

# Virginia Lawyer Register

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Brian Merrill Miller	Fairfax, Va.		July 23, 2008	n/a
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### Virginia Lawyer Register

The Official Publication of the Virginia State Bar

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The Virginia State Bar publishes the *Virginia Lawyer Register* five times annually. The *Register* is primarily a compilation of disciplinary actions against attorneys licensed to practice law in the commonwealth; administrative suspensions; legal ethics opinions; and proposed amendments to the Rules of the Supreme Court of Virginia. All documents submitted to the state bar for inclusion in the *Register* are subject to alteration as to typography and formatting, in order to conform to the requirements of the *Register*, without changing the intent of any document.

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## DISCIPLINARY SUMMARIES

The following are summaries of disciplinary actions for violations of the Virginia Rules of Professional Conduct (RPC) (Rules of the Supreme Court of Virginia, Part 6, § II, eff. Jan. 1, 2000) or another of the Supreme Court rules (Rules). Copies of complete disciplinary orders are available at the Web link provided with each summary or by contacting the Virginia State Bar Clerk's Office at (804) 775-0539 or [clerk@vsb.org](mailto:clerk@vsb.org). VSB docket numbers are provided.

### CIRCUIT COURTS

**CLARENCE JORDAN BALL III**  
Norfolk, Virginia  
05-021-1669, 05-021-2766

On June 6, 2008, a three-judge court of Virginia Beach Circuit Court reinstated a public admonition of Clarence Jordan Ball III for violating a professional rule that governs safekeeping property. The matter involved Mr. Ball's handling of disputed funds from a dissolved law firm partnership. The admonition originally was imposed December 13, 2007, but was stayed pending an appeal by Mr. Ball. He withdrew the appeal and the Supreme Court of Virginia dismissed it April 17, 2008. RPC 1.15(c)(4)

[http://www.vsb.org/docs/Ball\\_1-14-2008.pdf](http://www.vsb.org/docs/Ball_1-14-2008.pdf)

**CHANDRA MAHINDA BOGOLLAGAMA**  
McLean, Virginia  
04-052-1880, 04-052-3239, 05-052-2717, 06-052-0044,  
07-052-0319, 07-052-1157

On June 11, 2008, a three-judge panel in the Fairfax County Circuit Court revoked Chandra Mahinda Bogollagama's license to practice for violating professional rules that govern diligence, communication with clients, use of an attorney trust account, and the obligation to return unearned fees. The court also found that Mr. Bogollagama engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, and that in connection with the Virginia State Bar's investigation of a disciplinary matter he knowingly made a false statement of material fact. The violations occurred in six cases in which clients hired him to procure U.S. visas for themselves or relatives. RPC 1.3(a); 1.4(a); 1.15(a)(2), (c)(3), (4), (e)(1)(i-v); 1.16(d); 8.1(a), (c); 8.4(c)

[http://www.vsb.org/docs/Bogollagam\\_8-26-08.pdf](http://www.vsb.org/docs/Bogollagam_8-26-08.pdf)

**CURTIS TYRONE BROWN**  
Norfolk, Virginia  
04-021-0897, 04-021-1103

On July 10, 2008, a three-judge panel of the Norfolk Circuit Court issued a final order imposing a public reprimand with terms on Curtis Tyrone Brown for violating professional rules that govern competence, diligence, conflict of interest, fairness to opposing party and counsel, and misconduct by committing a deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness to practice law. The panel's

original order was issued October 16, 2006. The Supreme Court affirmed the judgment on October 19, 2007. RPC 1.1; 1.3(a); 1.7(b)(1), (2); 3.4(d), (e); 8.4(b)

[http://www.vsb.org/docs/Brown\\_10-10-08.pdf](http://www.vsb.org/docs/Brown_10-10-08.pdf)

