Committee notes that the Act contains specific language for representation of clients. Virginia Code § 2.2-3112(3), clarifies that a member of a public body may participate in the body's discussion and voting regarding a matter in which "a party to the transaction is a client of his firm if he does not personally represent or provide services to such client and he complies with the declaration requirements of § 2.2-3114 (G) or § 2.2-3115 (H)."

FOOTNOTES

3 Rule 1.11(a) states as follows:

A lawyer who holds public office shall not:

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

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

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

4 Further, Virginia Code § 54.1-3915 dictates that, "the Supreme Court shall not promulgate any rules or regulations proscribing a code of ethics governing the professional conduct of attorneys which are inconsistent with any statute." Finally, the Act expressly states that its purpose is to establish "a single body of law applicable to all state and local government officers and employees on the subject of conflict of interests." That section, 2.2-3100, goes on to state that "[t]his chapter shall supersede all general and special acts and charter provisions which purport to deal with matters covered by this chapter [with certain exceptions]." Thus, the Committee's interpretation and application of the RPC to the issues in this opinion must not contradict the provisions of the Act. The Committee will respond to the issues in this opinion accordingly.

There are ethical requirements consistent with and thus not superseded by the Conflicts Act. For example, Rule 1.11(b)[5] prohibits a lawyer from representing a private client in a matter in which he has participated "personally and substantially" as a public official unless both the client and the agency consent. The danger here is misuse of the public office for the benefit of the private client. Rule 1.11(c) limits a lawyer's use of information on behalf of a private client where such information is confidential information about a third person learned during the lawyer's public service.[6] Rule 1.11(d)[7] prohibits a lawyer from acting in an official capacity in a matter which he handled while in private practice, unless there is no one else who may act in the lawyer's stead. Again, the objective of this rule is to avoid divided loyalties, so that the public will have confidence that the lawyer is acting in the public's best interest when he acts in an official capacity. Rule 1.11(a)(1) prohibits the lawyer's use of public office to obtain a special advantage for himself or for a client, when such is not in the public interest. *See e.g.*, Alabama Opinion 1993-12 (potential for improper influence when the hearing examiner removes his authoritative hat and becomes just another advocate before his or her own agency).

The Committee's current approach to these issues differs somewhat from the "bright line" prohibition expressed in LEO 1763 and a number of prior opinions on this point.[8] To the extent that LEOs 1763, 1718, 1278, 537 and 419 are inconsistent with these conclusions, they are hereby superseded.

FOOTNOTES

5 Rule 1.11(b) states as follows:

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

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

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

6 Rule 1.11(c) states as follows:

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

7 Rule 1.11(d) states, in pertinent part, the following:

Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter.

8 The bright line rule expressed in LEOs 1765, 1718, 1278, 537 and 419 was that it is impermissible for a lawyer to lobby a governmental body when his partner was a member of that body notwithstanding disclosure and abstention by the lawyer-legislator and disclosure by the lawyer-lobbyist in conformity with the Conflicts Act.

2. May a lawyer represent a client before a public body if another lawyer in the firm sits on that public body?

Answer: There is no bright-line prohibition and the answer depends upon the particular facts in each instance.

The Committee notes that Virginia Code §2.2-3112 (3), quoted above, distinguishes representation of a firm client by the public officer from representation of a firm client by some other member of that officer's firm.

This does not necessarily mean that a lawyer may represent a client in all instances before a public body on which a member of his firm sits. While the duties and obligations of the public officer are governed by the Virginia Code, the private practice of members of his firm remains within the purview of the RPC.

Whether a lawyer may properly represent a client before a public body on which a firm member serves can be determined with an application of Rules 1.7, 1.11 and 8.4 to each particular matter. Rule 1.7 addresses whether the lawyer has a conflict of interest in the representation. Specifically, under Rule 1.7(a), a conflict of interest exists whenever, "there is significant risk that the representation of one or more clients will be materially limited by … a third person or by a personal interest of the lawyer." The question becomes: Will the public service of the one firm member pose such a risk for the client represented by the other attorney? Rule 1.7(a) creates neither a blanket prohibition nor a blanket approval for this type of scenario. A case-by-case determination is necessary. The Committee notes that in proper instances, Rule 1.7(b)[9] provides a "cure" for conflicts of interest that have arisen under Rule 1.7(a). However, if there is a conflict of interest under Rule 1.7(a) created by a lawyer's service on a public body, all of the lawyers in the firm have a conflict in representing a client before that public body. Rule 1.10.[10]

A second factor for a lawyer in this context to consider is Rule 1.11. The application of that Rule in the present context is fully addressed by the discussion provided with Question One, above.

A third factor for a lawyer in this situation to consider is Rule 8.4(d), which directs a lawyer not to "state or imply an ability to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official." A lawyer hired by a client to represent him before a public body on which a firm member serves must be cognizant of the possibility that the client may have selected the lawyer with some belief or hope that he will exercise improper influence with the public body due to the firm member's service. The lawyer should clarify that he in fact does not offer such influence as part of his legal services.

The Committee in prior opinions involving attorneys on public bodies has looked not only to the application of the ethics rules but also to public policy considerations. LEO 1718 highlights two, at times competing, primary public policy concerns in the present context. One is maintaining public faith in the legitimacy of government decisions. The other is ensuring the availability of qualified attorneys for service on public bodies. The discussion of these concerns in LEO 1718 treats the latter as merely speculative, with most emphasis placed on the need for ensuring public faith in the process. The Committee maintained that balance in LEO 1763, which reconsidered and affirmed the conclusions of LEO 1718. However, the Committee no longer considers the risk to availability of attorneys for public service to be merely speculative. The issuance of those opinions established a principle that a lawyer may never appear before a board on which his firm member sits. In the year since the issuance of those opinions, the Committee has become cognizant anecdotally that law firms are beginning to restrict the service of firm members on public bodies to prevent conflicts of interest requiring the loss of clients. Because of their legal education and work, attorneys bring a unique perspective to public service that is invaluable. A chill on that availability both reduces the number of citizens able to serve on public bodies and erodes the quality of decisions made by those bodies. Thus, the Committee departs from its early conclusions and opines that the blanket prohibition against representing clients before public bodies on which a firm member serves does not serve the public well. To the contrary, the public is better served by the case-by-case application of Rules 1.7 and 8.4, outlined above.

The conclusion that a bright-line prohibition would be appropriate in this context, as drawn in LEOs 1763, 1718, 1611, 1278, 632, and 549 (outlined above with the discussion of Question One), is inconsistent with the present conclusions; therefore, those opinions are hereby superseded on this point.

3. May a lawyer serving on a public body participate in the discussion of and voting on an issue that, while not an actual client matter, does affect a firm client?

Answer: Generally, yes, absent specific circumstances triggering a violation.

In some instances, a lawyer serving on a public body may be faced with a matter that, while not specifically a client matter, does nonetheless affect his client. Does that sort of indirect effect constitute a conflict of interest as if the client's own matter were before the body? Again, the Act is the legal authority by which the lawyer must decide whether or not he must recuse himself. However, the Committee also notes a pertinent provision in the RPC: Rule 1.11(a). Paragraph (a) of Rule 1.11, in pertinent part, directs that a lawyer/public officer must not:

FOOTNOTES

9 Rule 1.7(b) states as follows:

Notwithstanding the existence of a concurrent conflict of interest under paragraph(a), a lawyer may represent a client if each affected client consents after consultation, and:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) the consent from the client is memorialized in writing.

