Respondent's Name	Address of Record (City/County)	Action	Effective Date	Page
Disciplinary Board				
Colin Charles Connelly	Chesterfield, Va.	Consent to Revocation	February 22, 2008	n/a
Michael David Hancock	Richmond, Va.	Consent to Revocation	February 29, 2008	n/a
Theodore Scott Silva Jr.	Washington, D.C.	Public Reprimand w/Terms	January 23, 2008	2
Marc James Small	Chester, Va.	Consent to Revocation	February 22, 2008	n/a
District Committees				
David Michael Gammino	Richmond, Va.	Public Reprimand w/out Terms	February 5, 2008	3
LeRon William Gilchrist	Norfolk, Va.	Public Admonition w/out Terms	March 20, 2008	5
Thomas William Goodman Jr.	Pikeville, Ky.	Public Reprimand w/out Terms	February 19, 2008	8
John Bertram Mann	Richmond, Va.	Public Admonition w/Terms	March 18, 2008	10
Alana Sherrise Powers	Norfolk, Va.	Public Admonition w/out Terms	March 14, 2008	12
Patrick Allen Robbins	Accomac, Va.	Public Admonition w/out Terms	March 20, 2008	13
Danny Shelton Shipley	Norfolk, Va.	Public Reprimand	March 20, 2008	15
Robert Henry Smallenberg	Richmond, Va.	Public Reprimand	March 19, 2008	17
Cost Suspension				
Andrew Ira Becker	Virginia Beach, Va.	Disciplinary Board	February 5, 2008	n/a
Ellen Frances Ericsson	South Bend, Ind.	Disciplinary Board	March 3, 2007	n/a
Victor Mba-Jonas	Adelphia, Md.	Disciplinary Board	March 3, 2007	n/a
Khalil Wali Latif	Midlothian, Va.	Disciplinary Board	February 13, 2008	n/a
Brian Lee Leslie	Alexandria, Va.	Disciplinary Board	March 3, 2007	n/a
Peter Campbell Sackett	Lynchburg, Va.	Disciplinary Board	February 5, 2008 Lifted February 14, 2008	n/a
Interim Suspensions — Failure to Comply with Subpoena				
Vincent Francis Bonzagni	Front Royal, Va.	Disciplinary Board	February 20, 2008	n/a
Uzair Mansoor Siddiqui	Manassas, Va.	Disciplinary Board	February 5, 2008 Lifted February 11, 2008	n/a

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

VIRGINIA:
BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
THEODORE SCOTT SILVA JR.
VSB DOCKET NUMBER: 08-000-073253

ORDER OF PUBLIC REPRIMAND, WITH TERMS

This matter came on January 23, 2008, 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 Hearing issued by this Board on the 27th day of December, 2007. The Agreed Disposition was considered by a duly convened panel of the Virginia State Bar Disciplinary Board consisting of W. Jefferson O'Flaherty, lay member, Paul M. Black, Glenn M. Hodge, David R. Schultz, and James L. Banks Jr., chair, presiding.

Seth M. Guggenheim, senior assistant bar counsel, representing the Bar, and the Respondent, Theodore Scott Silva Jr., Esquire, by and through his attorney, Timothy J. Battle, Esquire, presented an endorsed Agreed Disposition, dated January 22, 2008, reflecting the terms of the Agreed Disposition. The conference was recorded by Intercall. Having considered the Agreed Disposition, it is the decision of the Board that the Agreed Disposition be accepted, and the Virginia State Bar Disciplinary Board finds by clear and convincing evidence as follows:

1. Theodore Scott Silva Jr., Esquire, (hereafter "Respondent"), is an associate member of the Virginia State Bar, not authorized to practice law in the Commonwealth of Virginia by reason of both his class of bar membership and administrative suspensions for nonpayment of dues and failure to meet Mandatory Continuing Legal Education requirements.

2. On December 12, 2002, the Respondent personally appeared in the Circuit Court of Arlington County, Virginia, and entered a plea of guilty to a felony charge brought upon an indictment, alleging that on or about July 13, 2002, the Respondent "did knowingly or intentionally possess cocaine, a Schedule II controlled substance, in violation of [Section] 18.2-250 of the Code of Virginia (1950), as amended."

3. The Court suspended imposition of sentence in the matter, and on March 4, 2005, vacated its finding of "guilty" in the matter and dismissed the charge against the Respondent contained in the indictment because the Respondent complied with the court-imposed conditions of his suspended imposition of sentence.

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 that the Respondent, Theodore Scott Silva Jr., receive, and the Board hereby imposes upon him, a **PUBLIC REPRIMAND, WITH TERMS**. The terms and conditions of such discipline are as follows:

1. The Respondent shall comply fully with the terms and conditions imposed upon him by Orders entered on December 4 and 10, 2007, by the District of Columbia Court of Appeals Board on Professional Responsibility in a case styled *In the Matter of: Theodore S. Silva, Jr.,* Bar Docket No. 077-06, which said Orders are attached hereto and incorporated herein by reference as Exhibits A and B, respectively.

2. Within five (5) days following entry of this Order, the Respondent shall furnish the Virginia State Bar c/o Seth M. Guggenheim, Senior Assistant Bar Counsel, 100 North Pitt Street, Suite 310, Alexandria, Virginia 22314, with written confirmation that he has authorized and requested the District of Columbia Office of Bar Counsel to notify Mr. Guggenheim of any finding of noncompliance with the terms of the aforesaid Orders made by the said Board on Professional Responsibility.

3. The Terms contained in this Order shall be deemed satisfied in the event no finding of noncompliance with the aforesaid Orders has been made on or before January 25, 2010, by the said Board on Professional Responsibility, or upon termination of the conditions contained in the said Orders, whichever date or event sooner occurs.

4. Should the Respondent fail to comply with the terms set forth in the preceding Paragraphs 1 and 2, he shall receive a one- (1) year suspension of his license to practice law in the Commonwealth of Virginia, 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. 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.

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, Holland & Knight, LLP, Suite 400, 2100 Pennsylvania Avenue, NW, Washington, DC 20034-3202 and by first class, regular mail, to Timothy J. Battle, P.O. Box 19631, Alexandria, VA 22320-9631, and to Seth M. Guggenheim, Senior Assistant Bar Counsel, Virginia State Bar, 100 North Pitt Street, Suite 310, Alexandria, VA 22314-3133.

ENTERED THIS 31st DAY OF JANUARY, 2008

VIRGINIA STATE BAR DISCIPLINARY BOARD

James L. Banks Jr., Chair

VIRGINIA:
BEFORE THE THIRD DISTRICT—SECTION II SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

IN THE MATTER OF
DAVID MICHAEL GAMMINO
VSB DOCKET NUMBERS: 06-032-0616
06-032-1114
07-032-0805

SUBCOMMITTEE DETERMINATION
(PUBLIC REPRIMAND WITHOUT TERMS)

On October 19, 2007, a meeting was held before a duly convened Third District—Section II Subcommittee consisting of Steven C. McCallum, Esquire, chair presiding, Cliona Mary Burke Robb, Esquire, and John B. Wake Jr., lay member. During the meeting, the Subcommittee authorized bar counsel to enter into an Agreed Disposition for a Public Reprimand. On January 28, 2008, an Agreed Disposition for a Public Reprimand was entered into between Kathryn R. Montgomery, assistant bar counsel, and the respondent, David Michael Gammino, ("Respondent"), represented by counsel Michael L. Rigsby, Esquire.

Pursuant to Supreme Court of Virginia Rules of Court Part Six, Section IV, Paragraph 13.G.1.d(3), the Third District—Section II Subcommittee of the Virginia State Bar hereby approves the Agreed Disposition and serves upon Respondent the following Public Reprimand:

FINDINGS OF FACT

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

VSB Docket No. 06-032-0616
Complainant: Virginia State Bar

2. Respondent was court-appointed to represent Anthony Lee Malone in a criminal appeal.

3. On October 6, 2003, a three-judge panel of the Court of Appeals dismissed the appeal based on insufficiency of the evidence.

4. On November 3, 2003, Respondent filed a petition for appeal with the Supreme Court of Virginia. However, Respondent failed to file a notice of appeal with the Court of Appeals, as required by the Rules of the Supreme Court of Virginia.

5. On December 15, 2003, the Supreme Court of Virginia dismissed the petition based on Respondent's failure to file a notice of appeal with the Court of Appeals.

VSB Docket No. 06-032-1114
Complainant: Charles Harbison

6. On June 14, 2003, Respondent was retained by the complainant, Charles Harbison, to withdraw a guilty plea. At the time, Mr. Harbison was being held at the Riverside Regional Jail.

7. Respondent timely filed a motion to withdraw the plea, but failed to seek an order staying execution of Mr. Harbison's sentence. Such order would have kept Mr. Harbison at the local jail and within the court's jurisdiction.

8. On September 26, 2003, Mr. Harbison's family notified Respondent that Mr. Harbison was being transferred to the custody of the Department of Corrections. At this time, the motion to withdraw guilty plea had not been heard.

9. Respondent immediately moved the court for an order requiring that Mr. Harbison be held at Riverside Regional Jail until the motion to withdraw guilty plea could be heard. The court signed the requested order, but Mr. Harbison had already been transferred.

10. Because Mr. Harbison had been transferred to the custody of the Department of Corrections, the court lost jurisdiction and could not rule on the motion to withdraw guilty plea.

VSB Docket No. 07-032-0805
Complainant: Rondell Hayes

11. Respondent was court-appointed to represent the complainant, Rondell Hayes, on appeal of a criminal conviction.

12. Respondent filed the notice of appeal on January 25, 2005, and the petition for appeal on May 24, 2005. The Court, per curium, denied the appeal by order dated October 4, 2005. The order provided that Complainant could seek reconsideration by a three-judge panel by filing a demand within fourteen days of the order.

13. On October 6, 2005, Complainant wrote Respondent a letter asking for information regarding the status of his appeal. Respondent did not respond until November 30, 2005, when, by letter, he sent Complainant a copy of the dismissal order, announced he was retiring from practice and that another lawyer in his office would be taking over his cases. The letter further stated that he had already asked that lawyer to pursue an appeal with the Supreme Court of Virginia.

14. By the time Respondent sent this letter, the fourteen-day period to demand reconsideration by a three-judge panel had lapsed. Moreover, the thirty-day period within which to appeal to the Supreme Court had also lapsed.

II. RULES OF PROFESSIONAL CONDUCT

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

RULE 1.3 Diligence

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.

III. IMPOSITION OF PUBLIC REPRIMAND

Accordingly, it is the decision of the Subcommittee to impose a Public Reprimand on Respondent, and he is so reprimanded. The Subcommittee imposes no new Terms, but notes that the Terms previously imposed by the Subcommittee in the January 9, 2006, Public Admonition with Terms remain in force.