**MICHAEL CHRISTOPHER BRUNO**  
Hampton, Virginia  
07-010-070591

On August 7, 2008, a three-judge court of Hampton Circuit Court suspended Michael Christopher Bruno's license to practice law for five years with terms, effective August 31, 2008. Mr. Bruno violated professional rules that govern diligence, candor toward the tribunal, fairness to opposing party and counsel, bar admission and disciplinary matters, and misconduct. The violations included dishonesty during a representation on a habeas corpus petition and during a subsequent bar investigation. This was an agreed disposition. RPC 1.3(a); 3.3(a)(1), (4); 3.4(c); 8.1(a); 8.4(a-c)

[http://www.vsb.org/docs/Bruno\\_10-15-08.pdf](http://www.vsb.org/docs/Bruno_10-15-08.pdf)

### DISCIPLINARY BOARD

**THOMAS LEE BROWN JR.**  
Richmond, Virginia  
07-033-2721

On July 18, 2008, the Virginia State Bar Disciplinary Board imposed a public admonition on Thomas Lee Brown Jr. for violating professional rules that govern diligence and communication. The violations occurred during a divorce representation. This was an agreed disposition of misconduct charges. RPC 1.3(a); 1.4(a)

[http://www.vsb.org/docs/Brown\\_8-26-08.pdf](http://www.vsb.org/docs/Brown_8-26-08.pdf)

**DALE ALAN GIPE**  
Richmond, Virginia  
06-031-0143

On September 8, 2008, the Virginia State Bar Disciplinary Board revoked Dale Alan Gipe's license to practice law. Mr. Gipe admitted that he violated professional rules that govern fees, safekeeping property, truthfulness in statements to others, and misconduct involving criminal or deliberately wrongful acts and dishonesty, fraud, deceit, or misrepresentation. Mr. Gipe failed to pay \$31,451.85 in monies owed to a title agency in twenty-seven real estate transactions, he did not follow VSB accounting requirements, and he wrote checks to himself from the escrow account that contained the funds. He also forged a signature in a real estate closing for which he was the responsible closing attorney. Mr. Gipe consented to the revocation. Rules Part 6, §IV, ¶13.G.L

[http://www.vsb.org/docs/Gipe\\_10-10-08.pdf](http://www.vsb.org/docs/Gipe_10-10-08.pdf)

## DISCIPLINARY SUMMARIES

### **OWAIAN MAURICE JONES**

Fredericksburg, Virginia

07-060-0522, 07-060-1778, 07-060-1812, 07-060-2039, 07-060-2192, 07-060-2232, 07-060-2324, 07-060-2403, 08-060-072756, 08-060-072958, 08-060-073476, 08-060-073489, 08-060-073591, 08-060-073732, 08-060-073843, 08-060-073893, 08-060-074730

On June 27, 2008, the Virginia State Bar Disciplinary Board suspended Owaian Maurice Jones's license to practice law for eighteen months. The board found he violated professional rules that govern competence, diligence, communication, safekeeping property, and bar admission and disciplinary matters. The misconduct included mishandling of trust account funds. Six cases were dismissed. On August 4, 2008, Mr. Jones's practice was placed in receivership by Stafford County Circuit Court. RPC 1.1; 1.3(a); 1.4(a); 1.15(c)(3), (4), (f)(5)(i-ii); 8.1(c)

[http://www.vsb.org/docs/Jones\\_9-9-08.pdf](http://www.vsb.org/docs/Jones_9-9-08.pdf)

### **GERARD RAYMOND MARKS**

Christiansburg, Virginia

07-101-070562, 07-101-070838, 08-101-073184, 08-101-073106, 08-101-072405, 08-101-073225, 08-101-072154

On August 6, 2008, the Virginia State Bar Disciplinary Board revoked Gerard Raymond Marks's license to practice law. Mr. Marks admitted that he violated a professional rule that governs misconduct involving criminal or deliberately wrongful acts and dishonesty, fraud, deceit, or misrepresentation. He accepted client money without performing the work for which he was hired, he issued a purported settlement check to a client when no settlement had occurred, and he forged the signatures of judges and other officials on legal documents. Mr. Marks consented to the revocation. Rules Part 6, §IV, ¶13.G.L