10 Rule 1.10 (a) states: "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9 or 2.10 (e).

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

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

The Committee reads Rule 1.11 as consistent with the provisions of the Conflicts Act, with Rule 1.11(a) providing additional direction specifically for lawyers in public service. LEO 1611 addressed an issue of this sort. In that opinion, the Committee applied Rule 1.11's predecessor, DR 8-101(A)(1)[11], to determine whether an associate attorney in the legislature could vote on a bill of significant interest to a client of the associate's law firm. The firm strongly believed that the associate needed to abstain from voting "to avoid any appearance of impropriety" or from voting against a client's interest on a substantial issue affecting that client. The Committee disagreed, holding that for there to be misconduct, the lawyer-legislator must attempt to secure a "special advantage" which would not be in the "public interest." The lawyer-legislator's voting on the matter would not violate the plain language of the rule unless some benefit would accrue to the firm's client which would be beyond the issue of whatever benefit (or detriment) would accrue to the public at large. Of course, as with similar issues earlier in this opinion, the issue of whether the legislator may vote or abstain is governed by the Conflicts Act, not the RPC. Whether such a vote involves an ethical breach under Rule 1.11(a)(1) is a separate issue.

This Committee opines that the conclusions of LEO 1611 remain correct; however, the Committee notes the discussion in LEO 1611 references the standard of "the appearance of impropriety." As discussed earlier in the present opinion, the Committee finds no authority for that standard in the RPC. Thus, while the Committee reaffirms the final conclusions drawn in LEO 1611, it expressly notes that opinion's appearance of impropriety discussion as no longer pertinent.

4. May a lawyer serving on a public body participate in the discussion of and voting on a matter involving a former client appearing before that body?

Answer: There is no bright-line prohibition and it depends upon the circumstances of each particular instance.

A lawyer serving on a public body may also at times be faced with a *former* client bringing a matter before the body. As to whether the lawyer can participate in the matter or would need to recuse himself, the Conflicts Act controls. In addition, the lawyer should be aware that Rule 1.11(d) prohibits a lawyer/public officer's involvement in matters in which he personally and substantially participated in his private practice.[12] Again, the Committee notes that Rule 1.11(d) does not override the Act, but instead provides guidance for attorneys serving as public officers regarding their private practice of law. In addition, Rule 1.9(c) might also apply, prohibiting the lawyer from using or disclosing information obtained in the course of representing a former client and therefore serving as an additional basis to prohibit the lawyer/public officer's involvement in a matter affecting the former client.

Prior LEO 208 presented a bright-line prohibition for this context. Specifically, that opinion concluded that a lawyer who is a member of a City Council may not preside over a hearing into a zoning matter in which the lawyer had earlier (before being elected) represented a party in front of the Council.

Topic 2: Appearance before Public Body Where Attorney or Firm Member Serves on "Parent" Body.

5. May a lawyer appear before a public body funded by, reporting to, established by, or with members appointed by a public body on which he or a member of his firm serves?

Answer: Generally yes, except for limited exceptions.

A slightly different scenario than those addressed in Topic 1, above, is where an attorney represents a client before a public body while a firm member serves on a "parent" public body.[13] For example, an attorney may need to represent a client before a committee operating as a tribunal where that committee's members are appointed by another public body, such as a Board of Supervisors. Is that connection still so close as to trigger possible conflicts of interest?

In LEO 245, the Committee opined that a lawyer who is a member of a Board of Supervisors may not represent applicants for loans from an authority appointed by the Board. The lawyer-Board member in LEO 245 retained appointive power over the Authority. Other LEOs in this context include LEO 549 (prohibiting a lawyer from representing clients before the Virginia Employment Commission where that attorney is an appeals examiner for the Commission) and LEO 826 (prohibiting a lawyer from representing clients before a local health

FOOTNOTES

11 DR 8-101(A)(1) of the Virginia Code of Professional Responsibility stated that a lawyer who holds public office shall not use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for a client under circumstances where he knows or it is obvious that such action is not in the public interest. That language mirrors current Rule 1.11(a)(1).

12 Rule 1.11(d) specifically states as follows:

Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

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

13 By "parent" body, the Committee is referring to those situations where one body provides funds for another, appoints it members, reviews its decisions, or directs its activities.

department that was an extension of the state health department for which the lawyer served as a hearing officer).

The Committee issued each of those prior opinions before the adoption of the RPC. Under current rules, a lawyer in this context should review Rules 1.7, 1.11, and 8.4, as discussed earlier in this opinion. Rule 1.7 would only trigger a conflict of interest if the firm member's service on the parent body significantly risked material limitation of the representation of the client in the matter. While such a determination is of course to be made on a case-by-case basis, the Committee suggests that such conflicts would be the exception rather than the norm as the lawyer would not be seeking action for his client from the very body on which a firm member serves.

The lawyer and his firm member should also be mindful of the related prohibitions, discussed above, against implying the ability to use one's public office for improper influence and against implying the ability to influence improperly a public body's decisions. *See* Rule 1.11(a) and Rule 8.4(d), respectively. A lawyer may not use his public position in order to gain an improper advantage for himself or a client. The question in each instance becomes whether the lawyer is attempting to influence the public body *improperly*. For example, suppose a lawyer-legislator appears before a commerce commission to urge a rate increase on behalf of a private client. This lawyer-legislator also serves on the state house committee that oversees the state commerce commission and sets the commissioners' salaries. Such circumstances alone do not make the lawyer-legislator's advocacy before the commission improper. Some additional act would be required for a violation. The lawyer-legislator must also have actually engaged in an overt attempt to exert *improper* influence over the state commerce commission. ABA Informal Op. 1182 (1971); *See also State ex rel. Nebraska State Bar Ass'n v. Holscher*, 193 Neb. 729, 738, 230 N.W.2d 75, 80 (1975). Similarly, the mere fact that a lawyer-legislator serves on a legislative committee that appoints or reappoints judges in the geographical area where the lawyer-legislator practices does not disqualify him or her from appearing before a judge appointed by that committee. A lawyer's representation before a public body on whose parent body he serves is not *per se* improper, but would become so only where some incident of wrong-doing occurs.

To the extent that prior LEOs 245 and 826 present bright line prohibitions inconsistent with the case-by-case application of the Rules outlined in this discussion, they are hereby superseded.[14]

Topic 3: Adversity to Public Body on Which Attorney or Firm Member Serves.

6. May a lawyer file or defend a lawsuit against a public body on which he serves?

7. May a lawyer challenge the decision of the public body on which he serves in a proceeding before some other public body?

8. May a lawyer serving on a city council or board of supervisors represent a criminal defendant where the charges include violations of that city or county's code? Similarly, may a member of the General Assembly represent a criminal defendant where the charges include violations of the Virginia Code?

Answer: In these particular scenarios the effect of the public service on the representation and the particular facts associated therewith will determine the specific answer.