The Clerk of the Disciplinary System shall assess the appropriate administrative fees.

THIRD DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

Steven C. McCallum, Esquire, Subcommittee Chair Presiding

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

IN THE MATTER OF
LERON WILLIAM GILCHRIST
VSB DOCKET NUMBERS: 07-021-2272
07-021-064908

SUBCOMMITTEE DETERMINATION
(PUBLIC ADMONITION WITHOUT TERMS)

On March 12, 2008, a duly convened Second District Subcommittee consisting of William W. King (Lay Member), Ellen C. Carlson, Esquire, and Mary M. Kellam, Esquire, chair, presiding, considered an Agreed Disposition in the above-referenced matters. It was the unanimous decision of the Subcommittee to accept the Agreed Disposition.

Pursuant to Part 6, Section IV, Paragraph 13.G.1.d.1 of the Rules of the Supreme Court of Virginia, the Second District Subcommittee of the Virginia State Bar hereby serves upon the Respondent the following Public Admonition Without Terms:

I. FINDINGS OF FACT

1. At all times relevant hereto, LeRon William Gilchrist ("Respondent") has been an attorney licensed to practice law in the Commonwealth of Virginia.

VSB Docket No. 07-021-2272
Complainant: Virginia State Bar/Court of Appeals of Virginia

2. On May 31, 2006, the Circuit Court for the City of Norfolk found Brandon Lamont Ratliff guilty of possession of cocaine with intent to distribute, contrary to his plea. Mr. Gilchrist was his court-appointed counsel.

3. On July 28, 2006, the Court sentenced Mr. Ratliff to fifteen years in prison, with seven years suspended, for a net sentence of eight years to serve, and a $2,500 fine.

4. On August 24, 2006, the Court convened to consider Mr. Gilchrist's motion to withdraw as counsel of record. According to the Court's Order, Mr. Gilchrist did not appear. Accordingly, the Court denied his motion and appointed him as counsel for the appeal.

5. His client desiring to appeal the matter, Mr. Gilchrist timely filed a notice of appeal on August 30, 2006.

6. Mr. Gilchrist, however, did not order the trial transcript and on December 1, 2006, the Court of Appeals issued an order directing him to show cause why the appeal should not be dismissed for failure to make the transcript a part of the record.

7. Mr. Gilchrist responded to the show-cause order candidly acknowledging that the transcript was indispensable to the appeal and that he could not show cause why the appeal should not be dismissed.

8. Accordingly, on January 5, 2007, the Court of Appeals dismissed the appeal.

9. Mr. Gilchrist cooperated with the bar during its investigation and explained that he had requested his support staff to order the transcript, but that this did not occur, and by the time he realized that this did not occur, it was too late to request an extension.

10. According to court reporter Diane Dallara, no one ever ordered the transcript.

11. Mr. Gilchrist explained further that the unexpected departure of one of the law firm's partners had an impact on the practice, but acknowledged further that it was his responsibility to ensure that the appeal was properly processed.

12. Mr. Gilchrist produced a letter, dated October 31, 2007, addressed to his client at the Norfolk City Jail, informing him that the Court of Appeals would not hear his case because of Mr. Gilchrist's failure to timely filed the transcript. The letter advised the client further to seek habeas corpus relief for a delayed appeal. The letter did not mention Virginia Code Section 19.2-321.1, the statute authorizing a delayed appeal under such circumstances.

13. The client never received the letter, however, having been moved from the Norfolk City Jail to the Hampton Roads Regional Jail on August 16, 2006, where he remained until May 25, 2007.

14. Mr. Gilchrist explained that no one ever told him that his client had moved, but that he assumed his client had received the letter because it was never returned.

15. Mr. Gilchrist did not inform his client about the availability of a delayed appeal under Virginia Code Section 19.2-321.1 because he did not know about the statute, which became effective July 1, 2005.

16. The client, Mr. Ratliff, informed the bar that he never heard from Mr. Gilchrist about the dismissal of the appeal or a delayed appeal, but that he would consult with institutional counsel about it.

17. The deadline for filing a delayed appeal, however, expired in July 2007, six months after the dismissal of the appeal.

II. NATURE OF MISCONDUCT

Such conduct (Case Number 07-021-2272) by LeRon William Gilchrist constitutes misconduct in violation of the following provisions of the Rules of Professional Conduct:

RULE 1.1 Competence

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

RULE 1.3 Diligence

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

RULE 1.4 Communication

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

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

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

I. FINDINGS OF FACT (Continued)

VSB Docket No. 07-021-064908
Complainant: Virginia State Bar/Court of Appeals of Virginia

18. On September 6, 2006, Kalvin Feimster, represented by Mr. Gilchrist, was tried before a jury in the Norfolk Circuit Court and convicted of child neglect and aggravated malicious wounding.

19. On November 17, 2006, the Court sentenced Mr. Feimster to a total of two years on the child neglect charge and twenty years on the other charge, with no time suspended, for a net total of twenty-two years in prison.

20. The client desired to appeal, and on December 8, 2006, Mr. Gilchrist timely filed the notice of appeal.

21. On December 11, 1006, the court appointed Mr. Gilchrist for the appeal.

22. Mr. Gilchrist also ordered the trial transcript from the court reporter by letter, dated December 8, 2006.

23. The due date for filing the transcript with the clerk of the trial court was January 16, 2007, in accordance with Rule 5A:8(a) of the Rules of Court.

24. On December 13, 2006, the court reporter informed Mr. Gilchrist's staff by telephone that the transcript would not be ready until late January 2007.

25. To Mr. Gilchrist's recollection, no one informed him of this development.

26. On January 16, 2007, the due date for filing the transcript ran. No one filed the transcript or moved for an extension of the deadline in accordance with Rule 5A:8(a).

27. The trial court received the transcript on January 19, 2007.

28. The transcript having been filed late, on February 1, 2007, the Court of Appeals issued an Order to Mr. Gilchrist directing him to show cause why the appeal should not be dismissed.

29. Mr. Gilchrist timely responded to the show-cause order, and on February 23, 2007, the Court of Appeals dismissed the appeal for failure to file the transcript.

30. Mr. Gilchrist promptly informed his client about the decision by letter, stating further, "At this point if you should decide to pursue your appeal further, you may file a habeas corpus petition with the court."

31. Mr. Gilchrist did not inform his client about the availability of a delayed appeal under Virginia Code Section 19.2-321.1 because he did not know about the statute, which became effective July 1, 2005.

32. During a conversation with the bar's investigator on September 12, 2007, the client informed the bar that he did not pursue a habeas corpus action because he did not know how, but that he would consult with institutional counsel about his remedies as suggested by the investigator.

33. By September 12, 2007, the six-month period for seeking a delayed appeal under 19.2-321.1 had passed.

34. Mr. Gilchrist cooperated during the bar's investigation and acknowledged that it was his responsibility to monitor the production of the transcript or file for an extension if needed.

II. NATURE OF MISCONDUCT

Such conduct (Case Number 07-021-064908) by LeRon William Gilchrist constitutes violations of the following provisions of the Rules of Professional Conduct:

RULE 1.1 Competence

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

RULE 1.3 Diligence

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

III. PUBLIC ADMONITION WITHOUT TERMS

Accordingly, it is the decision of the subcommittee to impose a **PUBLIC ADMONITION WITHOUT TERMS** and LeRon William Gilchrist is hereby so admonished.

Pursuant to Paragraph 13.B.8.c. of the Rules of Court, the Clerk of the Disciplinary System shall assess costs.

SECOND DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

Mary M. Kellam, Esquire, Subcommittee Chair

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

IN THE MATTER OF
THOMAS WILLIAM GOODMAN JR.
VSB DOCKET NUMBER: 07-102-1553

SUBCOMMITTEE DETERMINATION
(APPROVAL OF AGREED DISPOSITION FOR PUBLIC REPRIMAND WITHOUT TERMS)

On December 27, 2007, a duly convened Tenth District, Section II, Subcommittee consisting of Elsey A. Harris III, Esquire (chair presiding), Scott W. Mullins, Esquire, and Linda F. Rasnick, lay member, met and considered this matter.

Pursuant to Part Six, Section IV, Paragraph 13.G.1.d(3) of the Rules of the Supreme Court of Virginia, the Tenth District, Section II, Subcommittee of the Virginia State Bar hereby approves the Agreed Disposition entered into between Respondent Thomas William Goodman Jr. ("Respondent") and Assistant Bar Counsel Scott Kulp, and hereby serves upon Respondent the following Public Reprimand without Terms:

FINDINGS OF FACT

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

2. In his written response to the bar Complaint, Respondent contends he was hired to represent Complainant Dreama Sue Blankenship to set aside a misdemeanor guilty verdict and twelve-month sentence she received as a result of a conviction for drug distribution as a principal in the second degree. Because Ms. Blankenship had several years left on parole from another felony drug conviction, Respondent believed Ms. Blankenship needed to have the misdemeanor conviction overturned or face a parole violation resulting in an obligation to serve the balance of her prior sentence.

3. On July 18, 2002, Respondent provided a receipt for the $5,000 tendered to him on Ms. Blankenship's behalf that reads, "Appeal–Dreama Sue Blankenship CK# 1800." No fee agreement further defining the scope of the representation was memorialized.

4. Respondent's entry of appearance as counsel of record for Complainant was filed in the Buchanan County Circuit Court on July 22, 2002.

5. Respondent filed a Notice of Appeal on September 16, 2002.

6. On September 19, 2002, Respondent wrote to Complainant's trial counsel, James Wayne Childress, stating, in part, that he appeared in court the day before to secure bond for Complainant's pending appeal.

7. Respondent filed a two-page Statement of Facts on November 18, 2002.

8. On December 11, 2002, the Commonwealth objected to the Statement of Facts on the grounds it was not timely filed in compliance with Rule 5A:8(C)(1) of the Rules of the Supreme Court of Virginia, and it noticed a hearing in the Circuit Court for December 18, 2002.

9. On December 16, 2002, Respondent filed with the Court of Appeals a Motion for Extension of Time to file the Statement of Facts.

10. Respondent's Motion for Extension of Time was denied by Order dated December 19, 2002. The Motion was denied because the Court of Appeals had no jurisdiction to grant such a request. The Court of Appeals also noted that any trial court order extending the time to file a Statement of Facts, pursuant to Rule 5A:3(b), must be entered prospectively, not retroactively.

11. On August 15, 2003, the Court of Appeals issued an Order to Show Cause as to why the appeal should not be dismissed because, upon preliminary examination, the Court concluded neither a transcript nor statement of facts was timely filed.