[http://www.vsb.org/docs/Marks\\_8-26-08.pdf](http://www.vsb.org/docs/Marks_8-26-08.pdf)

### **REBECCA LOUISE MARQUEZ**

Arlington, Virginia

06-051-3016

On June 16, 2008, the Virginia State Bar Disciplinary Board imposed a public reprimand with terms on Rebecca Louise Marquez for violating a professional rule that governs safekeeping property. In 2006, the Virginia State Bar received notice of an overdraft of Ms. Marquez's trust account. Ms. Marquez has taken steps, including hiring a practice management consultant, to avoid a recurrence of the events that gave rise to this misconduct. This is an agreed disposition of misconduct charges. RPC 1.15(a)(1), (2), (c)(3), (e)(1)(i-v), (f)(2), (3), (4)(i-ii), (5)(i-iii), (6)

[http://www.vsb.org/docs/Marquez\\_8-26-08.pdf](http://www.vsb.org/docs/Marquez_8-26-08.pdf)

### **ASHRAF WAJIH NUBANI**

McLean, Virginia

06-051-0381, 06-051-0713, 06-051-1962

On May 20, 2008, the Virginia State Bar Disciplinary Board imposed a public reprimand on Ashraf Wajih Nubani for violating the disciplinary rule that governs safekeeping of property. On three occasions, the Virginia State Bar received notices of overdrafts on Mr. Nubani's trust account. This is an agreed disposition. RPC 1.15(a)(1), (2), (e), (f)(1)(i), (2), (4)(i-ii), (5)(i-iii), (6)

[http://www.vsb.org/docs/Nubani\\_052108.pdf](http://www.vsb.org/docs/Nubani_052108.pdf)

### **BERNADETTE WILBON O'NEAL**

Alexandria, Virginia

08-000-075614

On August 22, 2008, the Virginia State Bar Disciplinary Board suspended Bernadette Wilbon O'Neal's license to practice law in Virginia for an indefinite period. The suspension was based on a May 28, 2008, decision by the Maryland Court of Appeals to indefinitely suspend Ms. O'Neal's license to practice law in that state. The Virginia suspension will continue until she proves to the board that her Maryland license has been restored. Ms. O'Neal's Virginia license was summarily suspended on July 24, 2008, pending the August 22 hearing. Rules Part 6, §IV, ¶13.I.7

[http://www.vsb.org/docs/ONeal\\_10-10-08.pdf](http://www.vsb.org/docs/ONeal_10-10-08.pdf)

### **ROBERT RAY STONE JR.**

Arlington, Virginia

05-041-4139, 07-041-1180

On February 22, 2008, the Virginia State Bar Disciplinary Board revoked Robert Ray Stone Jr.'s license to practice law for violating professional rules that govern competence, communication, safekeeping property, declining or terminating representation, and unauthorized practice of law. Mr. Stone's license has been administratively suspended since November 1989. He has been ineligible to practice law since that time, but he continued to represent clients in Virginia. RPC 1.1; 1.4(a); 1.7(a)(1), (2); 1.15(a)(1), (2), (e)(1)(i-iii); 1.16(a)(1); 5.5(a)(1)

[http://www.vsb.org/docs/Stone\\_4-25-08.pdf](http://www.vsb.org/docs/Stone_4-25-08.pdf)

## DISCIPLINARY SUMMARIES

### DISTRICT COMMITTEES

#### NEVILLE PAUL CRENSHAW

Fairfax, Virginia

07-051-2304, 07-051-070059, 07-051-070607, 07-051-070987, 08-051-072466

On June 23, 2008, the Virginia State Bar Fifth District Committee, Section I, imposed a public reprimand with terms upon Neville Paul Crenshaw for violating professional rules that govern competence, diligence, and communication. The violations occurred in divorce and custody representations. Mr. Crenshaw is required to adopt the recommendations of a practice management consultant or face additional discipline. This was an agreed disposition. RPC 1.1; 1.3(a); 1.4(a)