The Committee had previously addressed a lawyer representing a client whose interests are adverse to those of a public body on which the lawyer serves. In LEO 847, the Committee concluded that a lawyer may not represent the party against the board or agency on which the lawyer currently serves as a part-time hearing officer, but may do so once the lawyer leaves the board or agency (provided the lawyer has no material confidential information).[15] In that opinion, the Committee further explained that if the part-time hearing officer is disqualified from any matter, everyone in the lawyer's firm is disqualified. *Id.* In LEO 409, the Committee opined that unless all parties consent, a lawyer who serves on an education committee (established to advise a school board) and who will review material that could be used against the school board in litigation may not represent a plaintiff in an action against the school board involving the same issues.

To reiterate conclusions drawn earlier in this opinion, whether or not the firm member serving on the body can participate on the board in that matter is subject to the Conflicts Act; however, whether the other members of the firm have conflicts of interest in representing clients adverse to the public body is governed by the RPC. As with the earlier conflicts discussion, the key provision is Rule 1.7. The Committee notes that conflicts arising under Rule 1.7 are imputed to everyone in a firm via Rule 1.10. Thus, if the lawyer serving on the body would have a conflict of interest in representing the client adverse to the public body, then no one else in the firm could represent that client in that matter. *See e.g.,* LEO 847 (if the part-time hearing officer is disqualified from appearing before Board, everyone in the lawyer's firm is disqualified). Determination of whether any lawyer in the firm has a conflict under Rule 1.7 involves case-by-case analysis of whether there is a significant risk that the representation would be materially limited by the personal interest of the lawyer (i.e., the public service). If such a conflict does exist, a "cure" would be possible where the requirements of Rule 1.7(b) can be met.

One specific context in which this issue of adversity arises is for lawyers who sit on city councils, county board of supervisors, and/or in the General Assembly. If a lawyer in any of those positions represents

FOOTNOTES

14 LEO 245 concludes that it is improper for an attorney who is a member of a board of supervisors to represent applicants for loans from the industrial development authority appointed by the board. LEO 826 concludes that it is improper for an attorney to represent a client before the local health department if the health department is merely an extension of the state health department or health regulatory board for whom the attorney sits as a part-time hearing officer. Neither opinion provides any explanation why the lawyer's conduct is improper.

15 Some agencies may also employ a "cooling off" period during which the attorney cannot represent the client before that agency until a specified time has passed. See Va. S. Ct. R., Pt 6, § IV, Para 13(F)(2)(b).

criminal defendants in private practice, he needs to consider the affect of the public service on such representations. For example, where a city councilman represents a criminal defendant charged with violating a city ordinance, the opposing party is the city. Whether that situation affects his service as a councilman is resolved by the Conflicts Act; however, how the Council service affects his representation of the client is governed by Rule 1.7. The lawyer must determine whether his role as councilman creates a "significant risk that the representation … will be materially limited by the lawyer's responsibilities to a third person or by personal interest of the lawyer." A lawyer serving in the General Assembly would use the same analysis were he to represent a criminal defendant charged with violation of a Virginia Code provision. As with many determinations discussed in this opinion, a bright line prohibition is not called for under that provision. Rather, the lawyer would make the determination by applying the quoted standard from Rule 1.7 to the specific facts of his representation and his service on the public body.

Topic 4: Connections to Member of Public Body other than Law Firm Membership

9. May a lawyer appear before a public body where that lawyer contributed financially to the campaign of one of the elected members of the body?

Answer: Yes, so long as the lawyer's conduct is in compliance with Rule 8.4(b) and (d).

Throughout the discussion thus far, the Committee has focused on lawyers and members in their firms. What about other relationships with members of public bodies? For example, may a lawyer represent a client before a public body where the lawyer contributed to the political campaign of a member of that body.

Rule 8.4(d) prohibits a lawyer from stating or implying an ability to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official. In Legal Ethics Opinion 1360 (1990), the committee stated that whether a lawyer's contribution to a public official's political campaign is done to improperly influence the public official requires a factual determination beyond the purview of this committee. If, in fact, a payment or contribution is made to a public official or political candidate with the intent to improperly influence the public official's actions on a particular matter, Rule 8.4(d) has been violated. In addition, the lawyer's conduct may constitute a criminal act, i.e., bribery,[16] and thereby violate Rule 8.4(b).[17] Thus, while the particular circumstances of a lawyer's contribution to a public official's political campaign does not cause a *per se* violation of the cited rules, there may be circumstances that imply that the interests of the lawyer's client have been improperly enhanced for improper reasons. As stated in LEO 1360, it is the opinion of the committee that a lawyer may not suggest or imply the ability to obtain results for a client through improper influence of a public official. The committee stated further that: "… it is axiomatic that such suggestion or implication alone would be improper, regardless of whether the lawyer making the suggestion intends or attempts to perform the act suggested, and further, regardless of whether the matter's outcome is actually affected." Conversely, where a lawyer or law firm contributes to a public official's election campaign or other political action committee, but makes no suggestion or implication to a client of an intent to improperly influence the public official, no presumption exists that the cited rules have been violated merely because the lawyer appears or intends to appear before a public body on which that public official serves.

In Legal Ethics Opinion 1421 (1991), the Committee stated that it is not *per se* unethical for a lawyer or a firm to contribute to the re-election campaign of an official with whom the lawyer deals. While the lawyer's contribution to the public official's political campaign is not *per se* improper, the Committee stated that the better practice is for such contributions to be made to the official's campaign committee rather than directly to the official.

Topic 5: Lobbying a Public Body

10. May a lawyer lobby a public body on behalf of a client on which he or a firm member serves?

Answer: Yes, as long as the lobbying activity is conducted in a manner complying with Rules 1.11 and 8.4.

This opinion has thus far addressed scenarios involving lawyers providing legal representation to clients in situations involving public bodies. Would the conclusions be different if the services provided were lobbying activities rather than legal representation?

A threshold question is whether the Rules of Professional Conduct even apply to a lawyer when engaging in lobbying activity as opposed to the practice of law. In other words, should this Committee draw any distinction between a lawyer serving as a lobbyist for a client versus appearing on behalf of a client before a public body as a lawyer?

Virginia Code § 2.2-419 states that "lobbying" means influencing or attempting to influence executive or legislative action through oral or written communication with an executive or legislative official; or solicitation of others to influence an executive or legislative official.

In addressing this issue, the Committee is mindful of the fact that "lobbying" is not the practice of law and that non-lawyers engage in such activity. Nevertheless, the Committee believes that a lawyer may engage in certain types of conduct that would violate the Rules of Professional Conduct even though lobbying is not the practice of law. In prior opinions the Committee has held lawyers subject to the applicable RPCs when performing activities outside the traditional

FOOTNOTES

16 § 18.2-438. Bribes to officers or candidates for office.—If any person corruptly give, offer or promise to any executive, legislative or judicial officer, sheriff or police officer, or to any candidate for such office, either before or after he shall have taken his seat, any gift or gratuity, with intent to influence his act, vote, opinion, decision or judgment on any matter, question, cause or proceeding, which is or may be then pending, or may by law come or be brought before him in his official capacity, he shall be guilty of a Class 4 felony and shall forfeit to the Commonwealth any such gift or gratuity given. This section shall also apply to a resident of this Commonwealth who, while temporarily absent therefrom for that purpose, shall make such gift, offer or promise.