12. On or about August 28, 2003, Respondent filed a Response to Show Cause, stating "that the Clerks' assessment of the status of this Appeal is correct, and that said Appeal should be dismissed."

13. On September 5, 2003, the Court of Appeals issued an Order dismissing Complainant's appeal.

14. Respondent and Complainant disagree about whether Complainant authorized Respondent to abandon the appeal. Respondent contends Complainant asked that the appeal be dismissed because she learned the Commonwealth would not pursue a parole violation charge. Complainant contends, however, Respondent had no discussion with her either about the appeal or that the appeal had been dismissed.

Nothing in Respondent's case file demonstrates that he corresponded with Complainant or copied Complainant on his filings with either the Buchanan County Circuit Court or the Court of Appeals.

15. By August 31, 2006, correspondence, Complainant demanded a refund of at least $3,000 from Respondent.

16. Upon receipt of the $5,000 tendered to him at the commencement of the representation, Respondent deposited the funds into his operating account rather than into an attorney trust account.

17. Respondent contends he was entitled to handle the funds in this manner because of freedom of contract to enter into a non-refundable, out-of-state retainer given that he lived and practiced in Kentucky and Complainant lived in Virginia.

18. Additionally, Respondent believes he earned the fee, in part, because he kept Complainant out of jail and helped her avoid a probation violation. The record shows, however, that Respondent had no role in the Commonwealth's ultimate decision to forego pursuit of a probation violation charge against Complainant.

19. A non-refundable legal fee is improper because it compromises the client's unqualified right to terminate the attorney-client relationship. Retention of a non-refundable fee violates the attorney's responsibility to refund any unearned advance fee, and a fee that has not been earned is per se unreasonable. Respondent was obligated to deposit the $5,000 tendered for Complainant's representation into his trust account until it was actually earned.

NATURE OF MISCONDUCT

The foregoing Findings of Fact give rise to the following violation of the Rules of Professional Conduct:

RULE 1.15 Safekeeping Property

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

SUBCOMMITTEE DETERMINATION

It is the decision of the Tenth District, Section II, Subcommittee to accept the Agreed Disposition of the parties. Accordingly, a hearing is not necessary to resolve this matter and Respondent shall receive a Public Reprimand without Terms pursuant to Part Six, Section IV, Paragraph 13.G.1.d(3) of the Rules of the Supreme Court of Virginia. This Public Reprimand without Terms is public discipline under the Rules of the Supreme Court of Virginia and it shall remain a permanent part of Respondent's disciplinary record with the bar.

WHEREFORE, the Respondent is hereby issued a Public Reprimand without Terms.

The Clerk of the Disciplinary System shall assess the appropriate administrative fees pursuant to Part Six, Section IV, Paragraph 13.b.8.c.(1) of the Rules of the Supreme Court of Virginia.

TENTH DISTRICT, SECTION II, SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

Elsey A. Harris, III, Esquire, Subcommittee Chair Presiding

VIRGINIA:
BEFORE THE THIRD DISTRICT COMMITTEE SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

IN THE MATTER OF
JOHN BERTRAM MANN
VSB DOCKET NUMBERS: 07-033-1418
07-033-1882
07-033-070688

SUBCOMMITTEE DETERMINATION
(PUBLIC ADMONITION WITH TERMS)

On March 3, 2007, a meeting in this matter was held before a duly convened Third District, Section III, Subcommittee consisting of Edward S. Whitlock III, Chair, David P. Baugh, Esquire, and Margaret E. McDermid, lay member.

Pursuant to Part 6, Section IV, Paragraph 13G.1.b of the Rules of the Supreme Court, the Third District, Section I, Subcommittee of the Virginia State Bar hereby serves upon the Respondent, John B. Mann, the following Public Admonition With Terms, resulting from an Agreed Disposition tendered to it by the Respondent and Assistant Bar Counsel.

I. FINDINGS OF FACTS

VSB Docket No. 07-033-1418
Complainant: Virginia State Bar (George Morton Appeal)

1. At all times relevant hereto, John B. Mann ("Respondent") has been an attorney licensed to practice law in the Commonwealth of Virginia.

2. Respondent has been licensed to practice law in the Commonwealth since August 26, 1970.

3. Respondent was counsel of record in the Virginia Court of Appeals in the case of *Morton v. Commonwealth*, Record No. 1103-06-2.

4. Respondent was appointed to represent George Morton in an appeal of criminal convictions in the Richmond Circuit Court.

5. Respondent filed a Notice of Appeal on Mr. Morton's behalf that was received by the trial court on May 1, 2006.

6. On July 20, 2006, Respondent requested an extension of thirty days because the court reporter had not prepared the transcripts.

7. The court granted an extension only until July 31, 2006.

8. The transcript did not arrive before July 31, 2006, but Respondent failed to request a second extension.

9. The Court of Appeals issued a rule to show cause why the appeal should not be dismissed for lack of transcript, and Respondent failed to answer it.

10. The Court of Appeals dismissed the appeal on September 14, 2006.

11. Respondent filed a petition for appeal on September 26, 2006.

12. Respondent admitted to the Virginia State Bar's investigator that he failed to request a second extension for filing the transcripts.

13. Respondent also stated that as mitigation he filed a petition for a belated appeal, which was granted.

Such conduct by John B. Mann constitutes violations of the following provisions of the Rules of Professional Conduct:

RULE 1.3 Diligence

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

VSB Docket No. 07-033-1882
Complainant: Virginia State Bar (Clifford Samy Appeal)

1. At all times relevant hereto, John B. Mann ("Respondent") has been an attorney licensed to practice law in the Commonwealth of Virginia.

2. Respondent has been licensed to practice law in the Commonwealth since August 26, 1970.

3. Respondent was counsel of record in the Virginia Court of Appeals in the case of *Samy v. Commonwealth*, Record No. 1858-06-2.

4. Respondent was retained to represent Clifford Samy on charges of possession of cocaine. After Samy's conviction, the trial court appointed him counsel for the appeal.

5. Respondent filed a notice of appeal on July 31, 2006.

6. On October 20, 2006, Respondent filed a motion to extend the time to file the transcripts based on what he called an "oversight" on the part of his office.

7. The Court of Appeals denied the motion because it was not timely filed and dismissed the appeal on October 25, 2006.

8. On November 6, 2006, Respondent filed a Reply to the Order of dismissal again requesting that Mr. Samy be given leave to file the transcripts late.

9. The Court of Appeals denied that request on November 13, 2006.

10. Respondent filed a motion for a delayed appeal, which was ultimately granted on December 16, 2006.

11. Respondent filed a petition for appeal on September 26, 2006.

Such conduct by John B. Mann constitutes violations of the following provisions of the Rules of Professional Conduct:

RULE 1.3 Diligence

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

VSB Docket No. 07-033-07-0688
Complainant: Virginia State Bar (Charles Lee Shaw Jr. Appeal)

1. At all times relevant hereto, John B. Mann ("Respondent") has been an attorney licensed to practice law in the Commonwealth of Virginia.

2. Respondent has been licensed to practice law in the Commonwealth since August 26, 1970.

3. Respondent was counsel of record in the Virginia Court of Appeals in the case of *Shaw v. Commonwealth*, Record No. 0060-07-2.

4. Respondent was retained to represent Charles Lee Shaw Jr. on a revocation of suspended sentence hearing in the Circuit Court for the City of Richmond. After Shaw's suspended sentence was revoked, the trial court appointed him counsel for the appeal.

5. Respondent filed a timely notice of appeal.

6. However, Respondent failed to timely file either a transcript or a statement of facts in connection with the appeal.

7. On March 13, 2007, the Court of Appeals issued a Rule to Show Cause requiring that Mr. Shaw show cause why the appeal should not be dismissed for failure to timely file transcripts or a statement of facts.

8. Respondent did not respond to the Court of Appeals' Show Cause Order.

9. The Court of Appeals dismissed Mr. Shaw's appeal on April 6, 2007.

10. Respondent states that a review of his file indicates that he did not receive a copy of the Show Cause Order from the Court of Appeals.

11. Respondent filed a motion for a delayed appeal, which was ultimately granted on June 6, 2007.

Such conduct by John B. Mann constitutes violations of the following provisions of the Rules of Professional Conduct:

RULE 1.3 Diligence

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

II. DISPOSITION

Accordingly, it is the determination of the Subcommittee that it hereby publicly admonishes the Respondent, John B. Mann, for the misconduct in the above captioned matters. The terms to be imposed are as follows:

1. That Respondent, within thirty days of the entry of the Public Admonition with Terms, document to the satisfaction of Bar Counsel that Respondent has sufficient docketing controls in which to properly calendar and track deadlines associated with appeals.

In the event of the Respondent's alleged failure to meet one or more of the terms set forth above, the Virginia State Bar shall issue and serve upon the Respondent a Notice of Hearing for Proceedings Upon Certification for Sanctions Determination. 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 Third District Committee, Section III, and Respondent hereby waives any right he may have to have a three-judge panel consider imposition of the alternate disposition. At the hearing, the burden of proof shall be on the Respondent to show timely compliance with the terms, including timely certification of such compliance, by clear and convincing evidence. The Respondent agrees his prior disciplinary record may be disclosed to the Third District Committee, Section III.

This Public Reprimand With Terms shall remain a permanent part of the Respondent's disciplinary record with the Bar.

The Clerk of the Disciplinary System shall impose an administrative fee pursuant to Part 6, Section IV, Paragraph 13.B.8.C of the Rules of the Supreme Court of Virginia.

THIRD DISTRICT, SECTION III, SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

Edward S. Whitlock, III, Chair

VIRGINIA:
BEFORE THE SECOND DISTRICT COMMITTEE
OF THE VIRGINIA STATE BAR

IN THE MATTER OF
ALANA SHERRISE POWERS
VSB DOCKET NUMBER: 07-022-2782

DISTRICT COMMITTEE DETERMINATION (PUBLIC ADMONITION WITHOUT TERMS)

On February 21, 2008, a hearing in this matter was held before a duly convened Second District Committee—Section II panel consisting of Bobby W. Davis, Esquire, Tonya Bullock, Esquire, Dianne B. Frantz, lay member, William King, lay member, and Megan E. Furlich Burns, Esquire, chair.

Pursuant to Part 6, Section IV, Paragraph 13.H.2.l.(2) of the Rules of the Supreme Court of Virginia, the Second District Committee of the Virginia State Bar hereby serves upon the Respondent the following Public Admonition Without Terms:

I. FINDINGS OF FACT

1. At all times relevant hereto, Alana Sherrise Powers ("Respondent") has been an attorney licensed to practice law in the Commonwealth of Virginia.