[http://www.vsb.org/docs/Crenshaw\\_070308.pdf](http://www.vsb.org/docs/Crenshaw_070308.pdf)

#### ROBERT BRUCE DICKERT

Bristol, Virginia

07-102-1510

On August 20, 2008, the Virginia State Bar Tenth District Committee, Section II, imposed a public admonition with terms on Robert Bruce Dickert for violating professional rules that govern diligence, communication, and safekeeping property. The misconduct occurred during his representation of a client who was trying to collect a judgment. Mr. Dickert was ordered to bring his attorney trust account into compliance with the assistance of an accountant. This was an agreed disposition. RPC 1.3(a); 1.4(a); 1.15(a), (c)(3), (e)(1)(i-v), (f)(2), (4)(i-ii), (5)(i-iii), (6)

[http://www.vsb.org/docs/Dickert\\_9-9-08.pdf](http://www.vsb.org/docs/Dickert_9-9-08.pdf)

#### HARVEY LATNEY JR.

Richmond, Virginia 23220

07-033-0910

On September 4, 2008, the Virginia State Bar Third District Committee, Section III, imposed a public reprimand with terms on Harvey Latney Jr. for violating professional rules that govern safekeeping property and responsibilities regarding nonlawyer assistants. Mr. Latney's legal assistant embezzled an estimated \$290,000 from clients of his private law practice. He was ordered to report regularly to the bar on his accounts, to make full restitution to the identified clients within five years, and to notify the VSB if he discovers any more embezzlement. This was an agreed disposition. RPC 1.15(e)(1)(i-v), (2)(i-iii), (f)(1)(i), (ii), (iii)(a-c), (iv), (v), (2), (3), (4)(i), (ii), (5)(i), (ii), (iii)(6); 5.3(a), (b), (c)(1), (2)

[http://www.vsb.org/docs/Latney\\_9-26-08.pdf](http://www.vsb.org/docs/Latney_9-26-08.pdf)

#### WILLIAM THEODORE LINKA

Richmond, Virginia

07-033-2689

On September 4, 2008, the Virginia State Bar Third District Committee, Section III, dismissed a case against William Theodore Linka for exceptional circumstances. The committee determined that Mr. Linka violated a professional rule that governs diligence. Because he was publicly reprimanded with terms on July 7, 2006, for seven cases similar to and in the same time frame as this one, further action is not warranted. Rules Part 6, §IV, ¶13.G.1.a(4)

[http://www.vsb.org/docs/Linka\\_9-26-08.pdf](http://www.vsb.org/docs/Linka_9-26-08.pdf)

#### HELENA DAPHNE MIZRAHI

Alexandria, Virginia

05-042-3903

On July 15, 2008, the Virginia State Bar Fourth District Committee, Section II, imposed a public reprimand with terms on Helena Daphne Mizrahi for violating professional rules that govern competence, meritorious claims and contentions, fairness to opposing party and counsel, and impartiality and decorum of the tribunal. The misconduct occurred during Ms. Mizrahi's representation of a plaintiff in an employment matter. RPC 1.1; 3.1; 3.4(d), (f), (g); 3.5

[http://www.vsb.org/docs/Mizrahi\\_8-26-08.pdf](http://www.vsb.org/docs/Mizrahi_8-26-08.pdf)

#### ROBERT CHARLES NEELEY JR.

Virginia Beach, Virginia

08-022-074213

On September 19, 2008, the Virginia State Bar Second District Committee publicly reprimanded Robert Charles Neeley Jr. for violating professional rules that govern communication and declining or terminating representation. Mr. Neeley delayed responding to a court-appointed client's request for a copy of his transcripts in a criminal case. This was an agreed disposition. RPC 1.4(a); 1.16(d), (e)