17 Rule 8.4(b) states that it is professional misconduct for a lawyer to commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness to practice law.

attorney/client relationship.[18] In certain instances a lawyer serving as a lobbyist may engage in conduct violating Rules 1.11 and 8.4(d).

As early as 1981, in LEO 419, this Committee opined that it was *per se* improper for a lawyer to lobby the General Assembly when someone in his firm is a member of the legislature. *See also* LEOs 537 and 1278. The pertinent RPC provisions for this determination are Rules 1.11(a) and 8.4(d).

In contrast to the prior LEOs, Rules 1.11(a) and 8.4(d) do not create a blanket prohibition against lobbying in this context. Further, the Committee is of the opinion that such a blanket prohibition is neither required by the rules, nor justified when the lawyer-lobbyist has not attempted to improperly influence the public servant lawyer and the latter has not used his or her public position to influence the public body to act in favor of the client on whose behalf the lawyer-lobbyist has acted. However, whenever one firm member will be lobbying the legislature of a firm member, the firm member/legislator must be careful to avoid using his public position for improper special advantage for clients, and the other members of the firm must be careful to avoid suggesting that they have special influence for clients through the legislative service of their firm member. *See* Rules 1.11(a) and 8.4(d). The lobbying activity would be permissible if the lawyers comply with the outlined provisions. To clarify, the Committee again makes the distinction that it is not answering whether the legislator may vote on the matter, as that falls under the Act. Rather, the Committee's comments on this point are limited to whether the members of the legislator's firm may lobby the legislature.

To the extent that LEOs 1278, 537, and 419 are inconsistent with these conclusions, they are hereby superseded.

Prior Opinions

This opinion departs significantly from positions taken in prior opinions. In sum, to the extent that the conclusions in this opinion conflict with LEOs 208, 245, 409, 419, 537, 549, 632, 826, 847, 1278, 1360, 1502, 1611, 1718, 1763, and 1773, those opinions are hereby superseded.

This opinion is advisory only, and not binding on any court or tribunal.

FOOTNOTES

18 See Legal Ethics Opinion 1368 (1990) (lawyer mediators subject to legal ethics rules when performing mediations). See also LEOs 1301 (lawyer serving as trustee); LEO 1442 (lawyer acting as lender's agent); and 1617 (lawyer serving as executor, trustee, guardian, attorney-in-fact or other fiduciary).

VIRGINIA STATE BAR'S
STANDING COMMITTEE ON LEGAL ETHICS
SEEKING PUBLIC COMMENT ON
LEGAL ETHICS OPINION 1832

Pursuant to Part Six: Section IV, Paragraph 10(c)(iii) of the Rules of the Supreme Court of Virginia, the Virginia State Bar's Standing Committee on Legal Ethics ("Committee") is seeking public comment on proposed advisory Legal Ethics Opinion 1832, Potential Conflict of Interest When Prospective Client Speaks Only With the Secretary and Has No Direct Contact with the Lawyer.

This proposed opinion generally addresses whether a conflict of interest is created prohibiting a lawyer from representing husband when wife, as a prospective client, has communicated with the lawyer's secretary and shared details of her case. Wife chooses not to retain lawyer, and the committee is asked to opine as to whether it is ethically permissible for this lawyer to continue to represent the husband against wife. The draft opinion finds that even though the wife never retained the lawyer and never became a client, the lawyer (through his staff person) has a duty of confidentiality, which may "materially limit" the lawyer's representation of the ex-husband. The Committee provides analysis as to what factors must be considered in determining the disqualification of the firm or possible use of an ethics "screen" between non-lawyer staff and the lawyer.

Inspection and Comment

The proposed advisory opinion 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 advisory opinion can be obtained from the offices of the Virginia State Bar by contacting the Office of Ethics Counsel at (804) 775-0557, or can be found at the Virginia State Bar's Web site at http://www.vsb.org.

Any individual, business or other entity may file or submit written comments in support of, or in opposition to, the proposed advisory opinion by filing ten copies with Thomas A. Edmonds, the Executive Director of the Virginia State Bar, not later than **April 18, 2007**.

(DRAFT—January 23, 2007)

LEGAL ETHICS OPINION 1832
POTENTIAL CONFLICT OF INTEREST WHEN PROSPECTIVE CLIENT SPEAKS ONLY WITH THE SECRETARY AND HAS NO DIRECT CONTACT WITH THE LAWYER

You have presented a hypothetical request in which a year ago, a woman, Ms. X, called a lawyer's office for an initial consultation. Ms. X communicated only with the lawyer's secretary, who scheduled an appointment for Ms. X to meet with the lawyer. Ms. X called the secretary a second time and advised the secretary that the lawyer had previously represented her ex-husband's sister. The secretary advised the lawyer of Ms. X's relationship to that former client. Prior to Ms. X's second call, the ex-husband had made an appointment to meet with the lawyer. The lawyer advised the secretary that he would not take Ms. X's case. The lawyer agreed to represent the ex-husband regarding petitions filed by Ms. X.

Ms. X now objects to that representation. Ms. X says she told the secretary "all the facts" about her case. Despite Ms. X's claim that

she told the secretary all about her case, the lawyer and his secretary maintain they are in possession of no confidential information about Ms. X.

With regard to this hypothetical scenario, you have asked the Committee to opine as to whether it is ethically permissible for this lawyer to continue to represent the ex-husband against Ms. X. Resolution of your question involves a determination of whether this lawyer has a conflict of interest in representing the ex-husband after his office acquired information from Ms. X. The source of the conflict of interest is the lawyer's duty of confidentiality under Rule 1.6.[1] As set out below, the Committee believes that Ms. X's communication with the secretary is information the lawyer is obligated to keep confidential under Rule 1.6. Thus, any information obtained from Ms. X could not be used by the lawyer in representing the ex-husband.

Based on the facts you present, there was no agreement, express or implied, that the lawyer would undertake representation of Ms. X.[2] However, Ms. X's contact with the law firm via the secretary does raise ethical obligations with respect to any confidential information given the secretary.

In prior opinions, the Committee has stated that a person who consults with a lawyer may reasonably expect that confidential information a person shares with a lawyer is protected under Rule 1.6, even if the lawyer and client do not agree to a professional engagement. See LEO 629 (1984) (A lawyer who learns confidences during a professional discussion at a social engagement may not reveal the contents without the client's consent); LEO 1453 (1992) (potential client's initial consultation with lawyer creates reasonable expectation of confidentiality which must be protected even if no lawyer-client relationship arises in other respects); LEO 1546 (1993) (wife who had initial consult with lawyer during which confidential information was disclosed precluded another lawyer in the same firm from representing husband in divorce).

FOOTNOTES

1 Rule 1.6 would require the lawyer and the secretary to preserve the confidentiality of any confidences and secrets Ms. X claims to have imparted to the secretary. A lawyer has an ethical duty to ensure that non-lawyer employees comply with the duty of confidentiality. Rule 5.3

2 Whether or not a lawyer-client relationship was created is a legal issue outside the purview of the Committee. However, the Restatement (3d) of the Law Governing Lawyers, § 14 (2000) offers some guidance:

> A relationship of client and lawyer arises when:
>
> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either:
>
> (a) the lawyer manifests to the person consent to do so; or
>
> (b) the lawyer fails to manifest lack of consent to do so and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
>
> (2) a tribunal with the power to do so appoints the lawyer to provide the services.