2. On November 10, 2005, the Norfolk Circuit Court sentenced Respondent's client, Dennis R. Lane, to a prison term of two and a half years.

3. At the conclusion of the November 10, 2005, sentencing hearing, Lane was very upset and disruptive in the courtroom. He asserted to Respondent that he was innocent, and that the length of his sentence exceeded that of others who had been found guilty of worse crimes.

4. Lane, through Respondent, advised the Court that he desired to appeal the conviction.

5. The Court thereupon appointed Respondent for the appeal.

6. After the Court advised Respondent of her appointment as appeals counsel, Respondent advised the Court that the appeal would be noted that day.

7. Respondent avers that she wrote to Lane at the Norfolk City Jail on November 14, 2005. Therein, Respondent advised Lane that "should you wish to appeal, you have thirty (30) days to notify me in writing."

8. Having never received said letter, Lane did not respond to Respondent's letter.

9. Respondent did not attempt to visit or otherwise further communicate with Lane at the Norfolk City Jail to ascertain his further wishes regarding appealing his conviction.

10. Notwithstanding her client's stated intent to appeal his conviction, Respondent's acceptance of the Court's appointment as appeals counsel, and Respondent's statement that the appeal would be noted the day of her appointment as appeals counsel, Respondent failed to note the appeal.

II. NATURE OF MISCONDUCT

Such conduct by Alana Sherrise Powers constitutes misconduct in violation of the following provisions of the Rules of Professional Conduct:

RULE 1.3 Diligence

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

The Committee failed to find the charged violations of Rules 1.16(c) and 1.16 (d).

III. PUBLIC ADMONITION WITHOUT TERMS

In considering an appropriate sanction, the Committee considered as mitigating evidence that at the time of the misconduct, Respondent was new to private practice, having only practiced previously as an assistant commonwealth's attorney and public defender. The Committee further considered mitigating that Respondent's prior discipline record arose from similar appeal defaults that occurred at roughly the same time and for which Respondent has previously been disciplined.

Accordingly, it is the decision of the Second District Committee to impose a Public Admonition Without Terms and Alana Sherrise Powers is hereby so admonished.

Pursuant to Paragraph 13.B.8.c. of the Rules of Court, the Clerk of the Disciplinary System shall assess costs.

SECOND DISTRICT COMMITTEE
OF THE VIRGINIA STATE BAR

Megan Elizabeth Furlich Burns, Chair

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

IN THE MATTER OF
PATRICK ALLEN ROBBINS
VSB DOCKET NUMBER: 07-021-064899

SUBCOMMITTEE DETERMINATION (PUBLIC ADMONITION WITHOUT TERMS)

On March 12, 2008, a duly convened Second District Subcommittee consisting of William W. King, lay member, Ellen C. Carlson, Esquire, and Mary M. Kellam, Esquire, chair, presiding, considered an Agreed Disposition in the above-referenced matter. It was the unanimous decision of the Subcommittee to accept the Agreed Disposition.

Pursuant to Part 6, Section IV, Paragraph 13.G.1.d.1 of the Rules of the Supreme Court of Virginia, the Second District Subcommittee of the Virginia State Bar hereby serves upon the Respondent the following Public Admonition Without Terms:

I. FINDINGS OF FACT

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

2. On December 21, 2006, the Circuit Court for the County of Accomack held a probation revocation hearing on John Kellenberger, determined that he was in violation of the terms of a previously suspended sentence, and sent him to prison for an additional ten years. The Court entered its order on December 22, 2006.

3. Mr. Robbins was Mr. Kellenberger's trial defense counsel for the probation revocation hearing only, another attorney having represented Mr. Kellenberger at the original trial.

4. His client desiring to appeal the matter, Mr. Robbins filed a Notice of Appeal on January 22, 2007, and ordered the transcript from the court reporter on the same date.

5. In accordance with the Rules of Court, Rule 5A:8, the due date for filing the transcript with the clerk of the trial court was sixty days of the entry of final judgment, or February 20, 2007.

6. Mr. Robbins delegated the responsibility for monitoring the production and filing of the transcript to a new secretary, who failed to see that this was done. (Mr. Robbins explained that, previously, the court reporter always called prior to the deadline to request an extension if unable to complete the transcript on time, but on this occasion, did not do so.)

7. Mr. Robbins did not discover the missed deadline until about two days after the due date when the court reporter called him to say that the transcript was not ready.

8. Mr. Robbins promptly met with his client at the jail to inform him of the problem, and advised him to seek a delayed appeal through the habeas corpus process. He also informed him that he could complain to the Virginia State Bar if he wished.

9. Mr. Robbins was unaware of the statutory remedy for a delayed appeal provided by Virginia Code Section 19.2-321.1, and did not inform his client about this at that time.

10. The client explained that he did not have the means or know-how to prepare a habeas corpus petition, and asked Mr. Robbins to help. Mr. Robbins, however, left the matter to his client, who then complained to the Virginia State Bar on April 5, 2007.

11. On April 13, 2007, the transcript not having been filed, the Court of Appeals issued an Order directing the appellant to respond by April 28, 2007, and show cause why the appeal should not be dismissed for failure to file the transcript.

12. Though he was counsel of record, Mr. Robbins did not respond to the Court's Show-Cause Order.

13. On May 11, 2007, no one having responded to the Show-Cause Order, and no transcript or statement of facts having ever been filed, the Court of Appeals dismissed the appeal.

14. During an interview with the Virginia State Bar's investigator on August 28, 2007, Mr. Robbins said that he had worked forty to fifty appeals, but did not know anything about Virginia Code Section 19.2-321.1, the delayed appeal statute, which became effective July 1, 2005.

15. On September 6, 2007, the Virginia State Bar investigator having informed him of the statute, Mr. Robbins notified his client by letter that he would file a motion for a delayed appeal.

16. Mr. Robbins filed the motion, but did not submit an affidavit acknowledging that it was he who missed the filing deadline, as required by 19.2-321.1, but attached instead his previous letter to the Virginia State Bar thinking that this met the requirement.

17. The Court of Appeals informed him of this problem, Mr. Robbins submitted the affidavit, and the Court of Appeals ordered a delayed appeal on December 27, 2007.

18. Mitigating factors recognized by the American Bar Association are the Respondent's prompt efforts to correct the harm caused to his client, and full disclosure to his client and the Virginia State Bar throughout this matter.

19. Also, as a result of this incident, the Respondent has implemented remedial office procedures, including a standard letter to the court reporting service indicating a transcript's due date with a suspense date for follow-up, and the training of a new administrative assistant in appellate matters.

II. NATURE OF MISCONDUCT

Such conduct by Patrick Allen Robbins constitutes misconduct in violation of the following provisions of the Rules of Professional Conduct:

RULE 1.1 Competence

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

RULE 1.3 Diligence

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

III. PUBLIC ADMONITION WITHOUT TERMS

Accordingly, it is the decision of the subcommittee to impose a Public Admonition Without Terms and Patrick Allen Robbins is hereby so admonished.

Pursuant to Paragraph 13.B.8.c. of the Rules of Court, the Clerk of the Disciplinary System shall assess costs.

SECOND DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

Mary M. Kellam, Esquire, Subcommittee Chair

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

IN THE MATTER OF
DANNY SHELTON SHIPLEY
VSB DOCKET NUMBER: 07-021-1348

SUBCOMMITTEE DETERMINATION (PUBLIC REPRIMAND)

On March 12, 2008, a duly convened Second District Subcommittee consisting of William W. King (lay member), Ellen C. Carlson, Esquire, and Mary M. Kellam, Esquire, chair, presiding, considered an Agreed Disposition in the above-referenced matter. It was the unanimous decision of the Subcommittee to accept the Agreed Disposition.

Pursuant to Part 6, Section IV, Paragraph 13.G.4. of the Rules of the Supreme Court of Virginia, the Second District Subcommittee of the Virginia State Bar hereby serves upon the Respondent the following Public Reprimand:

I. FINDINGS OF FACT

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

The William A. Johnson Matter

2. On January 3, 2003, the Circuit Court for the City of Norfolk revoked William A. Johnson's previously suspended sentence and imposed a net sentence of three years to serve. Mr. Shipley was his appointed counsel.

3. On January 9, 2003, the court appointed Mr. Shipley for the appeal.

4. Mr. Shipley timely appealed the matter to the Court of Appeals of Virginia, which denied the appeal on June 26, 2003.

5. By letter, dated July 16, 2003, Mr. Shipley advised his client that he was appealing the matter to the Supreme Court of Virginia.

6. Mr. Shipley filed a petition for appeal to the Supreme Court of Virginia, but did not file a notice of appeal as required by Rule 5:14(a) of the Rules of Court.

7. Accordingly, on August 28, 2003, the Supreme Court of Virginia dismissed the appeal.

8. Mr. Shipley did not notify Mr. Johnson of this development and took no further action in the matter, his office having inadvertently closed the file.

9. Mr. Shipley said that he did not realize that there was a problem until he received the complaint from the Virginia State Bar three years later.

10. Mr. Johnson, therefore, was unable to avail himself of the delayed appeal process.

The Earnest Leon Dew Matter

11. On February 27, 2004, the Circuit Court for the City of Norfolk sentenced Earnest Leon Dew to a net sentence of four years to serve on his conviction of malicious wounding. Mr. Shipley was his appointed counsel.

12. His client desiring an appeal, Mr. Shipley timely appealed the matter to the Court of Appeals of Virginia, and on March 15, 2004, the court appointed Mr. Shipley for the appeal.

13. By letter, dated August 9, 2004, Mr. Shipley provided his client with a copy of his petition for appeal, and said that if the appeal were denied by the Court of Appeals that he would automatically appeal it to the Supreme Court of Virginia.

14. On October 15, 2004, a single judge at the Court of Appeals denied the petition for appeal, and the decision was affirmed by a three-judge panel on December 8, 2004.

15. Mr. Shipley appealed the matter to the Supreme Court of Virginia, but once again failed to file the notice of appeal required by Rule 5:14(a) of the Rules of Court.

16. Accordingly, on March 3, 2005, the Supreme Court dismissed the appeal.

17. Mr. Shipley promptly advised his client about the problem, and filed a petition for a writ of habeas corpus for a delayed appeal, which was granted, and the appeal was restored to the docket.

The Danuel L. Maye Matter

18. On August 5, 2005, the Circuit Court for the City of Norfolk sentenced Danuel L. Maye to a net sentence of two years to serve on his conviction of possession of a firearm by a convicted felon.

19. His client desiring an appeal, Mr. Shipley timely appealed the matter to the Court of Appeals of Virginia, and on September 7, 2005, the Court appointed Mr. Shipley for the appeal.