[http://www.vsb.org/docs/Neeley\\_10-2-08.pdf](http://www.vsb.org/docs/Neeley_10-2-08.pdf)

#### PAUL LEE WARREN

Norfolk, Virginia

07-021-0665

On July 7, 2008, the Virginia State Bar Second District Committee imposed a public reprimand on Paul Lee Warren for violating professional rules that govern communication with a represented person. The case involved his representation of homeowners in a dispute with a contractor. RPC 4.2, 8.4(a)

[http://www.vsb.org/docs/Warren\\_8-26-08.pdf](http://www.vsb.org/docs/Warren_8-26-08.pdf)

## PROPOSALS FOR PUBLIC COMMENT

The following proposals are published for public comment. All comments should be submitted in writing to Karen A. Gould, Executive Director, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, VA 23219, no later than end of business on the day of deadline.

### PROPOSED AMENDMENT TO RULE 7.4(D) OF THE RULES OF PROFESSIONAL CONDUCT

Deadline for comment: December 17, 2008.

#### RULE 7.4(d)

The Standing Committee on Lawyer Advertising and Solicitation (SCOLAS) proposes an amendment to Rule 7.4(d) that currently allows a lawyer to communicate the fact the lawyer has been certified as a specialist in a field of law by a named organization, provided that the communication contains a disclaimer indicating there is no procedure in the Commonwealth of Virginia for approving certifying organizations. The proposed amendment would allow a lawyer to advertise a specialty certification without the need for a disclaimer if the certification was granted by an organization that is currently accredited by the American Bar Association (ABA). The proposed amendment would continue to require a disclaimer when advertising a certification that has been granted by an organization that is not accredited by the ABA because such organizations lack the rigorous requirements set forth in the ABA accreditation process.

The intent of SCOLAS in proposing the rule amendment is to provide an objective standard by which a lawyer's claim that he or she is certified as a specialist may be evaluated. Permitting a lawyer to advertise a specialty certification if bestowed by an ABA accredited organization accomplishes this end based upon the objective criteria employed in the certification process. SCOLAS believes that the stringent requirements imposed upon a certifying organization seeking ABA accreditation, as well as the public's ability to readily access information about a certifying organization eliminates the necessity for any disclaimer. Allowing lawyers to advertise a specialty certification which has been conferred on the basis of objective rather than subjective criteria protects the public by providing truthful, reliable information to the consumer of legal services. This is consistent with the trend in lawyer advertising as evidenced by the decisions in prior First Amendment cases decided by the U.S. Supreme Court which permit unrestricted lawyer advertising as long as it is truthful and not inherently misleading.

Full proposal available at <http://www.vsb.org/site/regulation/prop-amend-rule-74d>, or by calling (804) 775-0557.

### PROPOSED AMENDMENTS TO PARAGRAPH 13 PROCEDURE FOR DISCIPLINING, SUSPENDING, AND DISBARRING ATTORNEYS

Deadline for comment: February 1, 2009

The proposals will be considered by the VSB Council on February 28, 2009.

Paragraph 13 A.

Amendment to the definition of "Terms" to allow imposition of terms for certain suspensions.

Details can be found at <http://www.vsb.org/site/regulation/p13-definition-of-terms>

Paragraph 13 A.

Amendment to the definition of "Costs" to add electronic and telephonic conferencing costs to the items that may be charged to a respondent against whom discipline is imposed. Details can be found at <http://www.vsb.org/site/regulation/p13-definition-of-costs>

Paragraph 13 I(8)(b)

Amendment to increase reinstatement bond from \$3500 to \$5000.

Details can be found at <http://www.vsb.org/site/regulation/p13-increase-amount-reinstatement-bond>

### PROPOSED AMENDMENT TO PARAGRAPH 19, PROCEDURE FOR ADMINISTRATIVE SUSPENSION OF A MEMBER

Deadline for comment: February 6, 2009

These amendments will be considered by VSB Council on February 28, 2009.