See also LEO 1546 (1993) holding that a prospective client's initial consultation with an attorney creates an expectation of confidentiality that would conflict the firm if it later represented the opposing party in the same matter.

In LEO 1794 (2004), the Committee observed that the ethical obligation to protect confidential information of a prospective client encourages people to seek early legal assistance and such persons must be comfortable that the information imparted to a lawyer while seeking legal assistance will not be used against them. That Ms. X in the present scenario never retained the lawyer and never became a client does not relieve the lawyer of this duty of confidentiality.

There is, however, a significant factual difference between the present scenario and that of LEO 1794. In LEO 1794, the prospective client actually meets with the lawyer. In contrast, in the present scenario, the prospective client speaks only with the secretary and has no direct contact with the lawyer. The question then is whether the duties of Rule 1.6 are triggered by the provision of information to support staff rather than to a lawyer.

While the secretary in your scenario is not governed by the Rules of Professional Conduct applicable to lawyers, Rule 5.3(b) imposes a duty on the lawyer to ensure that the secretary's conduct is compatible with the professional obligations of the lawyer. Comment [1] of that rule adds that: "[a] lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client. …" (emphasis added).

The Committee applied these ethical precepts in LEO 1800. In that opinion, the Committee analyzed whether the conflicts rules apply when a firm hires the secretary of the law firm representing the opposing party in a litigation matter. The opinion concludes that Rules 1.7 and 1.9 apply exclusively to lawyers, not to support staff. However, that conclusion did not end the discussion or the lawyer's duties in that situation. The opinion looked to Rule 5.3, which governs a lawyer's duty to supervise support staff so that staff conduct is consistent with the lawyer's ethical responsibilities. In other words, lawyers are required to train support staff to preserve client confidences and secrets.

In LEO 1800, the Committee opined that the lawyer in the hiring firm is directed to screen the secretary from the matter so that the secretary will not disclose information regarding the former employer's client to the lawyer. For prospective clients to feel comfortable divulging information about their legal matters to law firms, those clients need assurance that the information will remain confidential, regardless of which individual at the firm does the intake interview and/or initial consultation. Without screening procedures, information obtained by support staff is imputed to the lawyers in a firm.

Returning to analysis of the present scenario, your facts state that Ms. X claims to have "told everything" to the secretary, but the lawyer and the secretary claim to have no confidential information. Further, when the secretary advised the lawyer of Ms. X's relationship to a former client, the lawyer advised that he had already agreed to represent the husband and that he would not represent Ms. X.

The Committee believes that LEO 1800 offers appropriate guidance in your scenario. To avoid the imputation of confidential information to the lawyer, and possible disqualification, the lawyer has an ethical duty to establish a screen between the secretary and lawyer as to Ms. X

and the ex-husband's case. The lawyer must instruct the secretary that she cannot reveal to the lawyer any confidential information obtained from Ms. X. To preserve information protected by Rule 1.6, the lawyer must use another staff person in lieu of the secretary for any work performed relating to the representation of the ex-husband against Ms. X and should send a written communication to Ms. X or her lawyer that these measures have been taken.

In the event that the ethics "screen" is breached and the lawyer learns confidential information communicated by Ms. X to the secretary, the lawyer may find it necessary to withdraw from representing the ex-husband. The lawyer's duty of confidentiality to Ms. X may materially limit the lawyer's representation of the ex-husband, since he would be foreclosed from using any information Ms. X may have given the secretary. See Rule 1.7(a)(2) (a conflict of interest exists if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a *third person* or by a personal interest of the lawyer) (emphasis added). Even assuming that Ms. X is not a "client" or "former client" she is a third person to whom the lawyer owes a duty of confidentiality which may "materially limit" the lawyer's representation of the ex-husband. Whether such a conflict exists depends, of course, upon the extent that the "screen" was breached and the nature of the information actually learned by the attorney.

For the protection of clients, the law firm, and public, the Committee recommends that the firm train non-lawyer support staff to minimize confidential information obtained from prospective clients before they can perform the necessary conflicts analysis.

In rendering this opinion the Committee continues to reiterate their position that confidential information learned by one lawyer in a firm is imputed to all lawyers in the firm and a screen can only be used to cure a client conflict with client consent, pursuant to Rule 1.7(b). Exceptions exist for conflicts that are carried with a departing lawyer pursuant to Rule 1.10 and government lawyers pursuant to Rule 1.11.

This opinion is advisory only, and not binding on any court or tribunal.

VIRGINIA STATE BAR'S
STANDING COMMITTEE ON LEGAL ETHICS
SEEKING PUBLIC COMMENT ON
LEGAL ETHICS OPINION 1836

Pursuant to Part Six: Section IV, Paragraph 10(c)(iii) of the Rules of the Supreme Court of Virginia, the Virginia State Bar's Standing Committee on Legal Ethics ("Committee") is seeking public comment on proposed advisory Legal Ethics Opinion 1836, *Conflicts of Interest Involved When City Attorney Provides Legal Services to Multiple Constituents Within An Organization.*

This proposed opinion generally addresses hypothetical situations in which a City Attorney operates under a government structure in which a Mayor, popularly elected in a citywide election, serves as the chief executive officer of City. Pursuant to the City's Charter, the City Attorney represents the City, as an organization, through its duly authorized constituents. The opinion addresses the issues of confidentiality as it exists between constituents, conflicts as between independent constituents and the designation of subordinate city attorneys to individual constituents.

Inspection and Comment

The proposed advisory opinion 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 advisory opinion can be obtained from the offices of the Virginia State Bar by contacting the Office of Ethics Counsel at (804) 775-0557, or can be found at the Virginia State Bar's Web site at http://www.vsb.org..

Any individual, business or other entity may file or submit written comments in support of, or in opposition to, the proposed advisory opinion by filing ten copies with Thomas A. Edmonds, the Executive Director of the Virginia State Bar, not later than **April 18, 2007**.

(DRAFT—January 23, 2007)

LEGAL ETHICS OPINION 1836
CONFLICTS OF INTEREST INVOLVED WHEN CITY ATTORNEY PROVIDES LEGAL SERVICES TO MULTIPLE CONSTITUENTS WITHIN AN ORGANIZATION

You have presented hypothetical situations in which a City Attorney operates under a government structure in which a Mayor, popularly elected in a citywide election, serves as the chief executive officer of City. In addition, the Mayor appoints a Chief Administrative Officer to administer the day-to-day operations of the City government. Pursuant to the City's Charter, the City Attorney represents the City, as an organization, and its constituents. The General Assembly approves the City's Charter, and any amendments thereto, which take effect upon the Governor's signature. The Charter's language regarding the City Attorney's role reads:

The city attorney shall be the chief legal advisor of the council, the mayor, the chief administrative officer and all departments, boards, commissions, and agencies of the city in all matters affecting the interests of the city. The city attorney shall perform particular duties and functions as assigned by the council. The city attorney shall be appointed by the council, shall serve at its pleasure, and shall devote full time and attention to the representation of the city and the protection of its legal interests. The city attorney shall have the power to appoint and remove assistants or any other employees as shall be authorized by the council and authorize any assistant or special counsel to perform any duties imposed upon him in this charter or under general law. The city attorney may represent personally or through one of his assistants any number of city officials, departments, commissions, boards, or agencies that are parties to the same transaction or that are parties in the same civil or administrative proceeding and may represent multiple interests within the same department, commission, board or agency. In matters where the city attorney determines that he is unable to render legal services to the mayor, chief administrative officer, or city departments or

agencies under the supervision of the chief administrative officer due to a conflict of interests, the mayor, after receiving notice of such conflict, may employ special counsel to render such legal services as may be necessary for such matter.