20. On March 22, 2006, the Court of Appeals denied the petition, and Mr. Shipley appealed the matter to the Supreme Court of Virginia.

21. On this occasion, Mr. Shipley filed the notice of appeal, but was late in filing the petition for appeal in accordance with Rule 5:17(a)(2) of the Rules of Court, and the Supreme Court dismissed the appeal accordingly on June 8, 2006.

22. Mr. Shipley notified his client of the error and on September 16, 2006, petitioned for a delayed appeal in accordance with Virginia Code Section 19.2-321.2. The petition was granted and the matter was restored to the Supreme Court's docket, where it was ultimately refused on May 24, 2007.

II. NATURE OF MISCONDUCT

Such conduct by Danny Shelton Shipley constitutes misconduct in violation of the following provisions of the Rules of Professional Conduct:

In failing to file a notice of appeal on two occasions, failing to timely file a petition for appeal on one occasion, and inadvertently closing the file after an appeal was dismissed because of his error, thereby depriving that client of the opportunity to seek a delayed appeal, the Respondent was in violation of the following provisions of the Rules of Professional Conduct:

RULE 1.1 Competence

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

RULE 1.3 Diligence

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

In closing the Johnson file after the appeal was dismissed due to his error, thereby not advising Mr. Johnson of the problem or of his option to seek a delayed appeal, the Respondent was in violation of the following provisions of the Rules of Professional Conduct:

RULE 1.4 Communication

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

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

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

III. PUBLIC REPRIMAND

Accordingly, it is the decision of the subcommittee to impose a PUBLIC REPRIMAND and the Respondent is hereby so reprimanded.

Pursuant to Paragraph 13.B.8.c., the Clerk of the Disciplinary System shall assess costs.

SECOND DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

Mary M. Kellam, Esquire, Subcommittee Chair

VIRGINIA:
BEFORE THE THIRD DISTRICT COMMITTEE SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

IN THE MATTER OF
ROBERT HENRY SMALLENBERG
VSB DOCKET NUMBER: 06-032-4208

SUBCOMMITTEE DETERMINATION
(APPROVAL OF AGREED DISPOSITION FOR PUBLIC REPRIMAND)

On March 14, 2008, a Third District, Section II, Committee panel assembled for a Hearing of this matter. Upon information that the bar and Respondent had endorsed an Agreed Disposition, a duly convened Third District, Section II, Subcommittee consisting of Martin Douglas Wegbreit, Esquire (chair presiding), Steven Colin McCallum, Esquire, and Coral Coleman Gills, lay member, met and considered the proposed Agreed Disposition.

Pursuant to Part Six, Section IV, Paragraph 13.G.1.d(3) of the Rules of the Supreme Court of Virginia, the Third District, Section II, Subcommittee of the Virginia State Bar hereby approves the Agreed Disposition entered into between Respondent Robert Henry Smallenberg ("Respondent") and Assistant Bar Counsel Scott Kulp, and hereby serves upon Respondent the following Public Reprimand:

I. FINDINGS OF FACT

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

2. Complainant Kimberly D. Taylor hired Respondent to represent her on criminal charges in Dinwiddie County, Virginia.

3. In pertinent part, after the trial was twice continued, a new trial date was scheduled for May 12, 2006.

4. Respondent produced his time records to show he spoke with the commonwealth's attorney, George Marable, on May 1, 2006. Respondent contends he learned that Mr. Marable would accept a plea to one count in exchange for dropping the other three counts. Sentencing would be in accordance with the sentencing guidelines.

5. Respondent contends his time records, appointment book, and meeting notes show he then met with Ms. Taylor on May 2, 2006, to review the applicable sentencing guidelines should she agree to accept the Commonwealth's plea agreement. Respondent contends Ms. Taylor agreed to plead guilty in accordance with the Commonwealth's terms.

6. According to Respondent, he suffered a back injury on May 6, 2006, saw a doctor on May 9, 2006, and was prescribed muscle relaxants and pain medication and put to bed for the rest of the week. He returned to work the following Monday, May 15, 2006.

7. During his absence, Respondent claims he informed his office staff to advise clients of his injury, and he contends his law clerk and secretary would so testify.

8. Respondent acknowledges Ms. Taylor called on a couple of occasions during his absence without leaving a detailed message.

9. Ms. Taylor contends Respondent was unresponsive to her attempted communications leading up to the trial. She denies knowing about any plea agreement Respondent negotiated on her behalf.

10. The bar's Investigation revealed that Ms. Taylor's mother, Sandra Lewis, said she and Ms. Taylor called Respondent repeatedly as the trial date drew near without getting a response. Ms. Lewis denies knowing Respondent was out with an injury or that he had negotiated any plea agreement.

11. A review of Ms. Lewis's cell phone records for the period April 1– May 31, 2006, indicate she made a total of thirteen calls to a number identified with Respondent. The last five calls beginning April 28, 2006, to May 9, 2006, were to Respondent's cell phone.

12. Respondent contends he and his law clerk each spoke to Ms. Lewis at least once between April 1, 2006, and May 2, 2006. Respondent acknowledges he has no recollection or records indicating he spoke to either Ms. Lewis or Ms. Taylor after May 2, 2006.

13. The record shows Ms. Taylor hired another attorney, Steve Novey, Esq., on May 11, 2006, because Respondent had not responded to her calls.

14. Upon interview by the bar's Investigator, Mr. Novey said he sent a letter to the court clerk notifying the court of his representation and enclosing an order of substitution signed by all parties. After the case was continued, Mr. Novey sent Respondent a letter dated May 17, 2006, requesting a copy of Ms. Taylor's file, but he never received a response.

15. Mr. Novey denies any indication that a plea agreement had been under discussion; however, he was successful in obtaining a plea deal for restitution and a suspended sentence after Ms. Taylor agreed to provide the Commonwealth with assistance.

16. Upon interview by the bar's Investigator, George Marable, Esq., Dinwiddie's commonwealth's attorney, said while he may have informally discussed a possible plea deal with Respondent, he has no recollection of it. He further has no record or recollection of Respondent accepting a plea deal. According to Mr. Marable, it was unlikely he would have offered a one-count plea deal because he had a strong case and Ms. Taylor had not then offered any cooperation. He confirmed that Mr. Novey later called him and offered Ms. Taylor's assistance. Upon hearing what Ms. Taylor had to say, he reached a plea agreement with Ms. Taylor.

II. NATURE OF MISCONDUCT

The foregoing Findings of Fact give rise to the following violations of the Rule of Professional Conduct:

RULE 1.3 Diligence

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

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status

III. SUBCOMMITTEE DETERMINATION

It is the decision of the Third District, Section II, Subcommittee to accept the Agreed Disposition of the parties. Accordingly, a Hearing is not necessary to resolve this matter and Respondent shall receive a Public Reprimand without Terms pursuant to Part Six, Section IV, Paragraph 13.G.1.d(3) of the Rules of the Supreme Court of Virginia. This Public Reprimand without Terms is public discipline under the Rules of the Supreme Court of Virginia.

WHEREFORE, the Respondent is hereby issued a single Public Reprimand without Terms. This Public Reprimand without Terms shall remain a permanent part of Respondent's disciplinary record with the bar.

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

THIRD DISTRICT, SECTION II SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

Martin Douglas Wegbreit, Esquire, Subcommittee Chair Presiding

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SOLO & SMALL-FIRM PRACTITIONER FORUM

Solo & Small-Firm Practitioner Forum

Regent University School of Law • 1000 Regent University Drive • Virginia Beach, Virginia

Monday, July 21, 2008

Space is limited. Registrations will be accepted on a first-come, first-served basis.
Confirmations will be e-mailed.

8:30 – 9:00 AM	Registration
9:00 – 9:15 AM	Welcome & Greetings John Y. Richardson Jr., Chair – CLBA Executive Committee Howard W. Martin Jr., President – Virginia State Bar
9:15 – 9:45 AM	Fee Dispute Resolution Program (.5 CLE/Ethics) Geetha Ravindra, Chair – VSB Special Committee on the Resolution of Fee Disputes
9:45 – 10:45 AM	The Devil Wore Green – An interactive trust accounting primer (1 CLE/Ethics) Jeannie P. Dahnk, Member – VSB Lawyer Malpractice Committee and VSB Past President Leslie A.T. Haley, Assistant Ethics Counsel – Virginia State Bar
10:45 – 11:00 AM	Break
11:00 AM – NOON	Fastcase – A free benefit for VSB members (1 CLE) Edward J. Walters III Co-Founder and CEO – Fastcase
NOON – 1:00 PM	Luncheon Speaker – Former Governor Gerald L. Baliles
1:00 – 2:00 PM	Disaster Preparedness – What's reasonable? (1 CLE) Sharon D. Nelson, President – Sensei Enterprises, Inc. John W. Simek, Vice President – Sensei Enterprises, Inc.
2:00 – 2:15 PM	Break
2:15 – 3:15 PM	60 Law Office Management Tips in 60 Minutes (1 CLE) Sharon D. Nelson John W. Simek
3:15 – 3:45 PM	Town Hall Meeting The Honorable Leroy R. Hassell Sr., Chief Justice – Supreme Court of Virginia

REGISTRATION

Solo & Small-Firm Practitioner Forum
Regent University School of Law • 1000 Regent University Drive • Virginia Beach, Virginia
Monday, July 21, 2008
NO CHARGE TO PARTICIPANTS • Lunch will be provided.

Name _____ VSB I.D. No. _____

Address _____

City and State _____ ZIP _____

Telephone (_____) _____ Fax (_____) _____ E-Mail (for confirmation) _____

Please return this registration form to:
Paulette J. Davidson, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800,
ot fax to (804) 775-0501, or e-mail clba@vsb.org.

CONSUMER REAL ESTATE PROTECTION ACT SURETY BOND INCREASE

CRESPA SURETY BOND INCREASE ENACTED

If you are registered with the Virginia State Bar under the Consumer Real Estate Protection Act (CRESPA), an amendment to § 6.1-2.21 of the Code of Virginia increasing the minimum CRESPA surety bond from $100,000 to $200,000 will be effective on July 1, 2008.

An original rider or a replacement bond must be received in the office of the Virginia State Bar by July 1, 2008, or your CRESPA registration will be revoked, and you will not be able to perform residential real estate closings.

If you have any questions regarding this matter, please contact the Membership Department at (804) 775-0530.

VIRGINIA STATE BAR COUNCIL TO REVIEW UNAUTHORIZED PRACTICE OF LAW OPINION 213

Pursuant to Part Six: Section IV, Paragraph 10(c)(iv) of the Rules of the Supreme Court of Virginia, the Virginia State Bar Council, at its meeting on June 19, 2008, in Virginia Beach, Virginia, is expected to consider for approval, disapproval, or modification, proposed Unauthorized Practice of Law Opinion 213, *Attorney on Associate Status Representing Multiple Ownership Interests in Negotiation and Drafting of Easement*.