The full proposal is available at <http://www.vsb.org/site/regulation/para19-102108> or by calling (804) 715-0551

Paragraph 19

Amendments to: 1) impose an additional \$100 delinquency fee for failure to comply with Mandatory Continuing Legal Education certification by February 1; and 2) delete certified mail requirement for initial notice of noncompliance with membership obligations

### Proposed Amendments to CRESPA REGULATIONS

Deadline for comment: February 6, 2009

These amendments will be considered by VSB Council on February 28, 2009.

15 VAC 5-80-40

Amendment would make UPL Guidelines available on the VSB website.

15 VAC 5-80-50

Amendment would permit attorney settlement agents to file a copy of surety bond, rather than original.

Full proposals available at <http://www.vsb.org/site/regulation/crespa-102108> or by calling (804) 775-0551.



## PROPOSED ETHICS OPINIONS/NOTICES TO VSB MEMBERS

### PROPOSED LEGAL ETHICS OPINIONS

Deadline for comment: December 17, 2008

Legal Ethics Opinion 1750

*Advertising Issues*

Available at <http://www.vsb.org/site/regulation/legal-ethics-opinion-1750>, or by calling (804) 775-0557.

Legal Ethics Opinion 1844

*Ethical Duty of Guardian Ad Litem to Investigate and Report Allegations of Child Abuse and Neglect*

Available at <http://www.vsb.org/site/regulation/legal-ethics-opinion-1844>, or by calling (804) 775-0557.

Legal Ethics Opinion 1846

*Is It Ethical for a Lawyer to Become a Member of a Lead-Sharing Organization?*

Available at <http://www.vsb.org/site/regulation/legal-ethics-opinion-1846>, or by calling (804) 775-0557.

### FINAL LEGAL ETHICS OPINIONS

The VSB's Standing Committee on Legal Ethics issued the following LEO as final on September 30, 2008.

Legal Ethics Opinion 1842

*Obligations of a Lawyer who Receives Confidential Information via Law Firm Website of Telephone Voicemail.*

Details can be found at <http://www.vacle.org/opinions/1842.htm>.

### COUNCIL POLICY

#### INCREASE IN FEE ASSESSMENTS PAID BY DISCIPLINED ATTORNEYS AND REINSTATEMENT PETITIONERS

The Rules of the Supreme Court of Virginia require that sanctioned respondents and reinstatement petitioners pay the costs of their proceedings. As defined by the rules, costs include reasonable expenses for experts and witnesses, court reporters, copying, mailing, required publication, and an administrative charge determined by Council. Va. Sup. Ct. R. Part 6, §IV, ¶.13 A. The amount of the administrative charges is set by the Virginia State Bar Council.

At its meeting on October 17, 2008, the council increased the administrative charge. The cost of administering the disciplinary system and the clerk's office has increased significantly over the last few years. The increase will partially offset those expenses and shift some of the increased fiscal burden to lawyers who are disciplined and who create the need for the system.

The administrative charge was originally set by the council in 1990 at \$300 for all cases. It has been increased once in eighteen years. In 2001, the council increased the fee to \$500 for district committee cases and \$750 for board and three-judge court cases. In 2002, a \$200 fee was added for subcommittee cases.

The 2008 assessment changes are:

- subcommittee cases: from \$200 to \$500;
- district committee cases: from \$500 to \$750;
- Disciplinary Board and three-judge court cases: from \$750 to \$1,000;
- reinstatement cases from \$750 to \$1,500.

The administrative charge for reinstatement cases is higher than other Disciplinary Board matters because those cases are more labor-intensive and expensive to administer. These fees apply only to members who have been sanctioned and petitioners seeking to be reinstated. The new fees are effective immediately.