The next to the last sentence in the foregoing paragraph roughly parallels language in Virginia Code § 2.2-507 (A) concerning the Attorney General's provision of legal services to agencies of the Commonwealth of Virginia.

Hypothetical Situations

In your request for this advisory opinion, you have presented the following scenarios in which potential or actual conflicts may arise for the City Attorney:

A. At the request of a Council member, the City Attorney drafts a proposed resolution, which if adopted, would request that the General Assembly make specific amendments to the City Charter. The City Attorney employs a legislative drafting practice used by the Virginia Division of Legislative Services, under which the City Attorney does not disclose a legislative drafting assignment received from either the City Administration[1] or a member of Council until the legislation is introduced at a Council meeting. All parties normally learn about the existence of proposed legislation upon its introduction at a Council meeting. However, the Administration believes that it should be advised of the contents of any proposed legislation, in advance of the Council meeting, where such proposed legislation, if enacted by the General Assembly, would weaken or dilute the powers of the Mayor.

B. At the request of a Council member, the City Attorney prepares an ordinance which, if adopted, would establish certain parameters and regulations under which all commissions or similar entities established by Council or the Mayor would operate. Like all ordinances and resolutions introduced before the Council, the proposed draft bears on its face this text: "Approved as to form and legality by the City Attorney" and, in the City Attorney's opinion, is legal. After the proposed ordinance is introduced before the Council, the Administration issues a memorandum opining that the provisions of the ordinance, as applied to the Mayor, are both unconstitutional and in violation of the Freedom of Information Act. The Administration believes that the City Attorney either should have advised the Council member that the proposed ordinance was illegal or informed the Administration of the Council member's intent to introduce the proposed ordinance.

C. Pursuant to the Charter, the legal services of the City Attorney are available upon request to all constituents of the City organization, including the Council, the Mayor, the Chief Administrative Officer, and all agencies, boards, commissions and departments of the City government. While the Council and the agencies, boards, commissions, and departments of the City government regularly avail themselves of these legal services, the Mayor and the Chief Administrative Officer do so only infrequently.

The Mayor has expressed to the City Attorney that he has a lack of trust in the City Attorney and therefore a need for the Mayor to have the benefit of his own ongoing legal counsel. The City Attorney has offered to the Mayor one of his assistants to serve as ongoing legal counsel to the Mayor. However, the Mayor has rejected this offer, insisting that the Charter specifically designates the City Attorney as the chief legal advisor for the Mayor. Notwithstanding the Mayor's lack of trust in the City Attorney, the Mayor, from time to time, chooses to confide in the City Attorney, but requests that the City Attorney not share with the Council any information the City Attorney obtains while representing the Mayor. In addition, the Mayor has requested that the City Attorney designate *two* assistants, rather than City Attorney, to represent the interests of the Council.

The City Attorney has responded to the Mayor that he is willing to make himself available to provide legal services to the Mayor and that his policy is to make all resources of his office, including attorneys with concentration and expertise in different practice areas, available to all of the constituent clients the Charter obligates him to represent. However, the City Attorney has advised the Mayor that he cannot agree to maintain the confidentiality of all information, in advance and without knowledge of the substance of the information, due to the requirements of Rules 1.6 and 1.7 of the Virginia Rules of Professional Conduct. The City Attorney has further advised the Mayor of the prevailing rule that, as between commonly represented clients, the privilege does not attach.[2] In addition, the City Attorney advised the Mayor that he cannot agree to represent the Mayor, to the exclusion of the Council, because of the Charter's language requiring the City Attorney to represent all of the constituents of the City government, including the Council.

Questions Presented

Based on the foregoing hypothetical situations you have asked the Committee to address the following questions regarding the ethical conduct of the City Attorney:

1. Where an attorney represents a governmental organization and also designated constituents of that organization, does the attorney have an ethical obligation to maintain as confidential information obtained from one constituent while concurrently providing legal services to another constituent? Conversely, is the attorney required to reveal information obtained in the course of performing legal services for one constituent to other constituents within the organization?

Answer: In the absence of any direction from the organizational client, the City Attorney does not have any ethical obligation to maintain as confidential information obtained from a constituent while concurrently providing legal services to

FOOTNOTES

1 The City Administration consists of the Mayor, the Chief Administrative Officer and all of the City employees that report to the Mayor and the Chief Administrative Officer.

FOOTNOTES

2 *See* Rule 1.7, Cmt. [30].

another constituent within the organization. Conversely there may be situations in which the City Attorney is required to reveal information obtained in the course of providing legal services to one constituent to other constituents within the organization.

2. Where an attorney represents a governmental organization, including a council of elected officials as a constituent, does the attorney have an ethical obligation to reveal to or withhold from one member of that council confidential information provided or requests for legal services made by another member of that council?

Answer: The City Attorney does not have an ethical duty to protect as confidential information obtained from one member of Council, but the City Attorney may have an ethical duty to disclose to the other members of Council information obtained from a Council member if disclosure is necessary for the City Attorney to carry out the representation of the City.

3. Where an attorney is charged by a special law enacted by the General Assembly (the Charter) to represent all independent constituents of a governmental organization:

A. May the attorney continue to represent two independent constituents when they disagree on legal or policy issues?

Answer: The City Attorney may continue to represent independent constituents even when they disagree on legal or policy issues unless the conflict materially limits the City Attorney's representation of the City's interests or interferes with the City Attorney's exercise of independent professional judgment on behalf of the City.

B. Does an ethical conflict arise when one independent constituent believes that the attorney's legal conclusions favors another constituent and disagrees with those conclusions?

Answer: An ethical conflict does not arise because one constituent disagrees with the City Attorney's advice. The City Attorney owes his ethical duties to the organization, the City, and not its constituents.

C. May the attorney designate subordinate attorneys from his office to represent each independent constituent under an arrangement where those separate attorneys do not share with their supervisors or any other attorney in the office confidential information obtained while providing legal services to their independent constituent client?

Answer: Absent authorization or direction from the organizational client, the City Attorney may not avoid his Rule 1.4 obligation to keep his client reasonably informed by assigning specific lawyers in his office to work with designated constituents. The organization is the client, not the constituents, and all the attorneys in the City Attorney's office represent the City.