UPL Opinion 213

UPL Opinion 213 was issued by the Standing Committee on the Unauthorized Practice of Law on April 8, 2008. This proposed opinion generally addresses whether a retired member of the Virginia State Bar who is on Associate membership status and who owns an undivided interest in a tract of land can verify the ownership of other undivided interests, negotiate and prepare an easement deed acting, not only for himself, but on behalf of the entirety, representing all interests, and reimburse expenses out of the sale of tax credits.

Pursuant to Unauthorized Practice Rule 6-103 (A)(1) of the Rules of Supreme Court of Virginia, a non-lawyer can act for him/herself *pro se* and draft legal instruments related to a real estate transaction as long as he/she is the owner of the property or a party to the transaction involving the property but he/she cannot act not for anyone else. The language "affecting his property" in UPC 6-5 would allow the landowner to draft a legal instrument (such as an easement) which affects the piece of property he actually owns and to represent himself and his own interests in such a transaction but it does not authorize a non-lawyer to act on behalf of another landowner and affecting another landowner's property, even if the various pieces of property are all part of a whole. This language cannot be construed to broaden the scope of what a non-lawyer can do for another. This would be inconsistent with Rule 6 itself as well as with the Definition of the Practice of Law generally and would be considered the unauthorized practice of law.

Inspection and Comment

The proposed unauthorized practice of law 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 AM and 4:30 PM, Monday through Friday. Copies of the 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 website 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 opinion by filing ten copies with Karen A. Gould, the Executive Director of the Virginia State Bar, not later than **June 6, 2008.**

# # #

(DRAFT—April 8, 2008)

UPL OPINION 213
ATTORNEY ON ASSOCIATE STATUS REPRESENTING MULTIPLE OWNERSHIP INTERESTS IN NEGOTIATION AND DRAFTING OF EASEMENT

You have asked the Committee to opine as to whether the following activity is the unauthorized practice of law: A member of the Virginia State Bar ("VSB") is retired from practice and on Associate membership status.[1] He is the owner of an undivided interest in a tract of land and wants to proceed *pro se* to protect the tract under a conservation easement. In doing this he wants to verify ownership of other undivided interests, negotiate and prepare an easement deed on behalf of the entirety, representing all interests, and reimburse expenses out of the sale of tax credits.

Acting *pro se,* landowner/Associate member can do whatever he believes necessary to protect his *own* interests. His proposed action to be taken on behalf of any other owner's interests would be unauthorized practice of law. The controlling authority on this issue is Part 6, § I, Introduction, (B)(Definition of the Practice of Law in Virginia) and (C) (Definition of "Non-lawyer")Rules of the Virginia Supreme Court; Unauthorized Practice Rule ("UPR") 6-103 (A); Unauthorized Practice Consideration ("UPC") 6-5; Part 6, § IV, ¶ 3(b) Rules of the Supreme Court of Virginia (Classes of Membership—Associate Members).

The language in the Introduction to Virginia's Unauthorized Practice of Law Rules and Considerations is clear:

> The right of individuals to *represent themselves* is an inalienable right common to all natural persons. *But no one has the right to represent another;* it is a privilege to be granted and regulated by law for the protection of the public. (Emphasis added.)

The Definition of the Practice of Law in the Commonwealth of Virginia states:

> Generally, the relation of attorney and client exists, and one is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill.
>
> Specifically, the relation of attorney and client exists, and one is deemed to be practicing law whenever
>
> ***
>
> (2) One, other than as a regular employee acting for his employer, undertakes, with or without compensation, *to prepare for another* legal instruments *of any character*, other than notices or contracts incident to the regular course of conducting a licensed business.
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> ***

FOOTNOTES

1. Part 6, § IV, Para. 3(b) Rules of the Supreme Court of Virginia:
Associate Members—Those persons who have heretofore or may hereafter be admitted to practice law in the courts of this state but who are not presently so engaged and all persons on the law faculties of any law schools of this state that have been approved by the American Bar Association may be come associate members of the Virginia State Bar upon application to the secretary and payment of the required dues. Associate members shall be entitled to all the privileges of active members except that they may not practice law, vote or hold office (other than as members of committees) in the Virginia State Bar.

While the individual described in the present inquiry is a member of the Virginia State Bar, these provisions (and restrictions) of the Rules apply to him because he holds only Associate membership status. *See* footnote 1 *supra*. Associate members "may not practice law" in any manner. For purposes of the practice of law, Associate members are essentially "non-lawyers," i.e. "any person … not duly licensed *or authorized* to practice law in the Commonwealth of Virginia." Part 6, § I (C), Rules of the Supreme Court of Virginia. In the inquiry presented, this individual is trying to organize all of the various ownership interests in a certain tract of land and negotiate and prepare on behalf of all of the interests a conservation easement to protect the land in its entirety. To do this would necessarily require at some point discussing with the other landowners what their respective legal rights were and explaining to them the need for and consequences of securing this easement, all of which constitutes legal advice. However, Part 6, § I (B)(1) of the Rules of the Supreme Court of Virginia states that such advice is deemed to be the practice of law only if it is provided *for compensation.* In this case, the landowner/Associate bar member would not be paid by these other landowners for his services so providing this advice would not, by itself, be unauthorized practice. Drafting the easement, however, would be preparing a legal instrument for another(s) and if the landowner/Associate member did that on behalf of all of the landowners he would be engaging in unauthorized practice whether he was paid for the service or not. Part 6, § I (B)(2), Rules of the Supreme Court of Virginia.

As to the drafting of the easement, the inquiry requests an interpretation and application of UPC 6-5, which is a comment to UPR 6-103 (A)(1). UPC 6-5 states:

> An individual, if he chooses to do so, may draw or attempt to draw legal instruments for himself *or affecting his property*. (Emphasis added.)

UPR 6-103 (A)(1) states:

> Unless a party to the transaction, a non-lawyer shall not, with or without compensation, prepare for another legal instruments of any character affecting the title to or use of real estate.
>
> (1) A non-lawyer may prepare a deed for any real estate *owned by him.* A non-lawyer may prepare a deed of trust or deed of trust note for any real estate owned by him or in connection with any transaction to which he is party involving its purchase, sale, transfer or encumbrance. (Emphasis added.)

***

The key to this rule provision and the consideration is that the non-lawyer acting *pro se* must be the owner of the property or he/she must be a party to the transaction involving a piece of real estate and he/she can only act for him/herself, not for anyone else. The language "affecting his property" in UPC 6-5 would allow the landowner to draft a legal instrument (such as an easement) which affects the piece of property he actually owns and to represent himself and his own interests in such a transaction but it does not authorize a non-lawyer to act on behalf of another landowner and affecting another landowner's property, even if the various pieces of property are all part of a whole. This language cannot be construed to broaden the scope of what a non-lawyer can do for another. This would be inconsistent with Rule 6 itself as well as with the Definition of the Practice of Law generally.

This opinion is based only on the facts you presented and is subject to review by Bar Council at its next regularly scheduled meeting in June 2008, after the requisite period for public comment, in accordance with Part Six, § IV, ¶ 10 (c)(iv) of the Rules of the Virginia Supreme Court. Should Council approve the Opinion, it will then be reviewed by the Supreme Court pursuant to Part Six, § IV, ¶ 10 (f)(iii).

VIRGINIA STATE BAR COUNCIL TO REVIEW UNAUTHORIZED PRACTICE OF LAW OPINION 214

Pursuant to Part Six: Section IV, Paragraph 10(c)(iv) of the Rules of the Supreme Court of Virginia, the Virginia State Bar Council, at its meeting on June 19, 2008, in Virginia Beach, Virginia, is expected to consider for approval, disapproval, or modification, a proposed Unauthorized Practice of Law Opinion 214, *Non-Lawyer Representation, for Compensation, of a Party to Arbitration*.

UPL Opinion 215

UPL Opinion 215 was issued by the Standing Committee on the Unauthorized Practice of Law on April 8, 2008. This opinion generally addresses whether it is the unauthorized practice of law for a non-lawyer Certified Public Accountant ("CPA") to represent a claimant in an arbitration proceeding before the National Association of Securities Dealers, Inc. ("NASD") against the Claimant's former brokerage firm and former stock broker. The CPA is not a licensed attorney in any jurisdiction and is not, and never has been an employee of the claimant. In this proposed opinion, the UPL Committee concluded that the CPA is not a licensed attorney in any jurisdiction, nor is or has he ever been an employee of the Claimant. He is independently offering to provide to customers from the public, services related to arbitration, including representation, and charging a fee for those services and representation. Among the services he is providing are counseling the client regarding potential legal claims against the brokerage company, drafting a statement of claim, drafting discovery requests and then representation at the hearing where he will introduce exhibits, conduct examination of witnesses, including expert witnesses, objecting to exhibits and making legal argument. Based on the Definition of the Practice of Law in the Commonwealth of Virginia, Part 6, § I of the Rules of the Virginia Supreme Court and the decisions of the UPL Committee in UPL Opinions 92, 200, and 206, the conduct of this CPA is the unauthorized practice of law.

Inspection and Comment

The proposed unauthorized practice of law 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 AM and 4:30 PM, Monday through Friday. Copies of the proposed 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 website 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 opinion by filing ten copies with Karen A. Gould, the Executive Director of the Virginia State Bar, not later than **June 6, 2008.**

# # #

(DRAFT—April 8, 2008)

UPL Opinion 214
Non-Lawyer Representation, for Compensation, of a Party to Arbitration

You have asked the Committee to opine as to whether it is the unauthorized practice of law for a Certified Public Accountant ("CPA"), who is not a licensed attorney in any jurisdiction, to represent a Claimant in an arbitration proceeding against the Claimant's former brokerage firm and former stock broker. The CPA is not, and never has been, an employee of Claimant. Among the services the CPA is providing to the Claimant are: counseling to the Claimant regarding potential legal claims against the brokerage company, drafting a statement of claim asserting the causes of action identified, drafting discovery requests, responding to discovery requests and objecting to discovery requests as appropriate. During representation at the hearing the CPA will introduce exhibits, conduct examination of witnesses, including expert witnesses, object to exhibits and make legal argument on behalf of the Claimant. The CPA is receiving compensation from the Claimant for his representation of Claimant in the arbitration proceeding. This arbitration proceeding is before the National Association of Securities Dealers, Inc. ("NASD").