### COUNCIL POLICY

#### VSB TO ISSUE ONLINE LAWYER DIRECTORY WITH OPT-OUT FEATURE

On October 17, 2008, the Virginia State Bar Council voted unanimously to provide on its website a comprehensive Virginia Lawyer Directory that will include contact information for all active-status Virginia lawyers in good standing, except those who opt out of the list.

The directory is scheduled to be launched on January 6, 2009. It will be accessible on the public area of the VSB website. Visitors will be able to look up a lawyer's name, address, and telephone number of record by searching for the lawyer's last name. E-mail addresses will not be included in the directory.

VSB President Manuel A. Capsalis has sent a letter to each member explaining the new policy and giving members time to opt out.

The opt-out selection feature is scheduled to be available starting in early November. To opt out, go to the VSB site at [www.vsb.org](http://www.vsb.org) and log in to the Member Login site in the upper right corner. Go to Virginia Lawyer Directory Options and choose Opt Out. If you change your mind later, you can be included by choosing Opt In. If you do nothing, your name will be included in the directory.

The Virginia Lawyer Directory replaces the VSB's Member Directory, which since April 2007 has listed only attorneys who opted to be listed. Only 3,674 of 27,156 active members in good standing participated in that directory. The VSB received complaints from persons — including VSB members — who found the directory of limited use. Bars in twenty-nine other states provide comprehensive public attorney directories online.

## NOTICE TO VSB MEMBERS

### BANK FAILURES AND LAWYER TRUST ACCOUNTS REDUX

By James M. McCauley, Ethics Counsel,  
Virginia State Bar

Since I wrote on the subject of what precautions lawyers should take to see that client funds in their trust account are fully insured by the FDIC in July, the financial crisis in this country has worsened—dramatically—and lawyers need to think proactively with regard to bank failures. One positive development, however, is that the FDIC raised the insurance limit to \$250,000. If a depositor's accounts at one FDIC-insured bank or savings association total \$250,000 or less, the deposits are fully insured. A depositor can have more than \$250,000 at one insured bank or savings association and still be fully insured provided the accounts meet certain requirements.

#### Lawyer Trust or Escrow Accounts are Fiduciary Accounts

As stated in the July 30 article, "If Your Bank Goes Under, Are Your Clients' Trust Account Deposits Fully Insured?" found at <http://www.vsb.org/site/news/item/trust-account-deposits-insured/>, IOLTA or lawyer trust accounts will be treated differently by the FDIC than a single depositor account. Provided the bank's records for your trust account show the existence of a fiduciary relationship, then each client or third party whose funds are in that account are covered up to the \$250,000 limit. Lawyers should make sure that the fiduciary nature of any account holding fiduciary funds is clearly reflected in the title of the account used by the bank. According to the FDIC, a clearly identified IOLTA or lawyer's trust account meets this requirement and discloses a fiduciary relationship. In addition, the name and ownership interest of each owner must be ascertainable from the deposit account records of the insured bank or from records maintained by the agent (or by some person or entity that has agreed to maintain records for the agent). So, for example, assume a lawyer has \$500,000 total in a pooled law firm trust account, holding trust funds for twenty clients. As long as the bank's records show the fiduciary nature of that account, and the lawyer's record keeping shows the name and amount held in trust on behalf of each client, each of these twenty clients is insured up to the \$250,000 limit.

Lawyers should also ask clients where they do their personal banking because if the client has accounts at the same bank as the lawyer's trust account, the FDIC will include the funds held in the client's other accounts at that bank toward the \$250,000 limit. For FDIC insurance purposes, funds in all accounts in that client's name will be combined.