Discussion

1. Before answering your first question, the Committee believes it is important to discuss the role of an attorney representing a local governmental entity. The Committee accepts your conclusion that the City Attorney has one organizational client, the City, which acts through various constituents (Mayor, CAO, Council, etc.). Whether a constituent may also become a "client" of the City Attorney is a question of law beyond the purview of this Committee.[3] Generally, under Rule 1.13 of the Virginia Rules of Conduct, a lawyer representing an organization does not, by virtue of his status as lawyer for the organization, represent the organization's constituents. Rather, "a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Rule 1.13 (a).

Your first question asks whether the City Attorney may ethically disclose or withhold confidential information obtained from another constituent. When one of the constituents of an organization communicates with the organization's lawyer in that person's organizational capacity, the communication is protected under Rule 1.6. *See* Rule 1.13, Comment [2]. However, this duty of confidentiality is owed to the "client," i.e., the City, and not to the "constituent" with whom the City Attorney is communicating. Rule 1.6 prohibits the City Attorney from revealing information protected under the attorney-client privilege; however, this privilege belongs to the organizational client, not its constituents.

In the absence of direction on these issues from the organization, Rule 1.6 and 1.13 apply by default. In other words, the City Attorney may look to the highest authority in the city for the treatment of confidential information obtained from a constituent; and, to what extent such confidential information may be shared with other persons in the organization.

One of the most fundamental ethical duties a lawyer owes to a client is the duty to keep the client reasonably informed about matters in which the lawyer is handling for the client. Rule 1.4 (a). In order to discharge this ethical duty, and competently represent the interests of the City, the City Attorney may need to disclose information obtained from a constituent within the organization to others. Indeed, in such circumstances, the City Attorney may be impliedly authorized to

FOOTNOTES

3 The Restatement (3d) of the Law Governing Lawyers, § 14 (2000) offers some guidance on whether an attorney-client relationship is created:

A relationship of client and lawyer arises when:

(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either:

(a) the lawyer manifests to the person consent to do so; or

(b) the lawyer fails to manifest lack of consent to do so and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or

(2) a tribunal with the power to do so appoints the lawyer to provide the services.

disclose information obtained from a constituent in order to carry out his representation of the City. Rule 1.6(a). Also, there may be situations where the City Attorney cannot honor a request that information obtained from a constituent be kept confidential, where disclosure is necessary to prevent or mitigate severe injury to the organization or to address an action or omission or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization. Under those circumstances, a lawyer must proceed as is reasonably necessary in the best interests of the organization, including the disclosure of information to other constituents or higher authority within the organization. Rule 1.13(b).

In dealing with the constituents of the organization, the lawyer must clarify his role as attorney for the organization when it is apparent that the organization's interests are adverse to those of the constituent with whom the lawyer is dealing. Rule 1.13(d).

Applying this analysis to your first question, the Committee opines that the City Attorney does not have any ethical duty to maintain as confidential, information obtained from one constituent while concurrently providing legal services to another constituent. Conversely, the City Attorney may have an ethical duty to disclose information learned in the course of providing legal services to a constituent within the organization, if it relates to the City Attorney's representation of his client—the City. Whether or not the City Attorney must or should disclose in advance to the Mayor or the Administration the circumstances of the proposed resolution or ordinance, as described in Scenarios 1 and 2, must be guided by the City Attorney's independent professional judgment acting in accordance with what he reasonably believes to be in the best interests of his client, the City. Such a factual and/or legal determination cannot be made by this Committee and is beyond its purview.

2. The discussion and analysis in response to your first question applies equally to your second question. An individual member of an elected body (i.e., Council) is a "duly authorized constituent" of that public body. This does not make the individual Council member a "client" of the City Attorney. The City Attorney has no ethical duty to keep confidential information obtained from a single Council member. In fact, the City Attorney may believe that disclosure of such information to others within the organization is authorized or required in order to diligently and competently carry out his representation of the City.

3. In regard to your third set of questions you ask:

   A. May the City Attorney continue to represent two independent constituents when those two constituents disagree on legal or policy issues?

The mere fact the Council or Mayor disagree on policy or legal issues does not necessarily create a conflict of interest for the City Attorney, precluding him from continuing to serve as their chief legal advisor under the Charter. The Administration may have a difference of opinion with a proposed action by Council, and there may be legal ramifications stemming from that difference of opinion. However, the Administration's disagreement with Council's proposed action or a desire to be advised on the legal ramifications of not complying with the proposed action is not sufficient to constitute a conflict of interest.

   B. Does an ethical conflict arise when one independent constituent believes that the attorney's legal conclusion favors another independent constituent and disagrees with those conclusions?

The Committee does not believe a conflict exists simply because one or more constituents disagree with the City Attorney's legal opinions or conclusions. The City Attorney, in his role as chief legal advisor to the City and the constituents named in the Charter, may render legal opinions or conclusions with which a constituent might strongly disagree or perceive as favoring another constituent. The provision of such legal advice would be consistent with the City Attorney's role as lawyer for the entire organization and would not be a conflict of interest. Moreover, an attorney serving in his role as an advisor may be ethically driven to candidly tell his client things the client does not want to hear. Rule 2.1 requires the City Attorney, as an advisor, to exercise independent professional judgment and render candid advice. Comment [1] to Rule 2.1 recognizes that such advice may be unpleasant to the client and the lawyer should not be deterred from giving such advice by the prospect that the advice will not be palatable to the client.

Although the Charter appears to contemplate the City Attorney representing multiple constituents with divergent interests, the Charter also recognizes that the City Attorney may not be able to represent them because of a conflict of interest. For example, if one constituent desires to file a lawsuit against another constituent, or join them as an adverse party in pending litigation, the City Attorney may not wish to rely on the authorization of Section 4.17 of the Charter, to the exclusion of other factors, to support common representation in a lawsuit between two constituents. Rather, instead of representing directly adverse constituents in litigation, the City Attorney should withdraw and request appointment of special counsel as provided in Section 4.17 of the Charter.[5]

Section 4.17 of the Charter obviously contemplates that the City Attorney will at times serve multiple constituents that have conflicting interests. While such circumstances may be less than ideal, the City Attorney cannot be routinely disqualified simply because the legal interests of concurrently served constituents are in conflict.

FOOTNOTES

5 In such a situation, the City Attorney should recommend the hiring of outside counsel for all independent constituents. Section 4.17 of the Charter authorizes the Mayor to hire outside counsel to represent himself or members of the Administration upon receipt of notice from the City Attorney that a conflict of interest exists. The City Attorney would likely recommend several lawyers to the Council, which would decide whom to hire to represent its interests.

C. May the City Attorney designate subordinate attorneys from his office to represent each independent constituent under an arrangement where those separate attorneys do not share with their supervisors or any other attorney in the office confidential information obtained from the independent constituent during the course of the representation?

This question essentially asks if the City Attorney may use a "screening mechanism" (formerly "Chinese Wall") to resolve conflicts of interest arising out of the representation of two independent constituents within the same governmental organization. A "screen" prohibits the lawyer(s) from participating in any matters involving a particular client. Its elements generally include a policy (1) prohibiting certain lawyers and staff from having any connection with a particular matter; (2) banning discussions with or the transfer of documents to those individuals; (3) restricting access to pertinent files; and (4) educating all attorneys and staff about the separation (both organizationally and physically) or "screen" separating the lawyers from the pending matter.