The Definition of the Practice of Law in the Commonwealth of Virginia, Part 6, § I (B) states that "one is deemed to be practicing law whenever":

(1) One undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal principles to facts or purposes or desires.

(2) One, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business.

(3) One undertakes, with or without compensation, to represent the interest of another before any tribunal—judicial, administrative, or executive—otherwise than in the presentation of facts, figures, or factual conclusions, as distinguished from legal conclusions, by an employee regularly and bona fide employed on a salary basis, or by one specially employed as an expert in respect to such facts and figures when such representation by such employee or expert does not involve the examination of witnesses or preparation of pleadings.

(4) One holds himself or herself out to another as qualified or authorized to practice law in the Commonwealth of Virginia.

The Committee has issued three opinions addressing the issue of a "non-lawyer" representing a party in an arbitration proceeding. In UPL Opinion 92, the Committee found that:

> It is not the unauthorized practice of law for a non-Virginia-licensed attorney to present evidence and argue matters of law before an arbitration panel of the American Arbitration Association in Virginia in order to represent a client from the attorney's jurisdiction in a franchise contract dispute.

In UPL Opinion 200, the Committee addressed the issue of whether a non-Virginia/foreign attorney, licensed to practice law in Maryland, could represent a corporation in an arbitration proceeding held in Virginia. The Committee found that the foreign attorney could proceed with such representation and that it would not be unauthorized practice. The corporate client was an existing client, which the attorney represented elsewhere. An arbitration proceeding involving this client was set to take place in Virginia. The Committee determined that an attorney is "practicing law" in Virginia when representing a party in an arbitration proceeding but that an arbitration proceeding is not practice before a "tribunal." The Committee then applied the factors under Pt. 6, § I (C)(1)-(3) Rules of the Virginia Supreme Court, allowing for certain "temporary practice" by a foreign attorney:

1. Such foreign attorney must be admitted to practice and in good standing in any state in the United States; and
2. The services provided must be on an occasional basis only and incidental to representation of a client whom the attorney represents elsewhere; and
3. The client must be informed that the attorney is not admitted in Virginia.

The Committee concluded that the attorney satisfied these requirements and it would not be unauthorized practice of law for the foreign attorney to represent his client in the arbitration proceeding in Virginia.

In UPL Opinion 206 the Committee addressed the issue of whether it was the unauthorized practice of law for a non-attorney corporate officer to represent the corporation at an arbitration conducted in Virginia and determined that this would not be unauthorized practice.

> The definition of the practice of law allows "a regular employee acting for his employer" to provide legal advice and prepare legal documents for this employer. While the definition and Rule 1-101 prohibit a non-lawyer from representing the interests of or appearing on behalf of his employer or a corporation before "a tribunal," the definition of "tribunal" in UPC 1-1 does not include an arbitration proceeding. It follows, therefore, that a non-attorney officer of a corporation can represent that corporation and provide legal advice to the corporation/employer within the context of an arbitration proceeding.

UPL Op. 206 (Feb. 10, 2004).

The individual in the present inquiry is neither an attorney licensed in another jurisdiction coming into Virginia to handle a matter for a client the attorney represents elsewhere nor is the person or entity who is a party to the arbitration the regular employer of this individual. Rather, this individual is a CPA, in Virginia, not a licensed attorney in any jurisdiction, who appears to be independently offering to provide to customers from the public, services related to arbitration, including representation, and charging a fee for those services and representation. Based on the Definition of the Practice of Law in the Commonwealth of Virginia, in particular, subsection (1), and the decisions of the Committee in UPL Opinions 92, 200 and 206, the conduct of this CPA is the unauthorized practice of law.

Of note, in September 2006, the NASD, (n/k/a Financial Industry Regulatory Authority, Inc. ("FINRA")) filed with the Securities and Exchange Commission ("SEC") a proposed rule amendment relating to representation of parties in arbitration and mediation.[1] On September 26, 2007, the SEC entered an order approving the proposed rule

FOOTNOTES

1. http://www.sec.gov/rules/sro/nasd.shtml: Notice: Rel. No. 34-55604

amendment.[2] This rule amendment came about in light of decisions from two jurisdictions, Florida and California,[3] addressing the issues of out-of-state lawyer and non-lawyer representation of parties in arbitration and the expanding multi-jurisdictional practice of law in jurisdictions throughout the country generally. The changes in the rule (1) codified the current practice by explicitly stating that parties may represent themselves in arbitration; (2) codified current practice permitting multijurisdictional practice by attorneys in NASD Dispute Resolution to the extent permitted by state law and required that the attorney must be licensed to practice and in good standing in a U.S. jurisdiction; (3) allowed that parties may be represented by a person who is not an attorney unless applicable law prohibits such representation or the person is currently suspended or barred from the securities industry in any capacity or is currently suspended or disbarred from the practice of law; and (4) allowed an attorney to represent a client in NASD arbitration or mediation held in any U.S. location, regardless of where the attorney is licensed, the representation being subject to the applicable law of the particular jurisdiction.

While it is beyond the purview of the Committee to apply or interpret the rules of the NASD, it appears that the Committee's conclusion in this matter is consistent with the NASD's rule as amended regarding representation in NASD arbitration and mediation.

This opinion is based only on the facts you presented and is subject to review by Bar Council at its next regularly scheduled meeting in June 2008, after the requisite period for public comment, in accordance with Part Six, § IV, ¶ 10 (c)(iv) of the Rules of the Virginia Supreme Court. Should Council approve the Opinion, it will then be reviewed by the Supreme Court pursuant to Part Six, § IV, ¶ 10 (f)(iii).

FOOTNOTES

2. Id., Order Approving Proposed Rule Change as modified by Amendment Nos. 1 and 2 Thereto Relating to Representation of Parties in Arbitration and Mediation

3. *Florida Bar v. Rapoport,* 845 So. 2d 874 (Fla. 2003); *Florida Bar Re: Advisory Opinion on Nonlawyer Representation in Securities Arbitration,* 696 So. 2d 1178 (Fla. 1997); *Birbower, Montalbano, Condo & Frank v. Superior Court,* 949 P. 2d 1(Cal. 1998).

On March 18, 2008, the Virginia State Bar's Standing Committee on Unauthorized Practice of Law issued as final Unauthorized Practice of Law Opinion 215, *In-house Counsel Based Outside Virginia Providing Legal Advice to Employer in Virginia*.

UPL Opinion 215
In-house Counsel Based Outside Virginia
Providing Legal Advice to Employer in Virginia

The Committee has been asked to opine as to whether lawyers who are members of the legal department of a financial institution which is chartered under the laws of a state other than Virginia and who are based in offices outside Virginia and who are licensed in jurisdictions other than Virginia are (1) subject to required registration as corporate counsel under Rule 1A:5 of the Rules of the Supreme Court of Virginia; and (2) engaging in unauthorized practice of law if they advise Virginia offices of the financial institution on Virginia law either from the lawyers' offices outside of Virginia or when they visit the Virginia offices in person.

The controlling authority is Rule 1A:5, Rules of the Virginia Supreme Court and the Practice of Law in the Commonwealth of Virginia, Part 6 § I, (B) and (C), Rules of the Supreme Court of Virginia.

Rule 1A:5 of the Rules of the Supreme Court of Virginia, Virginia Corporate Counsel & Corporate Counsel Registrants provides:

> Notwithstanding any rule of this Court to the contrary, after July 1, 2004, any person employed in Virginia as a lawyer exclusively for a for-profit or a non-profit corporation, association, or other business entity, including its subsidiaries and affiliates, that is not a government entity, and the business of which consists solely of lawful activities other than the practice of law or the provisions of legal services ("Employer"), for the primary purpose of providing legal services to such Employer, including one who holds himself or herself out as "in-house counsel," "corporate counsel," "general counsel," or other similar title indicating that he or she is serving as legal counsel to such Employer, shall either (i) be a regularly admitted active member of the Virginia State Bar; (ii) be issued a Corporate Counsel Certificate as provided in Part I of this rule and thereby become an active member of the Virginia State Bar with his or her practice limited as provided therein; or (iii) register with the Virginia State Bar as provided in Part II of this rule; provided, however, no person who is or has been a member of the Virginia State Bar, and whose Virginia License, at the time of application, is revoked or suspended, shall be issued a Corporate Counsel Certificate or permitted to register under this Rule.

Part I and Part II of this rule set out the certification and registration requirements for lawyers admitted to practice in U.S. jurisdictions *other than Virginia* or in a country other than the United States (Part II only):

Part I: Virginia Corporate Counsel

(a) A lawyer admitted to the practice of law in a state (other than Virginia), or territory of the United States, or the District of Columbia may apply to the Virginia State Bar for a certificate as a Virginia Corporate Counsel ("Corporate Counsel Certificate") to practice law as in-house counsel in this state when he or she is employed by an Employer in Virginia.

***

Part II: Corporate Counsel Registrants

(a) Notwithstanding the requirements of Part I of this rule, any lawyer as defined in the Introduction and Part I(a) of this rule may register with the Virginia State Bar as a "Corporate Counsel Registrant." A person admitted to the practice of law only in a country other than the United States, and who is a member in good standing of a recognized legal profession in that country, the members of which are admitted to practice law as lawyers, counselors at law, or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or public authority, may also register under Part II of this rule.

***

A Virginia-licensed attorney does not have to apply for certificate or registration pursuant to this rule nor does a non-Virginia-licensed attorney if that attorney is not located physically in Virginia as his/her base for employment as in-house counsel, corporate counsel, general counsel, etc.

The Definition of the Practice of Law in the Commonwealth of Virginia states:

> Specifically, the relation of attorney and client exists, and one is deemed to be practicing law whenever
>
> (1) One undertakes for compensation, direct or indirect, to advise another, *not his regular employer,* in any matter involving the application of legal principles to facts or purposes or desires.
>
> (2) One, *other than as a regular employee acting for his employer,* undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business. (Emphasis added).
>
> ***

Part 6, § I (B) Rules of the Supreme Court of Virginia. Paragraph (C) of Part 6, § I defines a "non-lawyer" and sets out the limits of temporary practice by a non-Virginia lawyer in Virginia:

> ***
>
> (C) Definition of "Non-lawyer." The term "non-lawyer" means any person, firm, association or corporation not duly licensed or authorized to practice law in the Commonwealth of Virginia. However, the term "non-lawyer" shall not include foreign attorneys who provide legal advice or services in Virginia to clients under the following restrictions and qualifications:
>
> (1) Such foreign attorney must be admitted to practice and in good standing in any state in the United States; and
>
> (2) The services provided must be on an occasional basis only and incidental to representation of a client whom the attorney represents elsewhere; and
>
> (3) The client must be informed that the attorney is not admitted in Virginia.
>
> A lawyer who provides services not authorized under this rule must associate with an attorney authorized to practice in Virginia.
>
> Nothing herein shall be deemed to overrule or contradict the requirements of Rules of this Court regarding foreign attorneys admitted to practice in the courts of the Commonwealth of Virginia including the association of counsel admitted to practice before the courts of this Commonwealth.
>
> A lawyer who provides services as authorized under this rule, or who is admitted *pro hac vice* under Rule 1A:4 shall, with regard to such services or admission, be bound by the disciplinary rules set forth in the Virginia Code of Professional Responsibility.
>
> Failure of the foreign attorney to comply with the requirements of these provisions shall render the activity by the attorney in Virginia to be the unauthorized practice of law.
>
> ***

In the inquiry presented, the lawyers involved are members of a financial institution's legal department and are all based in offices outside of Virginia and are licensed to practice law in other U.S. jurisdictions other than Virginia, in particular, the jurisdictions where their offices are located. In this posture, they are not subject to the requirements of Rule 1A:5. The certificate and registration requirements of this rule apply only to lawyers not licensed in Virginia who are working *in Virginia* as corporate counsel, in-house counsel, general counsel, etc.