### Bank Failures Not a Disciplinary Issue if Lawyers Use an FDIC Insured, Stable Bank

Lawyers do need to be cautious about where they hold client trust funds, making sure they are FDIC-insured and financially stable institutions. Opinions vary on whether a client's deposit should be divided up among different banks to stay under the \$250,000 limit. Whether such action is prudent depends on the practicality of the measure. Some lawyers hold client funds, in the millions of dollars, for as long as only one day to years. Opening multiple accounts for one client to make sure millions of dollars held for that client are FDIC insured may not be feasible. Lawyers must exercise reasonable diligence in selecting a financially stable financial institution to hold client funds. Lawyers should not worry about disciplinary action if a bank failure leads to the loss of client funds, provided the lawyer chooses an FDIC-insured, stable bank.

#### But if a Bank Fails, Is that a Basis for Malpractice Liability?

*Bazinet v. Kluge*, is one of the few reported cases involving a lawyer getting sued for legal malpractice, after a client lost money when a bank failed in 2003. In that case, a lawyer who represented a client selling two Manhattan apartments deposited the sales proceeds—\$1.4 million—in the firm's trust account, and an additional \$1.3 million when the original deal fell through. The bank suddenly closed and the FDIC became the receiver. The buyer sued the client, who cross-claimed the lawyer for malpractice for depositing the funds in a small Connecticut bank. An expert for the plaintiff was supposed to opine that the lawyer should have kept the funds in treasury bills or by obtaining supplementary insurance. A New York appellate court concluded the lawyer was not responsible for knowing that the bank was financially unstable.

Some commentators believe that such a case may go the other way given the current banking and financial crisis. Lawyers should be checking the financial soundness of their bank using Veribanc or other rating companies.

Conflict: Lawyer Represents a Bank on the Verge of Failing and has Client Funds Deposited at that Bank.

The banking crisis presents unique situations for lawyers, especially those who represent a bank facing financial difficulty. Suppose a lawyer represents Bank X. The lawyer learns from discussions with Bank X's management that Bank X's solvency is doubtful and that its failure is a distinct possibility. May the lawyer alert his clients to this problem and move trust or fiduciary accounts to another bank? It does not appear that the lawyer can do this without breaching his duty of confidentiality

to Bank X under Rule 1.6. More to the point is Rule 1.8 (b):

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

Neither Rule 1.6 nor Rule 3.3 permit disclosure unless the client, Bank X, intends to commit a future crime or has, in the course of the representation, perpetrated a fraud on a tribunal or third party. So it appears that there is a Hobson's choice for the lawyer: either the lawyer breaches his Rule 1.6 and Rule 1.8 (b) duties to his client, Bank X; or remains silent thereby breaching his/her fiduciary duties and Rule 1.15 duty to clients that have entrusted funds to the lawyers care to protect and safeguard.

Does the lawyer have a conflict of interest that requires him/her to withdraw from representing either? As it is not a conflict related to the substantive representation, the answer is probably "no." However, this ethical dilemma may require a difficult choice of weighing one's duty of confidentiality to the bank against one's fiduciary duties when handling client's funds. The lawyer would need to carefully scrutinize his/her jurisdiction's version of Rule 1.6 to determine if moving the funds would be a breach of confidentiality. While not a perfect solution, the most prudent course would likely be to protect the client's funds by moving the lawyer's fiduciary accounts to another financial institution while disclosing as little as possible regarding the bank.

Footnotes available at <http://www.vsb.org/site/news/item/bank-failures-trust-accounts-redux/>

### LICENSE FORFEITURES

The licenses of members of the Virginia State Bar have been forfeited from the practice of law for failure to comply with *Code of Virginia* §54.1-3914, in Title 54.100 (Regulations of professions and occupations). We have attempted to contact these members at their last address listed with the Virginia State Bar; however, in some instances, this has not been effective. In an effort both to advise the bench and bar of these forfeitures and to establish contact with those persons to whom our notices may not have been delivered, the names of those whose licenses have been canceled are being published on the VSB website at <http://www.vsb.org/site/members/license-forfeitures/>. Any member knowing the present location and/or practice status of any person on the list should contact the VSB Membership Department at (804) 775-0530 or [membership@vsb.org](mailto:membership@vsb.org) as soon as possible.