The screening procedure you propose in your inquiry differs from the typical ethics screen in that the proposed screen would be (i) related to an ongoing representation instead of specific legal matters and (ii) designed to screen attorneys representing potentially adverse interests within the organization. Because the "screened" attorney would be unable to reveal to the City Attorney or his assistants any confidential information given to him by the assigned constituent, this mechanism would likely have the effects of limiting the City Attorney's ability to (i) make all of the resources of his office available to the particular constituent and (ii) ensure that the assigned attorney is properly representing the interests of the organization as a whole.

The City Attorney should seek guidance from the organization regarding the designation of lawyers within his office to serve specific constituents. In the absence of such direction, the Committee believes that the Rules of Professional Conduct would preclude such utilization of a screen.

Finally, such an arrangement would likely interfere with the City Attorney's availability to keep his client, the City, reasonably informed about matters handled by other lawyers in his office. *See* Rule 1.4.

In addition, such a screening mechanism is inconsistent with the premise of Rule 1.10 that "a firm of a lawyer is essentially one lawyer for purposes of the rules governing loyalty to the client" or "that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated." Rule 1.10, Comment [6]. The screening mechanism is also inconsistent with the premise of Rule 1.6 that confidential client information is shared with attorneys in a law firm. *See* Rule 1.6, Comment [6]. The Rules of Professional Conduct define a "firm" or "law firm" as including a legal department of a corporation *or other organization*. (emphasis added).[6]

Moreover, if a "screening mechanism" of the nature you describe would make it more difficult for the City Attorney to adequately represent the City as an organizational client, then it should not be implemented by the City Attorney.

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

FOOTNOTES

6 Virginia Rules of Professional Conduct, Terminology ("Firm" of "Law Firm"). See also Rule 1.10, Cmt. [1a] stating "with respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct."

Lawyer Advertising Opinion No. A-0116: Communications That Claim "Se Habla Espanol"

Question Presented:
The question arises as to whether a lawyer may advertise the fact that they speak Spanish in their office, "Se Habla Espanol," if the lawyer is not fluent in Spanish, but one of the staff members is.

Answer:
The lawyer may communicate that Spanish is spoken in a particular office as long as the communication makes it clear whether it is the lawyer who speaks Spanish.

Analysis:
The appropriate and controlling disciplinary rule relevant to the question presented is Rule 7.1(a)(1):

RULE 7.1 Communications Concerning A Lawyer's Services

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

(1) contains false or misleading information;

Accordingly, lawyers may communicate to the public information that is truthful and not misleading. A statement may be truthful and still be misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no factual foundation. Rule 7.1, Comment [1].

A potential client should be able to make an informed choice regarding legal services. That choice should involve the distinction between having an understandable communication directly with a Spanish speaking lawyer or having a staff member of the lawyer acting as a third party intermediary and interpreter.

While the committee does not believe there is any ethical prohibition against the lawyer advertising that someone other than the lawyer speaks and understands Spanish, the advertisement should include, in Spanish, language that accurately describes how Spanish is spoken in that particular office. The exact language to be used to convey such an arrangement may vary based upon an accurate rendition of the Spanish that is spoken in the office; however, it must be clear that it is not the lawyer who speaks Spanish, if that is the case.

Committee Opinion
November 28, 2006

UPL Opinion 211
Virginia-Licensed Corporate Counsel Providing Pro Bono Services

You have asked the Committee to opine as to whether it is the unauthorized practice of law for an attorney, licensed and admitted to the Virginia State Bar either by examination or on motion, to provide volunteer pro-bono legal services to a community-based non-profit legal services entity, when the attorney is employed full time as in-house corporate counsel. The attorney would not maintain a separate law practice outside of his in-house corporate counsel position. The corporate employer would provide attorney with reasonable logistic and administrative support, including secretarial services, telephone and photocopy services and one day a month off with pay during which the attorney can work with and for the non-profit entity. While allowing the attorney access to these logistic and administrative supports, the corporate employer would have no involvement, control or influence over the attorney's rendering of legal services through the non-profit entity.

In considering this question, the Committee reviewed two existing Unauthorized Practice of Law Opinions, 57 and 167. The Committee also considered a Virginia Supreme Court opinion, *Richmond Ass'n of Credit Men v. Bar Assoc.,* 167 Va. 327,—S.E.2d—(1937). Unauthorized Practice of Law Opinion 57 addressed the issue of whether a corporation could employ attorneys to provide legal services to its customers. UPL Opinion 167 addressed whether a corporation's in-house counsel could provide personal legal services to the corporation's President/owner/CEO and/or clients under the auspices of the position of in-house counsel. Both opinions reached the conclusion that such conduct would be the unauthorized practice of law based on the holding in *Richmond Assoc. of Credit Men* as well as statutory authority. In *Richmond Assoc. of Credit Men v. Bar Assoc.*, the Court held:

> The practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character with special qualifications ascertained and certified after a long course of study, both general and professional, and a thorough examination by a state board appointed for the purpose. The right to practice law is in the nature of a franchise from the State conferred only for merit. It cannot be assigned or inherited, but must be earned by hard study and good conduct. It is attested by a certificate of the Supreme Court, and is protected by registration. No one can practice law unless he has taken an oath of office and has become an officer of the court, subject to its discipline, liable to punishment for contempt in violating his duties as such, and to suspension or removal. It is not a lawful business except for members of the Bar who have complied with all the conditions required by the statute and the Rules of the Courts. As these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in.
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> * * *
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> The relation of attorney and client is that of a master and a servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent, and it cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation, where he would be subject to the directions for the corporation and not to the directions of the client.'
>
> Independent of statute, it is contrary to public policy for a corporation to practice law, directly or indirectly.

This remains the Committee's position generally regarding a non-legal entity offering to provide legal services.

In UPL Opinion 167 the Committee concluded that "the attorney may only render legal service to the CEO if the attorney is a bar member *who maintains a practice separate from this employment with the corporation.*" (emphasis added). The issue raised in this request is whether a Virginia licensed corporate counsel providing pro bono legal services through an independent entity satisfies the "practice separate from" his employment requirement.

The requirement in UPL Opinion 167 of a separate law practice was similarly expressed in *Richmond Assoc. of Credit Men,* to ensure that the lay corporate entity was not holding out to provide, or was not providing, legal services and that the attorney would maintain his/her independence in representing a client, free from any influence or control by the corporate entity. In the inquiry presented, the Virginia-licensed corporate counsel would provide pro bono legal representation through a community-based legal services entity. As described, the entity and the work would be completely separate from the corporate employer, the corporate employer would not be offering the legal services nor would the corporate employer have any control over the entity or the legal representation. The corporate employer would, however, allow the attorney access to administrative support and time off to work with this service. This scenario is distinguishable from those presented in UPL Opinions 57 and 167 in both of which opinions the situation involved a corporate counsel providing representation to clients other than the corporate entity directly from his position as corporate counsel and under the auspices of the corporate entity. As described, this scenario provides that the attorney would be offering his/her legal services through "a practice separate from [his/her] employment with the corporation." This satisfies the "separate practice" requirement of UPL Opinion 167, and the attorney participating in this program would not be engaged in the unauthorized practice of law.

Committee Opinion
December 5, 2006