When these lawyers provide advice and counsel regarding Virginia law to employees of the financial institution employer located in branches in Virginia, they are not engaged in unauthorized practice. When they are providing the advice either from their offices outside of Virginia or when they visit the branches in-person in Virginia, this constitutes advising their *regular employer* which is permitted under Part 6, § I (B)(1) of the Rules of the Virginia Supreme Court. Should they have to prepare documents in either situation, again, these lawyers are providing this legal service only to their regular employer which is permitted under Part 6, § I (B)(2). These lawyers also fall within the scope of the temporary practice provisions of Part 6, § I (C). They represent the employer elsewhere and have occasion to have to come into Virginia in relation to that representation. This occurs only on a temporary or occasional basis. Nothing in this inquiry suggested that these lawyers were attempting to appear before any tribunal in Virginia on behalf of the employer, which would require association with Virginia-licensed counsel.

Finally, two earlier opinions from the Committee, UPL Opinions 93 and 99 are also instructive on the issues presented in this inquiry. In these opinions the Committee found that it was not the unauthorized practice of law for a non-Virginia-licensed attorney to prepare legal documents for a Virginia client relating to a Virginia matter when the attorney did so from his/her office in the jurisdiction where he/she was licensed. Similarly, if an attorney is providing legal advice to or on behalf of a Virginia client while located in his/her licensing jurisdiction, this will not be the unauthorized practice of law in Virginia. The Committee cautions that an attorney licensed other than in Virginia must also be aware of any applicable rules and/or limitations of his/her licensing jurisdiction and/or the jurisdiction where he/she is practicing regarding the practice of another jurisdiction's law where the attorney is not licensed.

Committee Opinion
March 18, 2008

VIRGINIA STATE BAR COUNCIL TO REVIEW A PROPOSED AMENDMENT TO RULE 2.11 OF THE RULES OF PROFESSIONAL CONDUCT

Pursuant to Part Six: Section IV, Paragraph 10(c) of the Rules of the Supreme Court of Virginia, the Virginia State Bar Council, at its meeting on June 19, 2008, in Virginia Beach, Virginia, is expected to consider for approval, disapproval, or modification, a proposed amendment by the Standing Committee on Legal Ethics to Rule 2.11 of the Rules of Professional Conduct.

RULE 2.11

It came to the attention of the Ethics Committee that Rule 2.11 Comment [9] includes a reference to Rule 2.2 which no longer exists. Rule 2.2 was deleted by Supreme Court Order, September 24, 2003; the purpose of the deletion was to remove ambiguity, as first developed in the Ethics 2000 initiative, of coverage and the resulting confusion between Rule 1.7's application to joint representations and Rule 2.2's application to the lawyer's role as intermediary. As the two contexts are indistinguishable, all such situations are now being handled in one rule, i.e., Rule 1.7. Further, the terms "Intermediary" and "Intermediation" no longer exist. Therefore, the Ethics Committee is proposing an amendment to Rule 2.11 Comment [9], which deletes reference to Rule 2.2 and clarifies the reference to Rule 1.7 and "common representation." The amendment also removes all references to the lawyer's role as intermediary.

Inspection and Comment

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

Any individual, business or other entity may file or submit written comments in support of, or in opposition to, the proposed amendment by filing ten copies with Karen A. Gould, the Executive Director of the Virginia State Bar, not later than **June 6, 2008.**

# # #

(***January 24, 2008***—**DRAFT**, as proposed by the Standing Committee on Legal Ethics)

RULE 2.11 Mediator

(a) A lawyer-mediator is a third party neutral (*See* Rule 2.10) who facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and resolve their dispute.

(b) Prior to agreeing to mediate and throughout the mediation process a lawyer-mediator should reasonably determine that:

(1) mediation is an appropriate process for the parties;

(2) each party is able to participate effectively within the context of the mediation process; and

(3) each party is willing to enter and participate in the process in good faith.

(c) A lawyer-mediator may offer legal information if all parties are present or separately to the parties if they consent. The lawyer-mediator shall inform unrepresented parties or those parties who are not accompanied by legal counsel about the importance of reviewing the lawyer-mediator's legal information with legal counsel.

(d) A lawyer-mediator may offer evaluation of, for example, strengths and weaknesses of positions, assess the value and cost of alternatives to settlement or assess the barriers to settlement (collectively referred to as evaluation) only if such evaluation is incidental to the facilitative role and does not interfere with the lawyer-mediator's impartiality or the self-determination of the parties.

(e) Prior to the mediation session a lawyer-mediator shall:

(1) consult with prospective parties about

(i) the nature of the mediation process;

(ii) the limitations on the use of evaluation, as set forth in paragraph (d) above;

(iii) the lawyer-mediator's approach, style and subject matter expertise; and

(iv) the parties' expectations regarding the mediation process; and

(2) enter into a written agreement to mediate which references the choice and expectations of the parties, including whether the parties have chosen, permit or expect the use of neutral evaluation or evaluative techniques during the course of the mediation.

(f) A lawyer-mediator shall conduct the mediation in a manner that is consistent with the parties' choice and expectations.

COMMENT

* * *

Mediation ~~and Intermediation~~

[9] While a lawyer is cautioned in ~~the Comment to Rule 2.2 not to act as intermediary between clients where contentious litigation or negotiation is expected~~ Rule 1.7 regarding the special considerations in common representation, ~~this~~ these should not deter a lawyer-mediator from accepting clients for mediation. ~~Unlike intermediation, where the lawyer represents all parties~~ In mediation, a lawyer-mediator represents none of the parties and should be trained to deal with strong emotions. In fact mediation can be especially useful in a case where communication and relational breakdown have made negotiation or litigation of legal issues more difficult.

* * *

On April 16, 2008, The Virginia State Bar's Standing Committee on Legal Ethics issued as final Legal Ethics 1843.

LEGAL ETHICS OPINION 1843
WHETHER A MEMBER OF THE VIRGINIA STATE BAR WHO PRACTICES PATENT LAW CAN BE A PARTNER WITH A NON-LAWYER REGISTERED PATENT AGENT?

This hypothetical involves a Virginia licensed lawyer who has maintained associate status during the course of his employment with the United States Patent and Trademark Office ("USPTO"). He has now retired and is considering two different options as he contemplates the practice of patent law with a firm owned by a nonlawyer registered patent agent. The questions presented involve whether or not he can be employed by the firm as a patent attorney and would, therefore, be sharing legal fees with a nonlawyer registered patent agent. In the alternative, could he maintain associate status and be employed as a registered patent agent? Under either scenario, the firm would be solely engaged in the practice of patent law before the USPTO.

Under Rule 5.4(b)[1], a lawyer cannot form a partnership with a non-lawyer; however, in the specific case of a patent lawyer, that rule is pre-empted by the Supremacy Clause[2] and 37 C.F.R. § 10, which deal with representation of others before the USPTO[3].

The U.S. Supreme Court has held that "[a] State may not enforce licensing requirements which, though valid in the absence of federal regulation, give 'the State's licensing board a virtual power of review over the federal determination that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress." *Sperry v. Florida* ex rel. *Florida Bar*, 373 U.S. 379, 385 (1963). Therefore, this legal authority leads to the conclusion that the Virginia Rules of Professional Conduct are preempted by the federal regulations as they pertain to the specific practice of patent law before the USPTO.

The C.F.R. that regulates practice before the USPTO regulates forming a partnership or sharing fees between practitioners.

A practitioner is defined in 37 C.F.R. § 10.1 (r):

> Practitioner means (1) an attorney or agent registered to practice before the Office in patent cases or (2) an individual authorized under 5 U.S.C. 500(b) or otherwise as provided by this subchapter, to practice before the Office in trademark cases or other non-patent cases.

Thus, while Rule 5.4(a) and (b)[4] prohibit a lawyer from forming a partnership or sharing legal fees with a nonlawyer, 37 CFR §10.49 allows the formation of a partnership among lawyer and non-lawyer "practitioners" as long as the activities of that partnership consist solely of the practice of patent law before the USPTO.

Finally, in dealing with the sharing of legal fees in a practice, 37 C.F.R. § 10.48 permits a lawyer/practitioner to share legal fees with a non-practitioner.

Thus, the federal regulations permit forming partnerships and sharing fees between attorneys and registered patent agents to the extent the shared fees arise from the practice of patent law before the USPTO. As a result, the requestor can join the practice of a nonlawyer patent agent either as a registered active Virginia lawyer or an associate member of the Virginia State Bar, as long as that practice is devoted solely to patent law before the USPTO.

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

Committee Opinion
April 16, 2008

FOOTNOTES

1. Rule 5.4 Professional Independence Of A Lawyer

> (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

2. Article Six of the Constitution of the United States in pertinent part: "[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding. "

3. As part of the definitions under 37 C.F.R. § 10.1, the code states:

> This part governs solely the practice of patent, trademark and other law before the Patent and Trademark office. Nothing in this part shall be construed to preempt the authority of each State to regulate the practice of law, except to the extent necessary for the Patent and Trademark Office to accomplish its Federal Objectives.

FOOTNOTES

4. RULE 5.4 Professional Independence Of A Lawyer

> (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
>
> (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
>
> (2) a lawyer who undertakes to complete unfinished legal business of a deceased, disabled, or disappeared lawyer may pay to the estate or other representative of that lawyer that portion of the total compensation that fairly represents the services rendered by the deceased, disabled or disappeared lawyer;
>
> (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit sharing arrangement; and
>
> (4) a lawyer may accept discounted payment of his fee from a credit card company on behalf of a client.
>
> (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.